Date and Time: Wednesday, September 27, 2023 1:50:00 PM CST
Job Number: 206716434

Documents (100)

1. [Hulse v. Hale Farms Dev. Corp., 586 F. Supp. 120]
Client/Matter: -None-
Search Terms: "antitrust law"
Search Type: Natural Language
Narrowed by:

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

2. [United States v. Phelps Dodge Industries, Inc., 589 F. Supp. 1340]
Client/Matter: -None-
Search Terms: "antitrust law"
Search Type: Natural Language
Narrowed by:

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

3. [De Ment v. Abbott Capital Corp., 589 F. Supp. 1378]
Client/Matter: -None-
Search Terms: "antitrust law"
Search Type: Natural Language
Narrowed by:

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

4. [Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705]
Client/Matter: -None-
Search Terms: "antitrust law"
Search Type: Natural Language
Narrowed by:

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

5. [Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752]
Client/Matter: -None-
Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

6. Clow Corp. v. Witco Chemical Corp., 1984 U.S. Dist. LEXIS 15714

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

7. Morris Electronics of Syracuse, Inc. v. Mattel, Inc., 595 F. Supp. 56

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

8. Reborn Enterprises, Inc. v. Fine Child, Inc., 590 F. Supp. 1423

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

9. Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

10. Dunn v. Phoenix Newspapers, Inc., 735 F.2d 1184

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

11. Gemini Supply Corp. v. Zeitlin, 590 F. Supp. 153

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

12. Laker Airways, Ltd. v. Pan American World Airways, 103 F.R.D. 22

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

13. Southern Pac. Communications Co. v. American Tel. & Tel. Co., 740 F.2d 980

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

14. National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

15. Remington Prods. v. N. Am. Philips Corp., 107 F.R.D. 642

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

16. L.A. Draper & Son v. Wheelabrator-Frye, Inc., 735 F.2d 414

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

17. Trace X Chemical, Inc. v. Canadian Industries, Ltd., 738 F.2d 261

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

18. Spartan Grain & Mill Co. v. Ayers, 735 F.2d 1284

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

19. Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc., 735 F.2d 884

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

20. Bio-Rad Labs., Inc. v. Nicolet Instrument Corp., 739 F.2d 604

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

21. Aspen Highlands Skiing Corp. v. Aspen Skiing Co., 738 F.2d 1509

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

22. Affiliated Capital Corp. v. Houston, 735 F.2d 1555

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

23. Casey v. Diet Center, Inc., 590 F. Supp. 1561

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

24. W. Goebel Porzellanfabrik v. Action Indus., 589 F. Supp. 763

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

25. Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

26. Furman v. Cirrito, 741 F.2d 524

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

27. [Clark Equip. Co. v. Lift Parts Mfg. Co., 1984 U.S. Dist. LEXIS 24675]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

28. [Southern Pac. Communications Co. v. American Tel. & Tel. Co., 740 F.2d 1011]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

29. [3 P.M., Inc. v. Basic Four Corp., 591 F. Supp. 1350]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

30. [Bogosian v. Gulf Oil Corp., 596 F. Supp. 62]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

31. [Indium Corp. of America v. Semi-Alloys, Inc., 591 F. Supp. 608]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

32. [United States v. LTV Corp., 1984 U.S. Dist. LEXIS 24598]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

33. [Int'l Wood Processors v. Power Dry, Inc., 593 F. Supp. 710]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

34. [F. Buddie Contracting, Inc. v. Seawright, 595 F. Supp. 422]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

35. [Grado v. Gross, 1984 U.S. Dist. LEXIS 24242]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

36. [Alexander Grant & Co. v. Tiffany Indus., 742 F.2d 408]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

37. [Hood v. Tenneco Texas Life Ins. Co., 739 F.2d 1012]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

38. [Hybud Equipment Corp. v. Akron, 742 F.2d 949]

Client/Matter: -None-

Search Terms: "antitrust law"

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

39. [Lemelson v. Bendix Corp., 104 F.R.D. 13]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

40. [James Julian, Inc. v. Raytheon Co., 593 F. Supp. 915]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

41. [Roland Machinery Co. v. Dresser Industries, Inc., 749 F.2d 380]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

42. [Terre Du Lac Asso. v. Terre Du Lac, Inc., 601 F. Supp. 257]

Client/Matter: -None-

Search Terms: "antitrust law"

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Narrowed by:

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

43. *In re Folding Carton Antitrust Litigation, 744 F.2d 1252*

Client/Matter: -None-

Search Terms: "antitrust law"

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

44. *Summers v. Federal Deposit Ins. Corp., 592 F. Supp. 1240*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

45. *D & R Distributing Co. v. Chambers Corp., 608 F. Supp. 1290*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

46. *United States v. Waste Management, Inc., 743 F.2d 976*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

47. *Western Shoe Gallery, Inc. v. Duty Free Shoppers, Ltd., 593 F. Supp. 348*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

48. *FTC v. Warner Communications, Inc., 742 F.2d 1156*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

49. *Airweld, Inc. v. Airco, Inc., 742 F.2d 1184*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

50. *Eurim-Pharm GmbH v. Pfizer, Inc., 593 F. Supp. 1102*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

51. *Coal Exporters Asso. v. United States, 745 F.2d 76*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

52. *Mozart Co. v. Mercedes-Benz of North America, Inc., 593 F. Supp. 1506*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

53. *General Leaseways, Inc. v. National Truck Leasing Asso., 744 F.2d 588*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

54. *Advisory Information & Management Systems, Inc. v. Prime Computer, Inc., 598 F. Supp. 76*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

55. *Nat'l Bancard Corp. v. Visa, 596 F. Supp. 1231*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

56. *Vogel v. American Soc. of Appraisers, 744 F.2d 598*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

57. *Battipaglia v. New York State Liquor Authority, 745 F.2d 166*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

58. Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 745 F.2d 441

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

59. Package Shop, Inc. v. Anheuser-Busch, Inc., 1984 U.S. Dist. LEXIS 24942

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

60. Auburn ex rel. Board of Public Works & Safety v. Mavis, 468 N.E.2d 584

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

61. Hayden v. Bracy, 744 F.2d 1338

Client/Matter: -None-

Search Terms: "antitrust law"

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Narrowed by:

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

62. Kalmanovitz v. G. Heileman Brewing Co., 595 F. Supp. 1385

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

63. Pa. Dental Ass'n v. Med. Serv. Ass'n, 745 F.2d 248

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

64. *De Modena v. Kaiser Found. Health Plan, 743 F.2d 1388*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

65. *Glictronix Corp. v. American Tel. & Tel. Co., 603 F. Supp. 552*

Client/Matter: -None-

Search Terms: "antitrust law"

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

66. *Monmouth Real Estate Inv. Trust v. Manville Foodland, Inc., 196 N.J. Super. 262*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

67. *Haff v. Jewelmont Corp., 594 F. Supp. 1468*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

68. *Souza v. Estate of Bishop, 594 F. Supp. 1480*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

69. *Ind. Fed'n of Dentists v. Ftc, 745 F.2d 1124*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

70. *United States v. American Airlines, Inc., 743 F.2d 1114*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

71. *COMPACT v. Metropolitan Government of Nashville & Davidson County, 594 F. Supp. 1567*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

72. *Haroco, Inc. v. American Nat'l Bank & Trust Co., 747 F.2d 384*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

73. *Nishimura v. Dolan, 599 F. Supp. 484*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

74. Innovation Data Processing, Inc. v. International Business Machines Corp., 603 F. Supp. 646

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

75. In re Ray Dobbins Lincoln-Mercury, Inc., 604 F. Supp. 203

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

76. Tom Hudson & Associates, Inc. v. Chula Vista, 746 F.2d 1370

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

77. Deak-Perera Hawaii, Inc. v. Department of Transp., 745 F.2d 1281

Client/Matter: -None-

Search Terms: "antitrust law"

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

78. Ficker v. Chesapeake & Potomac Tel. Co., 596 F. Supp. 900

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

79. Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 597 F. Supp. 217

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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

80. Hydro Air of Connecticut, Inc. v. Versa Techs., Inc., 599 F. Supp. 1119

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

81. Marrese v. Interqual, Inc., 748 F.2d 373

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

82. Olympia Co. v. Celotex Corp., 597 F. Supp. 285

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

83. Regents of University of California v. American Broadcasting Cos., 747 F.2d 511

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

84. Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 1984 U.S. Dist. LEXIS 22064

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

85. *Out Front Productions, Inc. v. Magid, 748 F.2d 166*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

86. *Stearns v. Genrad, Inc., 752 F.2d 942*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

87. *Manego v. Orleans Bd. of Trade, 598 F. Supp. 231*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

88. *Information Resources, Inc. v. A.C. Nielsen Co., 615 F. Supp. 125*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

89. *Kartell v. Blue Shield, 749 F.2d 922*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

90. Ralph C. Wilson Industries, Inc. v. American Broadcasting Cos., 598 F. Supp. 694

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

91. Ballo v. James S. Black Co., 39 Wn. App. 21

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

92. McGlinchy v. Shell Chemical Co., 1984 U.S. Dist. LEXIS 21581

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

93. Mizlou Television Network, Inc. v. National Broadcasting Co., 603 F. Supp. 677

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

94. Walker v. U-Haul Co. of Mississippi, 747 F.2d 1011

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

95. National Independent Theatre Exhibitors, Inc. v. Charter Financial Group, Inc., 747 F.2d 1396

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

96. Bender v. Southland Corp., 749 F.2d 1205

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

97. General Battery Corp. v. Slaton, 1984 Pa. Dist. & Cnty. Dec. LEXIS 108

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

98. National Independent Theatre Exhibitors, Inc. v. Buena Vista Distribution Co., 748 F.2d 602

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

99. United States v. American Cyanamid Co., 598 F. Supp. 1516

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

100. *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co., 174 W. Va. 538*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

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

Hulse v. Hale Farms Dev. Corp.

United States District Court for the District of Connecticut

June 14, 1984

Civ. No. H-83-815 (PCD)

Reporter

586 F. Supp. 120 *; 1984 U.S. Dist. LEXIS 15874 **; Fed. Sec. L. Rep. (CCH) P91,572

Charles HULSE, et al. v. HALE FARMS DEVELOPMENT CORP., et al.

Core Terms

mail

LexisNexis® Headnotes

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

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

International Trade Law > General Overview

HN1[] **Racketeer Influenced & Corrupt Organizations, Remedies**

To state a claim for damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), a plaintiff has two pleading burdens. First, he must allege that the defendant has violated the substantive RICO statute, *18 U.S.C.S. § 1962 (1976)*, commonly known as criminal RICO. In so doing, he must allege the existence of seven constituent elements: (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. RICO, *18 U.S.C.S. § 1962(a)-(c)*. Plaintiff must allege adequately defendant's violation of RICO before turning to the second burden of invoking RICO's civil remedies of treble damages, attorney fees, and costs. To satisfy this latter burden, a plaintiff must allege that he was injured in his business or property by reason of a violation of RICO, *18 U.S.C.S. § 1962*. RICO, *18 U.S.C.S. § 1964(c)*.

Counsel: [1]** John B. Nolan, Day, Berry & Howard, Hartford, Connecticut, for Plaintiff.

Thomas C. Marshall, Weber & Marshall, New Britain, Connecticut, for Defendant Robert W. Johnson.

Howard M. Wood, III, Wood & Wood, Glastonbury, Connecticut, for Defendant William E. Chipman.

Michael C. Daly, Furey, Donovan & Heiman, Bristol, Connecticut, for Defendants Hale Farms Development Corp. and Howard Levy.

Judges: Dorsey, District Judge.

Opinion by: DORSEY

Opinion

[*121] RULING ON DEFENDANTS MOTION TO DISMISS

DORSEY, District Judge.

Plaintiffs in this action seek damages for losses incurred in their purchase of limited partnership interests of Glastonbury Associates, a limited partnership formed and existing under the laws of the State of Connecticut. The complaint is framed in two counts. Count I alleges that defendant William Chipman made certain material misrepresentations and omissions in the sale of limited partnership interests of Glastonbury Associates in violation of Section 10 of the Securities Exchange Act of 1934, *15 U.S.C. §§ 78a, et seq.*, and *Rule 10b-5* promulgated by the Securities and Exchange Commission thereunder. 17 C.F.R. § 240.10(b)-5. Count II alleges that defendants violated **[**2]** the provisions of the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. §§ 1961-68* (RICO), thus subjecting them, *inter alia*, to treble damages for alleged participation in a scheme or artifice to defraud plaintiffs. The motion of defendants Howard Levy (Levy) and Hale Farms Development Corporation (Hale Farms) to dismiss the RICO count under *Rule 12(b)(6), Fed.R.Civ.P.*, must be denied.

Our circuit court has recently enumerated the dual pleading burdens required to state a civil RICO claim:

> ***HN1***[] To state a claim for damages under RICO a plaintiff has two pleading burdens. First, he must allege that the defendant has violated the substantive RICO statute, *18 U.S.C. § 1962 (1976)*, commonly known as "criminal RICO." In so doing, he must allege the existence of seven constituent elements: (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. *18 U.S.C. § 1962(a)-(c) (1976)*. Plaintiff must allege adequately defendant's **[**3]** violation of *section 1962* before turning to the second burden -- *i.e.*, invoking RICO's civil remedies of treble damages, attorneys fees and costs. *See Bays v. Hunter Savings Association, 539 F. Supp. 1020, 1023 (S.D.Ohio 1982)*. To satisfy this latter burden, plaintiff must allege that he was "injured in his business or property *by reason of* a violation of *section 1962*." *18 U.S.C. § 1964(c) (1976)* (emphasis added).

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)*.

Levy and Hale Farms assert the failure of plaintiffs to satisfy both burdens. As to the substantive or "criminal RICO" allegations, defendants contend that the complaint fails to state, with the specificity required for pleading fraud under *Rule 9(b), Fed.R.Civ.P.*, the circumstances of the two or more acts constituting the pattern of racketeering activity alleged.

In Count II, plaintiffs allege that each of the defendants, in violation of *18 U.S.C. § 1341* (the mail fraud statute), used the mails to lull plaintiffs into a false sense of security about their investment in Glastonbury Associates, and postponed their discovery **[**4]** **[*122]** of the underlying securities fraud by fraudulent pretenses, representations and promises. The complaint asserts the identity, author, recipient, date and nature of the allegedly false letters and documents in question sufficiently as facts constituting mail fraud by the defendants. The allegations here are thus distinguishable from those in *Bennett v. Berg, 685 F.2d 1053, 1062 (8th Cir.1982)*, *aff'd on rehearing*, *710 F.2d 1361* (8th Cir.) (en banc), *cert. denied*, *464 U.S. 1008, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983)*, stricken as "utterly fail[ing] to apprise defendants of the claims against them and the acts relied upon as constituting the fraud charged." By pleading two or more mailings incident to an essential element of a scheme to defraud violative of the mail fraud statute, *18 U.S.C. § 1341*, the complaint satisfies plaintiffs' first pleading burden.

Movants' contentions as to the second pleading burden appear to have both a procedural and a substantive element. To the extent the complaint could be said to be defective for failing specifically to allege "injury in. . . business or property by reason of a violation of *section 1962*," *18 U.S.C. § 1964(c)*, **[**5]** the defect is cured by plaintiffs' proferred recitation of this language in their motion for leave to amend, *Rule 15(a), Fed.R.Civ.P.*, which is granted.

By implication, movants seem to suggest further that RICO's requirement that plaintiff allege he was "injured in his business or property *by reason of* a violation of *section 1962*" (emphasis added) contains an implicit standing requirement, analogous to that employed in ***antitrust law***. Under this theory, courts have held that an injury is compensable under RICO only if suffered as a result of a distinctive RICO violation, not simply a predicate act. *See, e.g., Bankers Trust Co. v. Feldesman, 566 F. Supp. 1235, 1240-41 (S.D.N.Y.1983)*; *Harper v. New Japan Sec. Int'l, Inc., 545 F. Supp. 1002, 1006 (C.D.Cal.1982)*; *Johnsen v. Rogers, 551 F. Supp. 281, 284-85 (C.D.Cal.1982)*; *Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352, 358 (E.D.Mich.1983)*; *Clute v. Davenport, 584 F. Supp. 1562 (D.Conn.1984)*. Other courts have adhered to a contrary view. *See, e.g., Schact v. Brown, 711 F.2d 1343, 1357 (7th Cir.1983)*, *cert. denied*, *464 U.S. 1002, 104 S. Ct. 509, 78 L. Ed. 2d 698 (1984)*; *Bennett v. Berg, 685* ***[**6]*** *F.2d at 1059*; *Prudential Lines, Inc. v. McKeon*, No. 80 Civ. 5853 (S.D.N.Y., Apr. 21, 1982); *Landmark Savings & Loan v. Loeb Rhoades, 527 F. Supp. 206, 208 (E.D.Mich.1981)*; *Hellenic Lines, Ltd. v. O'Hearn, 523 F. Supp. 244, 248 (S.D.N.Y. 1981)*. While the Second Circuit does not appear to have reached the issue, the tenor of *Moss* and its express recitation of the persuasiveness of the Seventh Circuit's decision in *Schact, Moss v. Morgan Stanley*, 719 F.2d at n. 10, suggest that no such pleading obstacle to a civil RICO action need be surmounted by a plaintiff in this circuit in order to state a claim.

This standing requirement, like the now-discredited efforts to limit RICO to "organized crime," *see Moss, 719 F.2d at 21*, stems from a perceived need to constrain the very broad language used in drafting RICO. While Congress may not have contemplated the wholesale elevation of "garden variety" securities and common law fraud violations into RICO claims, *see* Note, *Civil RICO and "Garden Variety" Fraud -- A Suggested Analysis*, 58 St. John's L.Rev. 93, 112 (1984), the *Schact* court aptly noted:

> While we are mindful of the jurisprudential maxim that **[**7]** statutes are not to be interpreted woodenly and without regard to their aim, we do not see how any legitimate or principled tailoring of RICO could be effected without impairing the broad strategy embodied in the act. If Congress wishes to avoid the inclusion under RICO's umbrella of "garden variety " fraud claims involving the operation of enterprises through mail and securities fraud, it may easily do so through removing mail and securities fraud from the list of predicate acts enumerated in *§ 1961*. That is not, however, a program which may be undertaken by this court. *United States v. Turkette, 452 U.S. 576, 586-87 [101 S. Ct. 2524, 2530, 69 L. Ed. 2d 246]* . . . (1981).

[*123] *See also Moss, 719 F.2d 5*, at nn. 10, 13, citing *Schact* approvingly and listing a number of courts which have entertained civil and criminal RICO claims premised, like this claim, on common law fraud and "ordinary" securities fraud violations.

Accordingly, the complaint sufficiently pleads a RICO claim based upon an alleged pattern of racketeering activity involving predicate acts of mail fraud, *18 U.S.C. § 1961(1)(B)*. The motion to dismiss is denied without prejudice to renewal **[**8]** upon a more developed record. Defendants Levy and Hale Farms shall answer within ten (10) days.

SO ORDERED.

End of Document

United States v. Phelps Dodge Industries, Inc.

United States District Court for the Southern District of New York

June 14, 1984

No. 78 Civ. 4479 (ADS)

Reporter

589 F. Supp. 1340 *; 1984 U.S. Dist. LEXIS 15894 **; 1984-1 Trade Cas. (CCH) P65,987

UNITED STATES OF AMERICA, Plaintiff, v. PHELPS DODGE INDUSTRIES, INC., GENERAL CABLE CORPORATION, THE OKONITE COMPANY and THE ANACONDA COMPANY, Defendants

Core Terms

prices, cable, bid, sheets, conspiracy, civil penalty, competitors, violations, employees, discounting, adhere, settlement, contacts, compliance, new price, adders, phone, deterrence, orders, continuing violation, increased price, cease-and-desist, conversation, price-fixing, decisions, effects, freight, conditions, antitrust, collusion

LexisNexis® Headnotes

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

Evidence > Inferences & Presumptions > Inferences

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

HN1[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

In the absence of direct evidence, a district court may rely on circumstantial evidence of consciously parallel corporate conduct to support an inference of unlawful agreement. The agreement need not be proven by direct evidence, conduct pointing to concerted action is sufficient. Standing alone, however, such evidence is insufficient unless the circumstances under which it occurs make the inference of a rational, independent choice less attractive than that of concerted action. The principal considerations identified by the courts in making this inquiry are, first, whether the companies undertaking the parallel conduct had motivation to enter an agreement, and second, whether the parallel decisions would have been contrary to the companies' individual economic interests if effected separately.

Business & Corporate Law > ... > Authority to Act > Business Transactions > General Overview

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > General Overview

HN2[] **Authority to Act, Business Transactions**

When a corporation grants authority to its agents or employees to make sales on its behalf, it cannot then eschew responsibility for the means adopted by the agents and employees to make those sales, even when it has made real efforts to control their conduct.

Governments > Legislation > Interpretation

HN3[] **Legislation, Interpretation**

In interpreting a regulatory statute, common-law definitions are irrelevant; instead authority must be construed to extend accountability as far as necessary to eradicate the unfair practices which underlie the order.

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > General Overview

Criminal Law & Procedure > ... > Jury Instructions > Particular Instructions > Use of Particular Evidence

Torts > ... > Employers > Scope of Employment > General Overview

HN4[] **Duties & Liabilities, Authorized Acts of Agents**

The standard for imputing liability to a corporation for the acts of its employees should be no more stringent in civil penalty proceedings than in criminal prosecutions, where courts generally require only that the illegal act be committed within the scope of the wrongdoer's employment and refuse to allow technical claims of lack of authority or even evidence that the employee acted against express instructions to defeat the corporation's responsibility.

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > General Overview

HN5[] **Duties & Liabilities, Authorized Acts of Agents**

The scope of liability, like the breadth of the penalty provisions, must provide a meaningful deterrence against violations.

Business & Corporate Law > ... > Authority to Act > Business Transactions > General Overview

HN6[] **Authority to Act, Business Transactions**

In civil penalty proceedings, as in criminal prosecutions, a corporation which employs an agent in a responsible position cannot say that the man is only "authorized" to act legally.

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > General Overview

HN7[] **Duties & Liabilities, Authorized Acts of Agents**

To deny the possibility of corporate responsibility for the acts of minor employees is to immunize the offender who really benefits, and open wide the door for evasion. Particularly where the end sought is deterrence, distinctions between officers and agents, or between persons holding positions involving varying degrees of responsibility, are inappropriate.

Business & Corporate Law > ... > Duties & Liabilities > Authorized Acts of Agents > General Overview

Torts > Vicarious Liability > Employers > General Overview

HN8[] **Duties & Liabilities, Authorized Acts of Agents**

An employer must stand or fall with those whom he selects to act for him. He is in the same plight, if they are delinquent, as if he has failed to abate a nuisance on his land. It is the case of the non-performance of a nondelegable duty.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

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

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

Antitrust & Trade Law > Federal Trade Commission Act > Penalties

HN9[] **Remedial Powers, Federal Trade Commission Act**

Section 5(l) of the Federal Trade Commission Act, *15 U.S.C.S. § 45(l)*, provides for civil penalties of up to $ 10,000 for each violation against individuals or entities who violate final orders of the Federal Trade Commission. In the case of a violation through continuing failure to obey or neglect to obey a final order of the commission, each day that the conduct continues is a discrete offense subject to the maximum penalty. A "continuing conspiracy to fix prices" is the type of behavior Congress intends to cover as a continuing failure or neglect to obey.

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > Judicial Review

HN10[] **Settlements, Consent Judgments**

Determining the appropriate civil penalty is a matter within the sound discretion of the trial court. The courts identify several factors to guide this discretion: the good or bad faith of the defendants, the injury to the public, the defendants' ability to pay, the extent to which defendants have benefitted from the violations, and the need to vindicate the authority of the Federal Trade Commission.

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN11[] **Settlements, Consent Judgments**

The good or bad faith of the violator is an important factor in assessing the appropriate penalty.

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > Judicial Review

HN12[] **Settlements, Consent Judgments**

The degree to which a corporation takes steps on its own initiative to assure compliance with the Federal Trade Commission's cease-and-desist order affects the judgment as to what penalty is necessary to induce a sufficiently vigilant posture.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN13[] **Antitrust & Trade Law, Sherman Act**

Price-fixing is a per se violation of the antitrust laws.

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

HN14[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Suppression of competition significantly affects public interest.

Counsel: [1]** Benjamin P. Schoen, Esq., Lawrence G. McDade, Esq., Consumer Affairs Section, Antitrust Division, Department of Justice, Washington, District of Columbia, Selig S. Merber, Esq., R. Scott Wynn, Esq., Bureau of Competition, Federal Trade Commission, Washington, District of Columbia, for Plaintiff.

Simpson, Thacher & Bartlett, Esqs., New York, New York, Charles E. Koob, Esq., John F. Cambria, Esq., Morgan F. Kelly, Esq., for Defendant GK Technologies, Inc., Debevoise & Plimpton, Esqs., New York, New York, Robert L. King, Esq., Michael E. Wiles, Esq., for Defendant Phelps Dodge Industries, Inc.

Judges: Abraham D. Sofaer, D.J.

Opinion by: SOFAER

Opinion

[*1345] CORRECTED OPINION AND ORDER

ABRAHAM D. SOFAER, D.J.:

The United States brought this civil action in September 1978 for monetary penalties and injunctive relief, pursuant to section 5(l) of the Federal Trade Commission Act, *15 U.S.C. § 45(l)*, against defendants Phelps Dodge Industries, Inc., a successor to Phelps Dodge Copper Products Corporation; General Cable Corporation, now known as GK Technologies, Inc. ("GK"); the Okonite Company; and the Anaconda Company. The complaint charges that the defendants violated a 1936 Federal **[**2]** Trade Commission cease-and-desist order ("the Order"), which prohibited price fixing and coordination in the paper cable industry. In November 1979 a final judgment providing for a civil penalty of $300,000 and injunctive relief was entered against Okonite by consent. In January 1980 the remaining defendants unsuccessfully moved to dismiss the complaint on the ground that it failed to state a claim upon which relief could be granted, and extensive discovery ensued. In January 1982 a final judgment providing for a civil penalty of $100,000 and injunctive relief was entered by consent against Anaconda. In January 1983 the remaining parties agreed to submit the entire cause for final judgment on an agreed record.

The Order which the government argues the companies' conduct violated originated in an administrative proceeding instituted by the FTC on September 26, 1935, against defendants or their predecessors, and other companies no longer in the industry. The Order has remained in force since it became final in May 1938. The government charges that Phelps Dodge, GK, Okonite, and Anaconda violated the first, second, and fourth decretal paragraphs of that Order, which prohibit competitors **[**3]** from conspiring to fix or maintain prices, to adhere to prices in price sheets circulated among them, or to conduct investigations to ferret out and discourage deviations from such prices. [1] The findings and conclusions that **[*1346]** follow establish that defendants violated the 1936 Order by conspiring to fix and maintain prices in the paper cable industry. Civil penalties are assessed against Phelps Dodge and GK in the amounts of $517,500 and $552,000, respectively.

[4]** I. *Findings of Fact*

A. *The Paper Cable Industry, Market, and Price Book*.

Impregnated paper cable is electrical cable used for the transmission of high voltage electricity from a generation point to a distribution point. Order para. 2. It is generally made to specifications set by the purchaser from strands of copper or aluminum sheathed with a paper insulation. During the period between 1970 and 1975, the four defendants originally named in this action made over ninety percent of the paper cable sold in this country. Their products were essentially fungible, and their customers primarily public and private utilities.

For some time paper cable pricing has been based on data in a price book, an "historical formula which people have used in the industry as a basis for pricing their products." Priesing at 98. The price book formula in the 1970s reflected costs of labor, materials, and manufacturing, as well as a margin of contribution, for given industry specifications of paper cable. Priesing at 98-103. Book pricing was simply a shorthand method of determining the cost of a product generally manufactured to customer specification. Cowles at 40, 165-67. The price book

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[1] The Order provides in relevant part:

It Is Further Ordered that said respondent corporations . . . General Cable Corporations . . . Habirshaw Cable and Wire Corporation . . . The Okonite Company, Phelps-Dodge Copper Products Corporation . . . and their successors, officers, agents and employees, and the respondent, National Electrical Manufacturers Association, cease and desist, in connection with the business of selling and offering for sale impregnated paper cable, . . . in interstate commerce, from doing and performing, by agreement, combination or conspiracy between or among any two or more of said respondent corporations acting directly or by or through the respondent, National Electrical Manufacturers Association, the following acts and things:

(1) Fixing maintaining or enhancing prices, special charges, discounts, transportation charges or any terms or conditions of sale which terms or conditions constitute a substantial element in competition;

(2) Providing that any price lists compiled and distributed by any of them among their competitors are to be adopted and adhered to until modifications thereof are similarly compiled and distributed with the result that such original lists and amendments are so adopted and adhered to by any of them and their competitors;. . .

(4) Participating with competitors in initiating or conducting any investigation for the purpose of ascertaining and reporting for their joint benefit if, when and to what extent any competitor has deviated from any price list or any announced or quoted price, or otherwise bringing pressure or persuasion to bear upon competitors not to deviate from any such price list or price, provided that this paragraph shall not prevent the circulation of reports of the prices, terms, conditions and like particulars of closed transactions, when not done for the purpose of policing the activities prohibited in paragraphs (1) or (2);. . .

In re National Electrical Manufacturers Ass'n (No. 2565, Dec. 29, 1936).

contained **[**5]** a base price for specifications of paper cable, as well as a series of price sheets listing the adjustments to that price because of such factors as the cost of metal and other product components.

Three paper cable price sheets are most important in this litigation: the quantity discount sheet, which specified percentage discounts for various quantities of cable; the freight adder sheet, by which shipping charges were calculated; and the jacket adders, which listed the prices of the coverings, or jackets, for the paper cable, and which varied according to the type and thickness of paper insulation used. The price book served to simplify paper cable pricing by providing a means of separately pricing product components. The 1936 Order described the price sheets then in circulation, however, as "exceedingly complex and detailed." *In re National Electrical Manufacturers Assn*., Findings of Fact para. 4(a) (No. 2565 Dec. 29, 1936). Generally, no more than a handful of people in any paper cable company were capable of calculating the book price for a given order. Cowles at 206, 209.

Occasionally, one of the four major domestic producers would issue a revised price sheet and send it **[**6]** to its three major competitors, who typically would revise their own price sheets to conform to the new standard. This practice caused the companies' price books to remain identical: the list price for any given order generally would not vary from company to company. But the companies did not always charge the book price. When market conditions demanded, the companies would bid "off-book," either by discounting the book price by some percentage, Jackson at 111; by utilizing cost-plus pricing from individual component costs, Penhale at 25-26; Jackson **[*1347]** at 25-26, 128-32; or by employing some combination of book and cost-plus pricing, Jackson at 129-30; Penhale at 28; Kedzierski at 107. Each of these methods was responsive to competitive pressures; manufacturers could at any time reduce or increase the discount from book, or adjust their profit above (or loss below) cost. Employed in this manner, the price book enabled manufacturers to base their prices on identical data, but still engage in competitive pricing.

Until around 1970, "the book was pretty much the golden rule," from which paper cable companies derived quotations "without exception." Jackson at 110. After 1970 **[**7]** the fortunes of the paper cable industry fluctuated widely, and so did the industry's adherence to the book. For most of 1973 pricing went off-book, but during the first half of 1974 demand was so strong that at times quotes went above book. Penhale at 29-30; Schell at 39. Beginning in 1975, while quotes remained on-book, considerable discounting took place. By late 1975 the industry was in a serious downturn. Pricing went entirely off-book, Penhale at 29-30; Schell at 38; Viggiano at 60; Cowles at 92-93, and occasionally even went below cost, Kedzierski at 107; *see* Brooks at 70. Costs escalated so rapidly that historical data on which the price book was premised no longer accurately reflected the market, and low demand made book-price increases untenable. Phelps Dodge explored the possibility of a total overhaul of the pricing system, Cowles at 94; Priesing at 103, but the price book proved superior to any other method contemplated, Cowles at 183; Priesing at 156. GK also considered alternative pricing strategies to increase the profitability of paper cable, but none was implemented because the market was believed incapable of supporting higher prices. Brooks at 73, 76, 78-79. **[**8]** Against this gloomy background in the paper cable industry, certain contacts occurred between officials of the defendant companies named Trotter, Kedzierski, and Penhale.

B. *Contacts Between Trotter, Kedzierski, and Penhale*.

In April 1976, when demand for paper cable had been falling for some eighteen months, James Trotter was Product Manager for paper cable at Phelps Dodge and Leo Kedzierski held the same position with GK. Robert Flood, then of Phelps Dodge but formerly of GK, phoned Kedzierski to arrange a meeting between him and Trotter at the Hilton Hotel in Tarrytown, New York. Flood claims he arranged the meeting solely because he knew that Trotter's job at Phelps Dodge was in jeopardy and wished to introduce Trotter to someone at GK in case he might want to seek employment there. Flood at 70, 132, 137-38. He admitted, however, that he did not mention this purpose to Kedzierski during their phone conversation or during his brief appearance to introduce them when they met. Instead, amidst "general comments about the state of the industry," Flood indicated to Kedzierski only that the two men should meet because "Jim Trotter was involved in paper cable pricing." Flood at **[**9]** 75. Kedzierski testified, moreover, that Flood, relating a discussion at Phelps Dodge at which the participants were lamenting the plight of paper cable, suggested that "it didn't have to be like that." Kedzierski at 102-03. Flood termed Kedzierski's account of the conversation "a little dramatic," but he conceded that he had spoken of the poor state of the paper cable product line and that Kedzierski might reasonably have construed the discussion as an invitation to cooperate.

Flood at 72. At their initial meeting, Trotter and Kedzierski discussed Trotter's insecurity about his job with Phelps Dodge, which he thought hard times in the paper cable industry had put in jeopardy. Trotter at 352; Kedzierski at 262. But they also discussed the ailing state of the market for paper cable, book pricing, and ways to shore up the price. Kedzierski at 31; Trotter at 74-77.

Later in April, Kedzierski and Harry Penhale, then Vice-President for Quotations for paper cable at Okonite, arranged to meet at the Marriott Hotel in Saddlebrook, New Jersey. According to Trotter **[*1348]** and Kedzierski, Trotter was not present at this meeting. Trotter at 83, 387-88; Kedzierski at 38-39. Discussion focused **[**10]** primarily on the poor economic conditions then prevailing in the paper cable industry. Kedzierski testified that at this meeting Penhale supplied him with a copy of a new Okonite price sheet of "freight adders." Penhale recalled that he and Kedzierski had discussed the updated freight rates over the phone around this time, but that he had not actually provided Kedzierski with the sheet until a subsequent meeting attended also by Trotter, to whom he also gave a copy. Penhale at 80-83.

Penhale also recalled that at the April meeting Kedzierski had given him and Trotter each "a copy of some work he had done with respect to revisions in discounts on . . . the cable coverings," or jacket adders. Penhale at 83. Kedzierski testified that at this initial meeting he had merely mentioned to Penhale that he was doing some work on jacket adders, that Penhale requested that he send them to him, and that at a later time he did so. Kedzierski at 41-42; 237; *see* Trotter at 74. Trotter did not think he had received the jacket adders at all, recalling that Kedzierski had indicated to him that he had abandoned the work. Trotter at 334. But his superior Richard Cowles, Vice-President of Sales and **[**11]** Marketing for the Phelps Dodge Cable and Wire Company, testified that about this time Trotter had showed him a tentative price sheet for jacket adders from another company, an incident of which he apprised Schell, the president of the Cable and Wire Company. Cowles at 22-25. The evidence makes it likely, therefore, that Kedzierski provided Penhale and Trotter with copies of General Cable's proposed jacket adders.

Trotter also testified that during this period he received a copy of the Okonite freight rates and a quantity discount sheet. Trotter at 320-29. Penhale recalled that an exchange of freight rates occurred at the first three-way meeting. Penhale at 83. Trotter, however, testified that he received both documents through the mail sometime before the three companies issued new price sheets in late May. Thus, the men agree that Penhale gave Trotter a copy of Okonite freight rates; and Trotter recalled receiving quantity discount sheets as well. Though Trotter's recollection of his receipt of these materials seems less than precise, *see* Trotter at 326-27, the testimony of Cowles and Schell confirms that Trotter received some type of price sheet from a competitor. Schell at **[**12]** 156-59; Cowles at 15-25. In sum, notwithstanding the divergence in details of the participants' testimony, the evidence establishes that the men exchanged internal pricing information in the hope of gathering support for imminent price increases.

Penhale, Kedzierski, and Trotter did not simply exchange price information, but by phone call and meeting developed an understanding that their respective companies would bid "on the book" and thus attempt in concert to hold the marketplace price to the levels established by the new pricing sheets. Initially, Trotter advised his cohorts that Phelps Dodge was considering issuing a new price sheet incorporating higher prices. Trotter at 79, 163, 328, 83. Penhale assured Trotter that, if Phelps Dodge took the lead in issuing new price sheets, Okonite would support and follow them. Trotter had similar conversations with Kedzierski, who admitted suggesting to Trotter early in their discussions that General Cable would support higher prices for paper cable, and would adhere to the price sheets soon to be issued. On May 24, 1976, Phelps Dodge issued new price sheets, covering quantity discounts, jacket adders, and freight adders, which raised the **[**13]** price of most if not all types of paper cable. Phelps Dodge distributed the new price sheets to its competitors by mail, as was its custom, and they made their way to Penhale's and Kedzierski's desks. Quickly following Phelps Dodge's lead, General Cable simply copied the new prices and issued them as its own effective May 26. Okonite, too, adopted the Phelps Dodge pricing factors, issuing new price sheets for discounts and jacket and freight adders on June 1, 1976.

[*1349] The issuance of identical price sheets in the highly oligopolistic paper cable industry is not alone sufficient to establish collusive behavior. "Rigid list prices do not prove collusion if transaction prices depart substantially from list." Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562, 1581-82 (1969). But an agreement to stick to newly established price lists does constitute collusive conduct. Traditionally, defendants had used the price sheets only as guides while freely discounting from them to bid competitively. By the time the

May 1976 price sheets were issued, however, Trotter, Penhale, and Kedzierski had a clear understanding that their respective companies **[**14]** would cooperate by stabilizing the market price at book. Though wary of each others' true intentions, and concerned that the companies' simultaneous increase not just in book prices but in actual bids would appear concerted, Kedzierski, Penhale, and Trotter nevertheless agreed to adhere to book prices so long as their competitors did. As Penhale put it, Phelps Dodge should "run it up the flag pole and see who salutes." Penhale at 71-72.

Initially, at least, the three fell in line. In June 1976, GK, Phelps Dodge, and Okonite each began quoting book prices from the newly issued price sheets and sticking to them, a drastic change from the rampant discounting that had prevailed for the preceding eighteen months. Because each company bid on book and their price sheets were identical, their bids too were identical. In Penhale's view the identical bids submitted by the three producers during June and July resulted from the discussions held by the three men. Penhale at 103. Furthermore, Roger Brooks, Kedzierski's immediate superior at GK, testified that, based on several conversations with Kedzierski, Brooks understood that Penhale, Kedzierski, and Trotter had agreed that their respective **[**15]** companies would bid at the list prices established in the new price sheets; and Brooks believed that actual bidding during this period manifested this agreement. Brooks at 89-90, 96-97, 102-03, 110-11, 129-33.

Within a few weeks after the price sheets were issued, Kedzierski, Penhale, and Trotter met at the Saddlebrook Marriott to congratulate themselves that the book prices were holding and, in Penhale's words, to "pledge allegiance" to the agreement. In July, Trotter and Penhale met once again at the Saddlebrook Marriott. The three men were also in constant phone contact throughout the summer, discussing general industry conditions as well as specific bids, current pricing, and book price calculations. On several occasions, Kedzierski received an inquiry from pricing officials in corporate headquarters seeking information that would assist in formulating base prices for lead that the corporation would set for its divisions. Though prevailing lead prices were generally announced in the industry journal, Kedzierski contacted Penhale and Trotter to obtain prices actually being quoted in order to maintain a competitive position. Kedzierski passed on the information he received to corporate **[**16]** headquarters, where it formed the basis for lead pricing. Trotter also requested his competitors' lead factors. While lead was a relatively insignificant component of paper cable pricing, these discussions indicate the extent of the three men's efforts to ensure uniformity. Kedzierski at 225-35; Trotter at 380-83.

The agreement had a direct bearing on at least two major bids during the summer of 1976. In preparing a bid to Consolidated Edison involving several million dollars, Penhale and Kedzierski consulted by phone to ensure that each had arrived at identical calculations from the book for the five elements comprising the bid, and then agreed to bid those figures. Kedzierski at 73-76. Subsequently, Penhale informed Kedzierski that he would likely cut the price on one of the five items in order to remain competitive with Phelps Dodge and GK, each of which had a higher performance rating with Con Ed than did Okonite. Trotter and Kedzierski also discussed this bid, Trotter deriving from the conversation a "general feeling" that GK would bid on book. A third round of bilateral discussions on this **[*1350]** bid took place between Penhale and Trotter, after which Trotter predicted **[**17]** that all three companies would bid on book but for Okonite's partial adjustment. His prediction was accurate -- the Okonite, Phelps Dodge, and General Cable bids were identical on four of the five items, and Okonite cut on the fifth. Because the bids on four of the items were identical, Con Ed rejected these four and requested rebidding on them. Cowles at 98-99, 134-35, 150; Priesing at 131; Brooks at 99.

The men also cooperated on a pending bid to Commonwealth Edison of Chicago worth more than a million dollars, which each company had bid on book. Commonwealth approached General Cable, suggesting that if it reduced its bid on some minor related items it would receive a major portion of the paper cable business. Sensing that, contrary to Commonwealth's suggestion, the price of these relatively insignificant items would not affect Commonwealth's decision on the paper cable, Trotter and Kedzierski agreed not to cut their companies' bids, despite considerable pressure from GK's field salespeople. Kedzierski at 80-82. Kedzierski also discussed the matter with Penhale, who held a similar view of Commonwealth's strategy and indicated that he too would endeavor to maintain his company's **[**18]** bid prices. Penhale at 163-64. Commonwealth eventually split the order among the three companies, paying the book price to which the three men had agreed to adhere. Penhale at 164.

The existence of an agreement is also demonstrated by the conduct of the three men in confronting one another upon the receipt of field information indicating that a competitor had deviated. At the outset of their arrangement, Penhale and Kedzierski had several phone conversations in which they discussed charges of discounting. Kedzierski at 74. Kedzierski recalled that even at their first meeting there had been some "good-natured kidding" about discounting off the book. Kedzierski at 88. Penhale testified and Kedzierski confirmed that on several occasions Penhale called Kedzierski to "chide" him about having bid off-book, and that Kedzierski routinely pleaded a mistake in the calculations. Penhale at 154-55. Kedzierski also called Penhale when he received suspicious information from his salespeople. Kedzierski at 59-61. Trotter pointed out variations from book pricing in Okonite bids to Penhale during the same conversations in which the men discussed upcoming orders. Trotter at 104. At some point between **[**19]** late July and early September, but probably during August when it had become apparent that the agreement was breaking down, the three men met again at the Saddlebook Marriott. The major portion of the meeting was taken up by various charges of cheating on one bid or another, Kedzierski and Trotter "berating" Penhale with particular harshness for having cut a price on a significant piece of business with Boston Edison. Kedzierski at 92-93; Penhale at 100-02. When they refused to believe Penhale's initial excuse that a clerk in the district office had made a typographical error, Penhale claimed he was simply retaliating. Penhale at 101, 222-24. The meeting, which proved to be among the last contacts before the market reverted to massive discounting, concluded with extensive discussion of a major bid to the Long Island Lighting Company. Kedzierski at 97-98; Penhale at 102-03, 168.

Phelps Dodge executives characterized Trotter's role in developing the May 1976 price sheets as ministerial. Cowles at 59-61; Priesing at 36-37; *see* Trotter at 95, 152. He was not included in the discussions as to whether or not Phelps Dodge would go back on book, nor asked for recommendations as to appropriate **[**20]** price levels, nor requested to forecast the effect of a price increase on the Phelps Dodge market share. Trotter at 361, 77, 152-53. With respect to the discount schedules, Cowles insisted that upper management determined various marginal income levels, for which Trotter would work up corresponding price schedules. Trotter's superiors would then decide which to adopt without any input from him. Cowles at 205-08. In the case of the freight and jacket adders, Cowles said that Trotter simply prepared **[*1351]** price sheets which reflected the costs supplied him by other departments. Cowles at 208-09, 211-12; *see id*. at 58-59.

Trotter performed a significant, corporate staff function, however, in generating the price sheets, as well as compiling and analyzing the pricing, cost, and competitive bidding information which constituted the essential basis for managerial decisionmaking. Cowles at 57-59. He was the only person in the organization capable of doing the mathematical calculations necessary to develop new price sheets. Cowles at 206-12; *see* Priesing at 67. He obtained bid inquiries from field salespeople and relayed prices to them. He testified that his job responsibilities **[**21]** in each of his paper cable positions were "very similar," though the last, that of paper cable product manager, involved "more forecasting." Trotter at 13. With respect to pricing, his responsibility was "to see that [an inquiry] got priced and that the quotes went out on time, to see that bid due dates were met." Trotter at 13-14. If pricing was off-book, Trotter had authority to approve bids up to $25,000; anything higher had to be approved by Cavanaugh, his immediate superior. During the periods when quotations were from the book, however, Trotter testified that no approval was necessary, though higher management cursorily reviewed the bids. Decisions whether to quote book were made by those in the upper level of management, but Trotter was the source of the competitive data that informed those decisions, and he regularly made pricing recommendations. Trotter at 39-40; 434. When Phelps Dodge began to consider raising prices in early 1976, Trotter was assigned the task of evaluating the continued efficacy of the price book and developing alternative pricing mechanisms. Cowles at 93-94. Phelps Dodge followed his recommendation in retaining the price book, relied on data he generated **[**22]** in making its decisions on new volume discounts, and allowed him to "[use] his own judgment on the freight factors and the jacket adders." Cowles at 96.

Kedzierski also had a major role in paper cable pricing. He joined General Cable as a quotation clerk in 1954, when he learned to use the price book. In 1976 he became paper cable product manager, with autonomous pricing authority for bids up to between $50,000 and $100,000. Kedzierski at 14-16; Brooks at 27. On higher bids he had to consult with his marketing manager, Roger Brooks, and on exceptionally large bids with the general manager, William Garretson. Kedzierski described his pricing responsibilities as "to execute the tactics or strategies or objectives as set by the division, to review the day-to-day work performed by quotation and/or pricing people, and to recommend to management a change in objectives or a change in strategy." Kedzierski at 12-13. "Product managers were responsible for all the pricing strategies development and the day-to-day execution of pricing to include specific quotations and published price sheets." Brooks at 30; *see id*. at 34-35; Jackson at 96-97. The initiative to adjust prices to market **[**23]** conditions was expected to come from the product manager, who would in the first instance develop figures and make a recommendation. Jackson at 75-76. In sum, "the product managers . . . really would be the points where the decisions and recommendations would come with respect to pricing," for they were "closest to the marketplace." Brooks at 41.

In addition, Kedzierski kept his immediate superior Brooks apprised of his continuing contacts with Trotter and Penhale and their import, and Brooks did little if anything to discourage them. Trotter and Penhale understood that Kedzierski had signed on to the agreement only after checking with "his management." Trotter at 93; Penhale at 78-79, 142, 166. As marketing manager, Brooks had significant influence in establishing and implementing corporate pricing policy for the products within his market areas. Jackson at 74-75. The position of marketing manager for the Power and Control Division "involved all marketing related responsibilities to include the responsibilities of planning, market analysis, sales analysis . . . and also included management of the product managers' **[*1352]** functions within the division." Brooks at 22-23. Brooks **[**24]** viewed his responsibilities with respect to paper cable pricing to entail "managing the entire function and ensuring that basically the pricing that was executed on a day-to-day basis was within what is called acceptable or market competitive pricing ranges." Brooks at 27-28. Brooks and Kedzierski worked together closely, sometimes meeting as often as ten to fifteen times a day. Upon first hearing from Penhale, Brooks testified, Kedzierski called him in Miami to consult. Brooks at 89. Thereafter, Kedzierski kept Brooks aware that the contacts were continuing, made it "clear" that Kedzierski was talking on the phone with Penhale, and advised him that the meetings were intended to clarify the companies' intention to adhere to published book prices. Brooks at 89-93, 96-98. Brooks admitted that the result of the series of meetings and phone calls was an agreement to quote book price on the major jobs under bid at the time in order to "stabilize" the paper cable market. Brooks at 102-03, 111, 132.

Phelps Dodge contends that it increased prices, and GK says it followed the increase, solely because of economic necessity, and not as a result of any agreements reached by their employees. Conditions **[**25]** had become so bad, they allege, that a bold attempt to bolster prices became worth trying, despite continuing, abysmal demand. Schell at 97-98; Cowles at 26; *see* Penhale at 30; Viggiano at 61. Cowles claimed that the Phelps Dodge strategy was in effect riskless:

> Frankly, [with] the incremental income we were obtaining at that time, it really did not make much difference whether we took any more business at those prices or we just reduced our work force and curtailed our activities. . . .

Cowles at 32. Cowles testified that he, Schell, and Priesing determined to increase book prices and stay with them for at least an initial period, suffering some loss of business in an attempt to make the new prices stick. Cowles at 48-50, 59; *see* Priesing at 35, 131. If the competition did not follow but instead sought to take advantage of the move by undercutting the new, higher bids, Phelps Dodge would reconsider. Priesing at 131. At least initially, General Cable was happy to follow, as had been its custom. Brooks at 88-89.

These arguments fail to disprove, however, that the companies relied upon and benefitted from the collusion of Trotter, Penhale, and Kedzierski. **[**26]** They demonstrate that defendants greatly needed to return to book pricing, but the risks of any single company doing so without the others were very substantial: at the time of Phelps Dodge's decision, only three anticipated bids comprised the major portion of the industry's projected requirements for 1977 and early 1978. Cowles at 49. Just a few months before the increase, General Cable had decided not to pursue a similar strategy, after weighing the likelihood that the competition would follow its lead against the severe consequences if its strategy failed. Brooks at 74-76. The risks associated with a unilateral price increase diminished as the likelihood grew that competitors would follow, and that likelihood was made significantly greater by the activities of Trotter, Penhale, and Kedzierski, which undoubtedly affected the decision-making process. Furthermore, the conspiratorial activities helped keep the increase alive because the three men were able to signal each other their companies' willingness to continue on book, as well as to police each other's adherence to book.

II. *Liability of Phelps Dodge and GK*.

The Order provides the rule of law in this case. *See* *FTC v. **[**27]** Lukens Steel Co., 454 F. Supp. 1182, 1188 (D.D.C. 1978)*. It prohibits the respondent corporations "from doing and performing, by agreement, combination or conspiracy" any of the acts enumerated by its decretal paragraphs. Order at 2. The government seeks to impose liability here under three specific paragraphs: the first, which proscribes "fixing, maintaining or enhancing" prices and other charges, terms, and conditions of sale; the second, which prohibits "providing that any price lists . . . be adopted and adhered to;" **[*1353]** and the third, which prohibits the monitoring and enforcement of such price levels.

The evidence on submission warrants a finding that Kedzierski and Trotter agreed to fix prices. In the paper cable industry, proof of a price-fixing agreement has to be particularly strong because the concededly lawful use of the price books by all three competitors made identical, on-book pricing less suspicious than identical prices would be in an industry that had no price book. Here, however, the government has demonstrated that Kedzierski, Trotter, and Penhale expressly agreed that their companies would bid identically at book and would maintain those prices. Their **[**28]** conduct violated the first paragraph of the 1936 Order, which proscribed price-fixing in general terms, and the second, which specifically prohibited price-fixing in the form of an agreement to adhere to book prices. In addition, they monitored and encouraged compliance with the agreement to adhere to book prices. Their efforts may not have risen to the level of "participating with competitors in initiating or conducting any *investigation* for the purpose of ascertaining and reporting for their joint benefit if, when and to what extent any competitor has deviated from any price list or any announced or quoted price." Order para. 4 (emphasis added); *see In re National Electrical Manufacturers Association*, Findings as to the Facts and Conclusion (Dec. 29, 1936), para. 4(e), at 5. But their conduct violated the Order's fourth paragraph prohibiting "otherwise bringing pressure or *persuasion* to bear upon competitors not to deviate from any such price list or price." Order para. 4 (emphasis added). The questioning, "chiding," "good-natured kidding," expressions of "slight disappointment," and the like comprised forms of persuasion, designed to accomplish the prohibited ends.

[29]** GK suggests that the facts in this case fall outside the specific provisions of the 1936 Order, relying on what it terms the 'four corners' rule of strict construction" applicable in proceedings to enforce consent decrees. *See, e.g.,* *United States v. ITT Continental Baking Co., 420 U.S. 223, 43 L. Ed. 2d 148, 95 S. Ct. 926 (1975)*; *United States v. Armour Co., 402 U.S. 673, 29 L. Ed. 2d 256, 91 S. Ct. 1752 (1971)*. It contends, first, that conditions in the modern paper cable industry have radically changed from those existing at the time of the Order, and second, that the decretal provisions of the Order were directed primarily at activities undertaken through the respondents' trade association. The four-corners rule prohibits "modification [of consent decrees] disguised as construction." *ITT Continental, 420 U.S. at 236 n. 9*. Contrary to GK's suggestion, however, the rule does not necessarily mandate strict construction; it simply shifts the court's focus from the purpose of the statute to that of the order. *See* *United States v. Ancorp National Services, Inc., 516 F.2d 198, 201-02 (2d Cir. 1975)*; *United States v. Olin Ski Co., 503 F. Supp. 141, 143 (S.D.N.Y. **[**30]** 1980)* (quoting *United States v. J.B. Williams Co., 498 F.2d 414, 431 (2d Cir. 1974))*. The purpose of the Order under consideration here was to prohibit price-fixing by means of the price book or any other device, and the conduct proven falls squarely within the Order's central prohibitions. The first paragraph contains no more than "anti-price fixing boilerplate language," Cambria Affidavit para. 11; *see* GK Memorandum in Opposition to Motion for Summary Judgment on Liability at 19 n.*, but it amply covers the subject of this action -- a garden-variety price-fixing conspiracy, replete with surreptitious phone calls, anonymous transmissions through the mail, and meetings in hotel cocktail lounges. The purview of the second paragraph specifically includes agreements between the respondent corporations to adhere to any price lists, whether "acting directly or by or through the respondent, National Electrical Manufacturers Association." Order at 2. Finally, GK fails to explain how the significantly smaller number of competitors, the ailing state of the industry, or any other changed circumstance would render ineffective any portion of the Order ineffective absent a modification, **[**31]** **[*1354]** which neither GK nor Phelps Dodge had sought.

A. *Inference of Conspiracy*

Phelps Dodge and GK seek to avoid liability for civil penalties by arguing that the relevant bids resulted wholly from independent business decisions into which Kedzierski and Trotter had no input. The structure of the Order provides some support for defendants' argument, as the prefatory paragraph does not prohibit agreements to do the things specified in the enumerated paragraphs but instead proscribes defendants from "doing and performing" those things pursuant to an agreement. *See* *FTC v. Cement Institute, 333 U.S. 683, 728, 92 L. Ed. 1010, 68 S. Ct. 793 (1948)*. In effect, Phelps Dodge and GK argue that, even if Kedzierski, Trotter, and Penhale agreed to adhere to book price, the companies submitted identical, book-price bids for independent reasons, not because their employees had so agreed.

The weight of the evidence, however, supports an inference that GK and Phelps Dodge violated the Order by fixing prices pursuant to the agreement between Penhale, Kedzierski, and Trotter. The evidence shows that there was an agreement to fix the prices quoted in several large bids, that the companies **[**32]** bid identically on those orders, that the fixed bids reflected significantly higher prices than had prevailed in the market for some time, and that the higher prices proved a temporary aberration.

HN1[] In the absence of direct evidence, a court may rely on circumstantial evidence of consciously parallel corporate conduct to support an inference of unlawful agreement. *United States v. Paramount Pictures, Inc., 334 U.S. 131, 142, 92 L. Ed. 1260, 68 S. Ct. 915 (1948)*; *Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221, 83 L. Ed. 610, 59 S. Ct. 467 (1939)*. "The agreement need not be proven by direct evidence; conduct pointing to concerted action is sufficient." *Phelps Dodge Refining Corp. v. Federal Trade Comm'n, 139 F.2d 393, 396 (2d Cir. 1943)*. Standing alone, however, such evidence is insufficient "unless the circumstances under which it occurred make the inference of a rational, independent choice less attractive than that of concerted action." *Ambook Enterprises v. Time, Inc., 612 F.2d 604, 615 (2d Cir. 1979)* (Friendly, J.) (quoting *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 446 (3d Cir. 1977)*, *cert. denied*, *434 U.S. 1086, 55 L. Ed. 2d 791, 98 S. Ct. 1280* ***[**33]*** *(1978))*, *cert. dism*. *448 U.S. 914, 65 L. Ed. 2d 1179, 101 S. Ct. 35 (1980)*; *accord* *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 286-88, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)*; *Theatre Enterprises, Inc. v. Paramount Film Distribution Corp., 346 U.S. 537, 540-41, 98 L. Ed. 273, 74 S. Ct. 257 (1954)*; *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., 513 F.2d 102, 110-11 (2d Cir. 1975)*; *Federal Prescription Service, Inc. v. American Pharmaceutical Association, 214 U.S. App. D.C. 76, 663 F.2d 253, 267* (D.C. Cir.), *cert. denied*, *455 U.S. 928, 71 L. Ed. 2d 472, 102 S. Ct. 1293 (1981)*. The principal considerations identified by the courts in making this inquiry are, first, whether the companies undertaking the parallel conduct had motivation to enter an agreement, *see* *Cities Service, 391 U.S. at 286-87*; *Ambook, 612 F.2d at 615-16*, and second, whether the parallel decisions would have been contrary to the companies' individual economic interests if effected separately, *see* *Modern Home Institute, 513 F.2d at 110-11*; II P. Areeda & D. Turner, ***Antitrust Law*** para. 317 at 82 (1978). *See also* *Bogosian, 561 F.2d at* ***[**34]*** *446*; *Venzie Corp. v. United States Mineral Products, Co., 521 F.2d 1309, 1314 (3d Cir. 1975)*; *Lukens, 454 F. Supp. at 1190*.

The first factor is easily found here: the record is replete with evidence that the paper cable industry regarded a rise in prices as essential for the survival of the line of business involved. Both Phelps Dodge and GK had strong motivation to enter an agreement to support artificially high prices. Defendants contend, however, that separate implementation of parallel decisions to raise prices was reasonable to **[*1355]** expect in the industry, since pricing had become so "animalistic" at the time that loss of business was actually a blessing, averting a decision to leave the market altogether because of losses that would have been sustained in filing the orders. This argument is unconvincing. While Anaconda in 1975 and GK in 1978 found long-term prospects so bleak that they left the industry, no evidence exists that any of the firms unilaterally turned down business either immediately before or immediately after the conspiracy. Instead, competitive pressures were so strong during the conspiracy that widespread cheating appeared almost at once. The **[**35]** evidence shows in addition that those at Phelps Dodge who determined to raise prices knew that they could only maintain those prices if the competition followed. The continuing quest for new orders accords with familiar economic wisdom: absent a decision to cease operations completely, a company needs business to minimize loss, and the incentives to collude will be at least as strong in a declining as in any other market. *Compare* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 670 (1962), *with* Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562, 1592 (1969). The testimony of GK and Phelps Dodge managers indicates they did not abjure new orders, but simply calculated that the risks involved in raising prices were reasonable in light of the potential benefits for increased profits should their competitors follow.

Economic theory suggests that, in a market of few sellers and a fungible product, market intelligence and ability to respond will be so high as to make it difficult for one to differentiate between collusion and interdependent decisionmaking. L. Sullivan, **[**36]** *Handbook of the Law of Antitrust* § 111, at 320-21 (1977). *See generally* H. Blake & R. Pitofsky, *Cases and Materials in* ***Antitrust Law*** 1023 (1967); L. Schwartz & J. Flynn, *Antitrust and Regulatory Alternatives* 503-507 (1977). Professor Turner has argued that interdependent, consciously parallel oligopoly pricing is in reality individual decisionmaking and should be treated as such. He suggests that in an oligopolistic market with relatively inelastic demand, a price cut will likely not result in greater market share for the price cutter. Instead, he insists, competitors might be expected to match the price, and the net effect will be to reinstitute the prior allocation at a lower price. The interdependence that necessarily results from the structure of oligopoly markets might constitute agreement, but Turner believes it should not be characterized as collusion, since "mere interdependence of basic price decisions is not conspiracy." 75 Harv. L. Rev. at 672. Thus, the structure of the paper cable industry in 1976 may weaken the significance of evidence of conscious parallelism as indicative of an unlawful agreement. *See id*. at 665-66; L. Sullivan, §§ 116-17; **[**37]** *Ambook, 612 F.2d at 615*; *Delaware Valley Marine Supply Co. v. American Tobacco Co., 297 F.2d 199, 203 (3d Cir. 1961)*, *cert. denied*, *369 U.S. 839, 7 L. Ed. 2d 843, 82 S. Ct. 867 (1962)*.

Others have reasonably suggested, however, that it is unlikely that "prices could long be maintained above cost in a market, even a highly oligopolistic one, without *some* explicit acts of communication and implementation." Posner, 21 Stan. L. Rev. at 1574. Turner himself concedes that "it may well be that in reality a stable and firm pattern of noncompetitive prices is rarely achieved without some kind of agreement." 75 Harv. L. Rev. at 662. Nevertheless, whatever the theoretic possibility of an effective though wholly tacit oligopoly price agreement, or the legal significance of such behavior, certain marketplace data provide sufficient evidence of actual collusion in this case. For example, all producers in the paper cable market had excess capacity during the period immediately prior to the conspiracy, Jackson at 58-59; Kedzierski at 104-05; Trotter at 157-58; Cowles at 36-37; Viggiano at 117-19; Penhale at 178, yet the price sheets issued in late May and early June and the bids based **[**38]** upon them reflected significantly **[*1356]** higher prices than the companies had been charging, Trotter at 363-65; Brooks at 47; Viggiano at 62; Priesing at 130; Government Response to Defendants' Opposition to Motion for Partial Summary Judgment, Exhibit I. A precipitous rise in prices in the face of such excess capacity and declining demand becomes highly suspicious, *see* Turner, 75 Harv. L. Rev. at 659, as does a refusal to cut prices under the same circumstances, *see* Posner, 21 Stan. L. Rev. at 1582-83. Equally suspicious are identical, supposedly secret bids from producers with excess capacity vying for a large order, *see id*. at 1582; Turner, 75 Harv. L. Rev. at 659, notwithstanding the readily available mechanism of the price book. All these telltale signs are present here.

Moreover, in this case the circumstantial evidence of marketplace conditions and behavior does not stand alone. Apart from its significance as a matter of the vicarious liability of the corporations for the unlawful activity of their employees, the evidence of contacts between Kedzierski, Trotter, and Penhale strengthens the inference that the corporations' actions resulted from collusion **[**39]** rather than interdependent decisionmaking. First, it is reasonable to conclude, and this court does conclude, that officials in Phelps Dodge and GK responsible for setting corporate pricing policy and determining actual prices on the Con Ed, and Commonwealth Edison bids either directly or indirectly received from the conspirators assurances in some form that their competitors would support price increases. Brooks' continuing awareness of his immediate subordinate's activities at GK makes the inference of such assurances particularly strong. Kedzierski testified that Brooks led him to understand that he was keeping higher management informed, specifically mentioning Garretson, and that Brooks made clear at the same time that he couldn't acknowledge securing the information in the first place. Kedzierski at 120, 197. The ritual and identical Garretson and Cummings Affidavits denying any such knowledge do not defeat the inference drawn from the circumstantial economic evidence and the direct evidence of agreement.

Even if the respective higher managements were not expressly aware of their employees' agreement, their reliance on the field information and market assessments generated **[**40]** by Trotter and Kedzierski as paper cable managers infected the pricing decisions with the taint of the conspiracy. Finally, Trotter and Kedzierski each had a major role in developing the figures incorporated into the price sheets adopted by their respective employers in May and June 1976. Reliance of upper management on these price lists constituted action pursuant to an agreement by the companies to violate the Order.

B. *Vicarious Liability*

Defendants are also liable in this case because they are responsible for the conduct of Kedzierski and Trotter. Little direct authority exists on the issue of the vicarious liability of a corporation for its employees' conduct in violation of a cease-and-desist order. The parties argue over whether to employ a theory of apparent authority, proof of actual authority, or some other test based on an agency rationale. Whether Kedzierski and Trotter had "actual" authority, however, or appeared to have authority, to bind their respective employers to the price-fixing conspiracy is not the proper inquiry here. One decision that relied on agency reasoning supports the view that "if defendants' salesmen and representatives were acting within the **[**41]** *apparent* scope of their authority when the alleged representations took place, then liability is imposed upon the defendant." *United States v. Tri-State Home Improvement Co., 446 F. Supp 14, 16 (E.D. Wisc. 1977)* (emphasis in original). Even that decision specifically and properly rejected in the context of a cease-and-desist order the corollary that the third person relying on the agent's apparent authority must reasonably believe that the agent is authorized. *See* *Restatement (Second) Agency § 8, comment c*. The court explained:

> **[*1357]** The defendants' view that it is necessary to establish that the customers actually believed that Podell was authorized to bind Tri-State is not a correct statement of the law in actions to enforce cease and desist orders of the FTC. This is not a case where the third party is suing the principal under a theory of apparent authority. The central inquiry here is whether or not the defendants violated a cease and desist order of the FTC. That order forbids the defendants from making various representations. It is sufficient for a motion for partial summary judgment to show that Tri-State clothed its sales representatives with **[**42]** manifestations of its authority, and this has been done by the depositions referred to above. Whether or not customers believed Podell to be so authorized is irrelevant to the inquiry of whether or not the FTC order was violated.

446 F. Supp. at 16.

The apparent-authority theory is inapposite, however, to the problem of evaluating a company's vicarious liability for conduct by its employees that violates cease-and-desist orders. Whatever terminology the cases employ, the true import of their holdings is that, ***HN2***[] when a corporation grants authority to its agents or employees to make sales on its behalf, it cannot then eschew responsibility for the means adopted by the agents and employees to make those sales, even when it has made real efforts to control their conduct. *See* *Standard Distributors v. FTC, 211 F.2d 7, 13 (2d Cir. 1954)*; *Parke, Austin & Lipscomb, Inc. v. FTC, 142 F.2d 437, 440 (2d Cir. 1944)*; *Globe Readers Service, Inc. v. FTC, 285 F.2d 692, 695 (7th Cir. 1961)*; *Steelco Stainless Steel, Inc. v. FTC, 187 F.2d 693, 697 (7th Cir. 1951)*; *International Art Co. v. FTC, 109 F.2d 393, 396 (7th Cir. 1940)*; *Perma-Maid Co. v. FTC, 121 F.2d 282, 284 (6th **[**43]** Cir. 1941)*; *see also* W. Seavey, *Studies in Agency* 187 (1st ed. 1949) (where agent has authority to sell goods, he may have "authority" to make certain representations even though forbidden to do so, but doubtful whether this is "apparent authority"). The proper inquiry is not into a third party's reasonable perception of the agent's or employee's authority, but into the corporation's delegation of responsibility to employees to carry out activities within the purview of a cease-and-desist order. ***HN3***[] In interpreting a regulatory statute, common-law definitions are irrelevant; instead authority must be construed to extend accountability as far as necessary to eradicate the unfair practices which underlie the order. *See* *Goodman v. FTC, 244 F.2d 584, 591 (9th Cir. 1957)*.

Nor is it necessary to rely upon the Supreme Court's endorsement of apparent-authority theory in the context of civil antitrust liability in *American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982)*. The harm addressed here did not flow from any misapprehension of authority, and those defrauded were not persons dealing with participants in the conspiracy, **[**44]** but the customers of the conspirators' employers. The customers might reasonably have relied on the integrity of the bids, but their reliance has no relevance to the capacity of Kedzierski and Trotter to involve their employers in the conspiracy. *Compare* *Wilk v. American Medical Association, 719 F.2d 207, 231 (7th Cir. 1983)* (private damages suit; refusal to deal); *Pan Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 561 (5th Cir. 1980)* (same); *United States v. Empire Gas Corp., 537 F.2d 296, 301-02 (8th Cir. 1976)*, *cert. denied*, *429 U.S. 1122, 51 L. Ed. 2d 572, 97 S. Ct. 1158 (1977)* (civil antitrust action; attempt to monopolize through threats of retaliatory price cuts).

The two courts that have alluded to apparent authority in the context of a price-fixing conspiracy reached conclusions similar to the one here espoused. In *Continental Baking Co. v. United States, 281 F.2d 137, 149-51 (6th Cir. 1960)*, an appeal from the conviction under section one of the Sherman Act of three baking companies for a conspiracy to fix prices, the court questioned the utility of apparent authority terminology, and rested instead on the settled principle that "so long as the criminal **[**45]** **[*1358]** act is directly related to the performance of the duties which the officer or agent has the broad authority to perform, the corporate principal is liable for the criminal act also, and must be deemed to have 'authorized' the criminal act." And in *United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 204-05 (3rd Cir. 1970)*, *cert. denied*, *401 U.S. 948, 28 L. Ed. 2d 231, 91 S. Ct. 928 (1971)*, which affirmed the conviction of a corporation under section one of the Sherman Act on the basis of a sales manager's participation in a price-fixing conspiracy, the court approved a jury instruction that had "charged in substance that the corporation would be responsible if the agent acted 'on behalf of the corporation and within the scope of his employment or his apparent authority. '" The instruction defined acts within the scope of employment as "acts done on behalf of a corporation and directly related to the performance of the type of duties the employee has general authority to perform."

HN4[] The standard for imputing liability to a corporation for the acts of its employees should be no more stringent in civil penalty proceedings than in criminal prosecutions, **[**46]** where courts generally require only that the illegal act be committed within the scope of the wrongdoer's employment and refuse to allow technical claims of lack of authority or even evidence that the employee acted against express instructions to defeat the corporation's responsibility. *See Developments in the Law -- Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1247-51 & n.32 (1979). In *United States v. Koppers Co., 652 F.2d 290, 298 (2d Cir. 1981)*, an appeal by a corporation from a felony conviction under section one of the Sherman Act, the court specifically approved an instruction by which

> the [district] court charged that a corporation could be held criminally liable for the acts of its managerial agents
>
> > "done on behalf of and to the benefit of the corporation and directly related to the performance of the duties the employee has authority to perform . . . By a managerial agent I mean an officer of the corporation or an agent of the corporation having duties of such responsibility that his conduct may fairly be assumed to represent the corporation."

See also *United States v. Hilton Hotels* ***[**47]*** *Corp., 467 F.2d 1000, 1007 (9th Cir. 1972)*, *cert. denied*, *409 U.S. 1125, 93 S. Ct. 938, 35 L. Ed. 2d 256 (1973)* ("as a general rule a corporation is liable under the Sherman Act for the acts of its agents in the scope of their employment, even though contrary to general corporate policy and express instructions to the agent.") *Continental Baking Co., 281 F.2d at 149*.

No reason exists to impose a standard less strict in civil penalty proceedings than in criminal prosecutions, because civil penalties differ from the criminal sanctions provided for in antitrust statutes. The civil penalty is not designed to punish or to assign moral culpability, but to deter. *Compare* *United States v. United States Gypsum Co., 438 U.S. 422, 437-43, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*, *with* *J. B. Williams, 498 F.2d at 421*. For this reason, "the standard of responsibility for compliance and of liability for transgression is drawn to securing abatement of the practices and not to testing (except in fixing the amount of penalty) for the presence of corrupt complicity." *United States v. Halperin*, 1966 Trade Cases P 71,905 at 83,176 (E.D.N.Y. 1966). ***HN5***[] The scope of liability, like the **[**48]** breadth of the penalty provisions, must "provide a meaningful deterrence against violations." *United States v. ITT Continental Baking Co., 420 U.S. 223, 232, 43 L. Ed. 2d 148, 95 S. Ct. 926 (1975)* (considering "continuing failure or neglect to obey" provision of section 5(l)).

The goal of deterrence is best effectuated by a rule which holds the corporation strictly accountable for the conduct of its employees acting within the scope of their responsibilities. To achieve the most effective deterrence, the entity against which an order is directed must bear a high **[*1359]** degree of responsibility for ensuring its employees' adherence to the order's requirements. Any less stringent standard would undermine the effectiveness of FTC orders. ***HN6***[] In civil penalty proceedings, as in criminal prosecutions, a corporation "which employs an agent in a responsible position cannot say that the man was only 'authorized' to act legally." *Continental Baking, 281 F.2d at 150*; *see also* *Hydrolevel, 456 U.S. at 572-73*. Even though its influence may be indirect, the corporation is still in the best position to regulate the conduct of its middle and lower management employees. The pressure **[**49]** to maximize income is keenly felt below senior levels and may lead to "unauthorized" antitrust violations. *See* Coffee, "*No Soul to Damn: No Body to Kick": An Unscandalized Inquiry Into the Problem of Corporate Punishment*, 79 Mich. L. Rev. 386, 397-400 (1981); *see also* Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 Va. L. Rev. 1099, 1132-47 (1977). But "***HN7***[] to deny the possibility of corporate responsibility for the acts of minor employees is to immunize the offender who really benefits, and open wide the door for evasion." *United States v. George F. Fish, Inc., 154 F.2d 798, 801 (2d Cir. 1946)*, *cert. denied*, *328 U.S. 869, 90 L. Ed. 1639, 66 S. Ct. 1377 (1946)*; *see* *Hilton Hotels, 467 F.2d at 1006*. Particularly where the end sought is deterrence, "distinctions . . . between officers and agents, or between persons holding positions involving varying degrees of responsibility," are inappropriate. *George F. Fish, Inc., 154 F.2d at 801*.

Both Kedzierski and Trotter held the title of paper cable product manager, and each had "'duties of such responsibility that his conduct may fairly be **[**50]** assumed to represent the corporation. '" *Koppers, 652 F.2d at 298* (quoting district court charge); *see* Model Penal Code §§ 1.04(5), 2.07(1)(a) (where offense is "violation" involving only civil penalties or contemplates conduct, like price fixing, generally involving corporate action, corporation may be held liable if "the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment"); *id*. § 2.07, Comment at 150 (Tentative Draft No. 4, 1955); *Developments*, 92 Harv. L. Rev. at 1251-52; *cf.* *United States v. Johnson, 541 F.2d 710, 711-12 (8th Cir. 1976)* (appropriate to hold president and sole stockholder of corporation individually liable for civil penalties by virtue of corporation's salespeople's violations of cease-and-desist order). One might fairly state, therefore, that, since the corporation subject to a cease-and-desist order has a duty to secure compliance with its provisions, penalties for noncompliance are imposed not as a matter of vicarious liability, nor of apparent authority, nor of respondeat superior, but instead simply for failure to achieve compliance by persons in positions **[**51]** of relevant responsibility. ***HN8***[] The employer must "stand or fall with those whom he selects to act for him. He is in the same plight, if they are delinquent, as if he had failed to abate a nuisance on his land. . . . It is the case of the non-performance of a nondelegable duty." *People v. Sheffield Farms-Slawson-Decker Co., 225 N.Y. 25, 30, 121 N.E. 474, 476 (1918)* (Cardozo, C.J.) (citations omitted), *quoted in* *Continental Baking, 281 F.2d at 150*; *United States v. Armour & Co., 168 F.2d 342, 343-44 (3d Cir. 1948)*.

Finally, defendants' contention that Kedzierski and Trotter entered the conspiracy in order to curry favor with Penhale in hopes that he might be able to offer them employment in the future, rather than to benefit their companies, is of no consequence here. To convict a corporation of a crime on the basis of its agent's conduct, the agent must have acted with an intention to benefit the corporation. *E.g.,* *Hilton Hotels, 467 F.2d at 1006 n. 4*; *Standard Oil Co. v. United States, 307 F.2d 120, 128-29 (5th Cir. 1962)*; *see Developments*, 92 Harv. L. Rev. at 1250. But this general rule arises directly from the requirement of criminal intent: "unfaithful servants **[**52]** whose conduct was undertaken to advance the interests of parties other than their corporate employer" cannot have the **[*1360]** requisite intent to impute to the corporation. *Standard Oil, 307 F.2d at 129*. Liability for civil penalties, on the other hand, accrues without regard to the actor's intent; the government need only prove that the Order has in fact been violated. *E.g.,* *United States v. H.M. Prince Textiles, Inc., 262 F. Supp. 383, 388 (S.D.N.Y. 1966)*; *United States v. Vitasafe Corp., 212 F. Supp. 397, 398 (S.D.N.Y. 1962)*. The *Hydrolevel* Court explicitly rejected the agent's lack of intent to benefit the corporation as a defense in actions to recover treble damages, regarding it as "simply irrelevant" to the deterrent purposes of the antitrust laws. *456 U.S. at 573-74*.

Even were the defense available, it would not exculpate Phelps Dodge or GK here. The record is devoid of support for the contention that Kedzierski acted from job insecurity. No evidence exists that his superiors were dissatisfied with his performance or that he was dissatisfied with his job. The only evidence that he perceived a need to explore other opportunities was his testimony that, **[**53]** when the sale of GK's paper cable division to another company became imminent, he initiated a conversation with a former GK employee then employed at Okonite about employment prospects there. Kedzierski at 117-18. But this conversation did not occur until 1978. At the time of the events under consideration here, Kedzierski had worked for GK for over twenty-two years and had a history of steady if unspectacular promotion. That pattern continued when Kedzierski was promoted to marketing manager in early 1977, a position he retained upon the sale of the division to Pirelli. Kedzierski at 8, 16-17.

Trotter may well have believed his job insecure. Trotter at 128; Flood at 70; Kedzierski at 262; Penhale at 181, 225. He testified that sometime before 1976 he had lunch with Penhale and Larry Miscall, a former Phelps Dodge employee then with Okonite, after Miscall called him and intimated that Okonite might be looking for new employees. Trotter at 265-66, 273-74. He testified also that, when he learned in October 1975 that his job was in jeopardy, he contacted Penhale again, presumably to test the waters. Trotter at 279; *see* Penhale at 181, 225; Flood at 70; Yearly at 68-69. But the evidence **[**54]** does not support Phelps Dodge's contention that Trotter was willingly manipulated by Penhale, leaking information to him in the hope that he would take care of him should he lose his job at Phelps Dodge. Cowles testified that when he got an inkling that Trotter might improperly be receiving information about competitors, he assured him that regardless what happened to the paper cable business he would have a job. Cowles at 68. By these assurances Cowles implicitly recognized what other evidence makes clear -- that Trotter saw his employment security inextricably entwined with the future of the paper cable industry. *See* Kedzierski at 262; Priesing at 121. Trotter was acting for his own purposes to the extent that he would benefit from a revival of the fortunes of the Phelps Dodge paper cable business. But behavior induced by this type of pressure, though prohibited by company policy as well as by law, is intended to benefit both the corporation and the individual involved. *See* Cowles at 95; *American Radiator, 433 F.2d at 204*. *Compare* *Hilton Hotels, 467 F.2d at 1006 n. 4* ("purpose to benefit the corporation is necessary to bring the agent's acts within the scope of his **[**55]** employment") *with* *id. at 1003 n. 1* (no defense that boycott resulted from employee's personal quarrel with representative of boycotted company).

III. *Civil Penalty*.

A. *Continuing Violation*.

HN9[] Section 5(l) of the Federal Trade Commission Act provides for civil penalties of up to $10,000 for each violation against individuals or entities who violate final orders of the Commission. In the case of a violation through "continuing failure to obey or neglect to obey a final order of the Commission," each day that the conduct continues is a discrete offense subject to the maximum penalty. A "continuing conspiracy to fix prices" is the type of behavior **[*1361]** Congress intended to cover as a "continuing failure or neglect to obey." *United States v. ITT Continental Baking Co., 420 U.S. 223, 231, 43 L. Ed. 2d 148, 95 S. Ct. 926 (1975)*. In *ITT Continental*, the Supreme Court observed:

> These violations share two discernible characteristics: the detrimental effect to the public and the advantage to the violator continue and increase over a period of time, and the violator could eliminate the effects of the violation if it were motivated to do so, after it had begun.

[56]** *Id*. Effective deterrence requires daily penalties for this type of violation, for without them potential violators might regard the statutory penalty "as nothing more than an acceptable cost of violation." *Id*.

GK contends that "while the Supreme Court . . . acknowledged, in dictum, the possibility that an *ongoing* conspiracy may constitute a continuing failure or neglect to obey a final FTC order, the Court's dictum hardly suggests that every agreement or 'conspiracy,' even if proved, amounts to a continuing violation." Memorandum of GK on Issue of Civil Penalty at 26. GK concludes that here the proof of the requisite "discrete continuing violations" necessary to establish an ongoing conspiracy is lacking. *Id. at 28*. To the contrary, a conspiracy to maintain prices at an artificially inflated level is by its very nature an ongoing enterprise. As the court in *FTC v. Consolidated Foods Corp., 396 F. Supp. 1353, 1356 (S.D.N.Y. 1975)*, upon which GK relies, pointed out, "continuing conspiracies to fix prices . . . necessarily continue on a day-to-day basis until a specific act is taken in abatement." The very phrasing chosen by GK to make the argument -- "discrete **[**57]** continuing violation" -- confuses acts attributable to the conspiracy with the conspiracy itself. The discrete acts taken by the participants are simply evidence of the underlying conspiracy; they do not reflect the full extent of the wrong effected by the conspiracy itself. The approach suggested by GK would impose only the "license fee" which Congress moved to foreclose. *See* *ITT Continental, 420 U.S. at 231*; H. Rep. No. 580, 86 Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 1804, 1807 (discussing amended section 5(l) as model for similar amendment to section 11 of Clayton Act); *see also* *United States v. Beatrice Foods Co., 351 F. Supp. 969, 971 (D. Minn. 1972)*, *aff'd*, *493 F.2d 1259 (8th Cir. 1974)*, *cert. denied*, *420 U.S. 961, 43 L. Ed. 2d 438, 95 S. Ct. 1350 (1975)*.

GK also contends that a violation is continuing for purposes of assessing daily penalties only if its effects are continuing. The argument miscomprehends the Court's statement in *ITT Continental* that Congress intended the continuing violation provision "to assure that the penalty provisions would provide a meaningful deterrence against violations whose *effect* is continuing **[**58]** and whose detrimental *effect* could be terminated or minimized by the violator at some time after initiating the violation." *420 U.S. at 232* (emphasis in original). As is obvious from the context, however, this language did not qualify the definition of continuing violation, but rather expressed the deterrent rationale underlying the daily penalty provision. Proof of specific, continuing effects of a violation is unnecessary, if a conspiracy has been proved to have commenced and has not been shown to have ended.

Phelps Dodge employs a similar strategy by reading *ITT Continental* to treat as continuing violations only conduct of which the defendant was aware and which it could have stopped had it wished. The observation that one characteristic of a continuing violation was the ability of the violator to "eliminate the effects of the violation if it were motivated to do so," *420 U.S. at 231*, does not qualify the definition of "continuing violation," but simply explicates its deterrent purpose. Phelps Dodge's argument that only "deliberate and calculated flouting" of the Order would implicate the continuing violation provision is a transparent attempt to reargue the issues of corporate **[**59]** responsibility and bad faith under a different rubric.

[*1362] The number of offenses remain to be counted. The imprecision of the deponents' testimony makes it difficult to pin down the duration of the conspiracy here but it lasted at least from the time of the issuance of the new price sheets at the end of May until the final tripartite meeting in August. Two meetings occurred during April or May, and the conspirators had extensive phone contact during those months. Brooks' testimony makes clear that the agreement was in place by the time Kedzierski met with Penhale, which occurred no later than May 24, 1976. *See* Brooks at 90, 96, 101-02, 111.

Neither Phelps Dodge nor GK has satisfied its burden of advancing evidence to show when the conspiracy ended. *See United States v. James, 609 F.2d 36, 41 (2d Cir. 1979)*, *cert. denied*, *445 U.S. 905, 63 L. Ed. 2d 321, 100 S. Ct. 1082 (1980)*; *United States v. Molina, 581 F.2d 56, 59 (2d Cir. 1978)*; *United States v. Stromberg, 268 F.2d 256, 263 (2d Cir. 1959)*. Trotter testified that at their meeting in August each of the three men indicated that his company would be bidding on book to Long Island Lighting. Trotter at **[**60]** 120-21, 188. Kedzierski recalled only that they discussed whether they would be bidding on that order, and Penhale was not certain whether the Long Island Lighting discussion had occurred at this meeting or by phone. Kedzierski at 95; Penhale at 150-51. Other discussion at the August meeting had made clear to all that their agreement was evaporating, so they would not likely have assumed that their competitors' bids would be on book absent explicit confirmation. Trotter testified that the men also discussed the Con Ed rebid at this meeting, each indicating that his company would remain on book. Trotter at 119-20. Neither Penhale nor Kedzierski mentioned discussing the rebid at this meeting, however, and Penhale assumed that the companies had gone off book on the rebid. Penhale at 147; *see* Cowles at 150. The record demonstrates, moreover, that the agreement collapsed after the August meeting. Kedzierski testified he had no significant conversations with Penhale after that meeting, and but one or two with Trotter, who Phelps Dodge had by that time transferred to another division upon learning that he had had improper contacts with competitors. Kedzierski at 96-97. Penhale and Kedzierski **[**61]** testified that they knew by the time they left the August meeting that the agreement was dead, an assessment Kedzierski shared with Brooks. Penhale at 102; Kedzierski at 97. This meeting constituted the last attempt of the conspirators to maintain their arrangement so it is appropriate to use it as the termination date; and since the weight of the testimony places this meeting in August, Trotter at 116, 118-19, 376; Kedzierski at 89; Penhale at 95-96, a termination date of August 1, 1976, seems a fair and realistic estimate. By this time, too, the resumption of competitive activity in the marketplace demonstrated that the conspiracy had disintegrated. *See United States v. Continental Group, Inc., 603 F.2d 444, 467 (3d Cir. 1979)*, *cert. denied*, *444 U.S. 1032, 62 L. Ed. 2d 668, 100 S. Ct. 703 (1980)*. The agreement is thus held to have lasted sixty-nine days.

B. *Amount of Civil Penalty*.

HN10[] Determining the appropriate civil penalty is a matter within the sound discretion of the trial court. *ITT Continental, 420 U.S. at 229 n.6*; *Brown & Williamson Tobacco Corp. v. Engman, 527 F.2d 1115, 1121 & n.8 (2d Cir. 1975)*, *cert. denied*, *426 U.S. 911, 48 L. Ed. 2d 837, 96 S.* ***[**62]*** *Ct. 2237 (1976)*; *United States v. J.B.*

Williams Co., 498 F.2d 414, 438 (2d Cir. 1974), *aff'g in part and rev'g in part*, *354 F. Supp. 521 (S.D.N.Y. 1973)*. The courts have identified several factors to guide this discretion: the good or bad faith of the defendants; the injury to the public; the defendants' ability to pay; the extent to which defendants have benefitted from the violations, *United States v. Swingline, Inc., 371 F. Supp. 37, 46 (E.D.N.Y. 1974)*; and the need to vindicate the authority of the Commission, *Consolidated Foods, 396 F. Supp. at 1357*. *See J. B. Williams, 498 F.2d at 438*; *United States v. Reader's Digest Association, Inc., 494 F. Supp. 770 **[*1363]** (D. Del. 1980)*, *aff'd*, *662 F.2d 955 (3d Cir. 1981)*, *cert. denied*, *455 U.S. 908, 102 S. Ct. 1253, 71 L. Ed. 2d 446 (1982)*; *United States v. Louisiana-Pacific Corp., 554 F. Supp. 504, 507 (D. Or. 1982)*.

1. *Good faith*. ***HN11***[] The good or bad faith of the violator is an important factor in assessing the appropriate penalty. *J. B. Williams*, 354 F. Supp. at 551. The conduct of Trotter and Kedzierski in entering the agreement to fix the price of paper cable by adhering to book price **[**63]** was willful and deliberate. This constitutes bad faith. *J. B. Williams*, 354 F. Supp. at 551; *United States v. Ancorp National Services, Inc., 367 F. Supp. 1221, 1224 (S.D.N.Y. 1973)*, *aff'd*, *516 F.2d 198 (2d Cir. 1975)*. In evaluating good faith for penalty purposes, however, the response of the entire corporate hierarchy to the obligations imposed by the Order must also be assessed. ***HN12***[] The degree to which the corporation took steps on its own initiative to assure compliance affects the judgment as to what penalty is necessary to induce a sufficiently vigilant posture. *See J. B. Williams*, 354 F. Supp. at 551.

The managers of GK and Phelps Dodge failed to take sufficient steps to assure that their employees would abide by the Order. Harry Schell, President of the Phelps Dodge Cable & Wire Company during the relevant period, testified he was unaware of the existence of the Order until the FTC investigation began. Schell at 21. To Bruce Cowles, Vice-President of Cable & Wire, the Order "was kind of a surprise," Cowles at 70, as it was to Michael Cavanaugh, the company's National Marketing Manager, Cavanaugh at 16-18, 41, 74-75. Schell testified that upon learning of the Order **[**64]** he distributed it to Cowles, Cavanaugh, and Trotter, but both Cowles and Cavanaugh testified at their depositions that they had as yet not so much as seen it. Cowles at 70, 72; Cavanaugh at 74-75. Indeed, Cowles confessed at that time that he still did not know what the Order provided. Cowles at 72-73. Phelps Dodge proved it had an antitrust compliance program which dealt with the types of behavior prohibited by the 1936 Order. Such a program does not excuse the failure of the company to apprise its employees of the need to conform their conduct to specific prohibitions of the Order, let alone the ignorance of its president and vice-president of its very existence. Moreover, though Schell testified he regularly advised his subordinates of the company's strict policy against improper contacts by issuing written directives, speaking to his sales and marketing people, and having the company's attorneys give talks, Schell at 30-31; *see* Cowles at 67; Priesing at 79-80; Memorandum of Phelps Dodge in Opposition to Motion for Partial Summary Judgment, Appendix A, these efforts could not have been very diligent. Cavanaugh testified he could not recall ever having received instruction as **[**65]** to antitrust compliance. Trotter remembered only a speech by counsel in 1970 or 1971, and a booklet issued in the early 1970's and recirculated in 1980, though he did believe at the time of the meetings with Penhale and Kedzierski that he was probably violating company policy. Trotter at 239-45, 223-24.

In addition, the company responded with insufficient vigor to tangible indications of Trotter's illegal conduct. In April 1976, when Phelps Dodge was considering a price increase for paper cable, Trotter showed Cowles a piece of paper he said had come in the mail indicating that competitors were contemplating a price increase. Trotter at 328-29; Cowles at 15-18. Cowles testified that he informed Schell and instructed Trotter to throw the paper away and to avoid using information from the paper. Cowles at 22-25. But he did not bother determining from which company the information came and why it was sent to Trotter. He could not say whether Trotter had actually discarded the paper. Cowles at 22-25. In August 1976, Trotter revealed to Cowles and Schell information about a competitor's bid to Con Ed. Cowles found it "unusual" for Trotter to have obtained such information, and Schell **[**66]** assumed it came from a competitor. Cowles at 18-19; Schell at 162-65, 181. **[*1364]** Trotter testified that he specifically told Cowles that he knew from Okonite that it had bid low on one item on the Con Ed bid. Trotter at 117-18, 224-25. Though they considered the matter of Trotter's illicit contacts "highly sensitive," after some discussion, Priesing, Schell and Cowles, responded only by withholding information on current bidding from Trotter, abruptly terminating his paper cable responsibilities, and transferring him to a position of similar responsibility in the Phelps Dodge Communications Division. Cowles at 22-24, 162-64; Priesing at 45, 48-50; Schell at 162-69; Trotter at 8, 124-25. Trotter was neither disciplined nor told specifically why he had been transferred, and virtually no investigation ensued, even though the limited inquiries undertaken made it appear increasingly probable that the source of the information was improper communication. Trotter at 125-26; Cowles at 164-65; Schell at 168, 171-72.

GK displayed no greater solicitude for the mandates of the Order. Kedzierski testified that during his tenure as product manager for paper cable he received no instruction **[**67]** to refrain from contacts with competitors, and Brooks and Kedzierski were completely ignorant of the Order's existence. Although no direct evidence exists that anyone above Brooks in the corporate hierarchy actually learned of Kedzierski's activities during the conspiracy, GK's management nevertheless failed to fulfill its affirmative obligation to ensure compliance. Furthermore, Brooks' level of responsibility as Marketing Manager of the Power and Control Division of General Cable was significant, and he virtually acquiesced in Kedzierski's activities. Brooks conceded that, though aware of Kedzierski's contacts with competitors, he conveyed to him at most a "sort of mild discouragement, but . . . didn't direct him not to nor . . . strongly discourage him not to have those dialogues or that communication." Brooks at 96. He explained that he "did nothing actively to stop" these contacts because he believed they might benefit both his company and the industry. Brooks at 131; *see id. at 89-98, 129-31*. Brooks attributed his passivity, moreover, to "the environment," observing that he "didn't think [an agreement to stick to the new prices] was something that was so unusual or so **[**68]** blatantly improper or illegal," Brooks at 133, thus demonstrating the need for a compliance program geared as much to the specific proscriptions of the Order as to the overriding mandates of the antitrust statutes. GK's attitude toward the Order seems accurately reflected by its argument that "plainly, an order which is forty-six years old and which relates to an all but extinct industry is hardly something a corporation can reasonably be expected to give prominent attention to." Reply Memorandum of GK on the Issue of Civil Penalty at 11.

Corporate management can and must do far more than did the managements of GK and of Phelps Dodge to establish a good-faith attempt to prevent violations of a cease-and-desist order. For example, in *United States v. Ancorp National Services, Inc., 367 F. Supp. at 1224-25*, the court found that defendant, which operated hundreds of newsstands, had violated the terms of an FTC cease-and-desist order which prohibited it from receiving from suppliers price adjustments not generally available to its competitors. The court imposed a substantial penalty on the corporate defendant in large part because it found that, with the exception of a single memorandum **[**69]** circulated by the president to corporate officers instructing them to review the order and to report any potential violations, "there was no evidence . . . of any . . . action taken by any officer of [the corporation] to assure compliance with the FTC order," *id. at 1224*; the record instead indicated that the defendant had "ignored" the order, *id. at 1225*. Similarly, GK and Phelps Dodge maintained compliance programs so lax that their employees involved in paper cable, including senior executives, were ignorant even of the existence of the Order. Phelps Dodge management did not attempt to satisfy itself that no improper communications were occurring, even when suspicious circumstances came to light, and **[*1365]** the mid-level manager responsible for paper cable at GK, fully aware of such contacts, thought them so little outside the norm that they merited neither his close scrutiny nor any efforts to assure that they ceased. On this record, neither GK nor Phelps Dodge can claim it took the "energetic steps" to effect compliance necessary to a showing of good faith. *Swingline, 371 F. Supp. at 44, 47* (quoting *Babee-Tenda v. Scharco Manufacturing Co., 156 F. Supp. **[**70]** 582, 587 (S.D.N.Y. 1957)* (civil contempt proceeding)); *see J. B. Williams*, 354 F. Supp. at 551 ("reckless disregard of the injunctions in the order" warrants penalty "at or near the maximum prescribed"); *In re Dolcin Corp., 101 U.S. App. D.C. 118, 247 F.2d 524, 534-35 (D.C. Cir. 1956)* (decree "imposed an affirmative obligation . . . to take all reasonable steps to effect compliance with [the] court's order," which officers "could [not] discharge by remaining inert"), *cert. denied*, *353 U.S. 988, 1 L. Ed. 2d 1143, 77 S. Ct. 1285 (1957)*; *United States v. Johnson, 541 F.2d 710, 712 (8th Cir. 1976)* *cert. denied*, *429 U.S. 1093, 51 L. Ed. 2d 539, 97 S. Ct. 1106 (1977)* (chief executive officer of company found liable for civil penalty for violation of cease-and-desist order by his salesman; good faith effort to fulfill "affirmative duty" imposed by this order not established where record showed that he failed to do "everything in his power . . . to assure compliance with the F.T.C. order").

2. *Public harm*. Substantial public harm inheres in an agreement to fix prices. Perhaps no other conduct so directly contravenes the public interest in a free, competitive economy. **[**71]** The Supreme Court long ago placed price-fixing beyond the reach of the rule of reason by declaring ***HN13***[] such conduct a per se violation of the antitrust laws, *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*, and Congress has made it a felony, *15 U.S. C. § 1*. Similarly, the Order had the purpose of protecting the public from practices

deemed anticompetitive by the Commission. Violation of the restrictions embodied in the agreement therefore presumptively harmed the public regardless of the quantum of financial loss. Moreover, ample evidence of actual harm exists in this case. The defendants artificially inflated the price of paper cable and contaminated a series of major competitive bids during the summer of 1976. The increased costs of paper cable presumably led to lower earnings for the utilities that purchased the paper cable and increased utility charges to consumers. These indirect effects constitute public harm. *See* Swingline, 371 F. Supp. at 47 **HN14**[] ("suppression of competition" significantly affects public interest).

3. *Benefits derived by defendants*. To accomplish the statutory purpose of deterring violations, a penalty must ensure **[**72]** that disobedience does not pay. As a general rule, an offender should be deprived of any benefit derived from violating an FTC order, and common sense suggests that courts consider multiplying the amount of benefit by a factor representing the likelihood of detection. *See* Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1466-67 (1979).

The record contains insufficient evidence from which to determine accurately the benefit derived by GK and Phelps Dodge from the illegal agreement. The government contends that this dearth of information results from the claim of GK and Phelps Dodge that they have no knowledge of particular sales during the relevant period. The companies have submitted little detailed analysis of how the price increases attributable to the conspiracy affected their sales figures or profit margins, choosing instead to repeat their contention that the agreement had no impact on corporate pricing decisions. A memorandum written by Roger Brooks of GK the day after Phelps Dodge issued its new price sheets on paper cable in late May 1976, evaluated their likely effect. *See* Government Response **[**73]** on Liability, Exhibit I. Brooks concluded that "generally, if these levels are adhered to in the marketplace, they will represent an increase of 12-30 percent versus **[*1366]** the past four (4) months [sic] quotation levels." Based on sales reports generated by GK, the government argues that GK had paper cable sales of $3,494,000 between June 1, 1976, and September 30, 1976, the government's proposed violation period. Applying Brooks' percentage estimate to the GK sales figures, the agreement would be found to have produced additional revenue to GK of between $419,280 and $1,048,200. The government suggests, moreover, that this range actually understates the revenues GK derived. Absent the conspiracy, the government argues, the downward trend in prices in early 1976 would have continued, driving down revenues from the level from which Brooks drew his figures. The government also urges that the time value of money should be taken into account.

GK derides the "amateur economics" of the government's approach, but provides little assistance in outlining an alternative. It points out that the government analysis employs total sales figures for the June-September period; but GK makes **[**74]** no attempt to differentiate between revenue from affected bids and revenue from other sources, although it has the resources and access to information necessary to provide such an analysis. GK also points out that its paper cable division actually lost $5 million in 1976, due in large part to dramatically increased costs, and that losses increased in 1977 and early 1978, when it decided to sell the division. This demonstrates nothing, however, as a reduced loss is at least as great a benefit as an increased profit.

The government proposes that its analysis as to GK should apply to Phelps Dodge as well. Little if any price competition existed between defendants during the conspiracy period, similar market conditions prevailed, and the three major producers had approximately equal market share of paper cable at the time. Phelps Dodge confirms the ball-park accuracy of the government's proposed analysis. It estimates that as a result of the May 1976 price increase it gained "at most roughly $800,000, and probably substantially less." Phelps Dodge Memorandum on Issue of Civil Penalty at 25-26.

GK and Phelps Dodge emphasize that they have each contributed over $2 million to the settlement **[**75]** of the private class action brought by paper cable purchasers, an amount greater than the highest reasonable estimate of increased profits resulting from the price increase. Thus, they contend, they already have disgorged any illegal gains obtained and cannot be said to have retained a benefit from their improper behavior. The cases relied upon by GK and Phelps Dodge, Swingline, 371 F. Supp. at 47, and United States v. Papercraft Corp., 426 F. Supp. 916, 919 (W.D.Pa. 1977), both deal with costs incurred in complying with FTC orders. Neither supports the proposition that a corporation which incurs liability for civil penalties should receive credit for funds paid in settlement of private suits arising under different statutes but grounded in the same or related transactions. Moreover, the private paper cable plaintiffs founded their action on a series of transactions beginning well before the period to which the government has limited its claim. Nevertheless, while a setoff would be inconsistent with the Supreme Court's recognition that the Sherman and FTC Acts provide "cumulative remedies against activity detrimental to competition," *FTC v. Cement Institute, 333 U.S. 683,* ***[**76]*** *694, 92 L. Ed. 1010, 68 S. Ct. 793 (1948)*, the civil payments made may properly be considered in evaluating what additional penalty could reasonably be required to deter conduct of the sort proscribed.

4. *Ability to pay*. Phelps Dodge has provided information on a recent and severe downturn in the economic fortunes of its parent corporation. *See* Phelps Dodge Memorandum on Civil Penalties, Appendix C; Additional Materials Regarding Financial Condition of Phelps Dodge Corporation. Otherwise, the companies for the most part only briefly address the criterion of ability to pay, likely because they recognize that each is undoubtedly able to pay **[*1367]** any penalty that could reasonably be assessed in this case. GK in 1980 had net sales of $1.18 billion; total assets of $732 million; net profits of $70 million; working capital of $227 million; and $19.9 million on hand in cash and negotiable instruments. Phelps Dodge in 1981 had economic net sales of $1.438 billion; total assets of $2.144 billion; net profits of $58.5 million; total current assets of $473 million; net stockholders' equity of $1.089 billion; and $15.4 million on hand in cash and other negotiable instruments.

[77]** 5. *Vindication of FTC authority*. This consideration underlies all proceedings brought to recover civil penalties. Though the Order violated is old, it has remained fully in effect. Further, it deals with matters central to the FTC's mission to preserve a competitive economy and protect the public from unfair practices, for price-fixing poses a "threat to 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)*. GK's departure from the industry by virtue of the sale of its paper cable division does not remove this factor, nor does it eliminate the need for general deterrence. The efforts of GK and Phelps Dodge to divorce themselves from the conduct of their employees suggest, in fact, that vindication is an important consideration here. The penalty assessed must provide a "'meaningful deterrence' . . . without being overly punitive." *Reader's Digest, 494 F. Supp. at 779* (quoting *ITT Continental, 420 U.S. at 232*). It "should be large enough to hurt, and to deter anyone in the future from showing as little concern as [GK and Phelps Dodge] did for the need to [comply]." *Swingline* ***[**78]*** *, 371 F. Supp. at 47*.

6. *Okonite settlement as guide*. On November 20, 1979, Okonite, a codefendant in this suit, agreed to pay $300,000 in five equal annual installments to settle the government's claims. Phelps Dodge offers an expert economic analysis that places a real value on that settlement of $251,000, and suggests that, in light of the purportedly greater culpability of Okonite, Phelps Dodge should be assessed a considerably lesser civil penalty. In fact, the Okonite settlement offers little guidance in assessing appropriate penalties for Phelps Dodge or GK. Penhale held a higher executive position in Okonite than did Trotter or Kedzierski in their respective companies, and had virtually autonomous authority to develop corporate pricing policy and to set specific bid prices. Penhale at 14-15, 42. But Okonite, a smaller company than its competitors, employed no manager in a position equivalent to that held by Penhale's coconspirators. In addition, the record fails to support Phelps Dodge's argument that Penhale masterminded the scheme and that Trotter and Kedzierski were willingly manipulated by him in the hope that he might secure them employment in the future. The very **[**79]** nature of a settlement agreement, moreover, precludes a precise assessment of its value. By settling, both the government and Okonite waived the opportunity systematically to present evidence on the issues of liability and good faith which inform the discretion of this court in assessing a penalty. Further, the settlement figure of a codefendant of roughly equal culpability should if anything serve as a floor, not a ceiling. Settlement involves negotiation and compromise; the parties avoid the burdens, expense, and risks of litigation, but forego the possibility of fully vindicating their positions. Incentive to settle would be reduced if figures arrived at in negotiated settlements were used as a cap on the liability of a codefendant which chose unsuccessfully to defend.

Finally, the government claims the Okonite settlement is worth far more in present value than defendants' estimate of $251,000. That estimate, the government contends, is premised on overly favorable assumptions as to bond rating and interest rates, and on a failure to add the time value of money since the settlement several years ago. A figure close to half a million dollars would more fairly represent the value **[**80]** of the Okonite settlement at this time. The Okonite settlement also no doubt reflected the fact that the company is several **[*1368]** times smaller than either Phelps Dodge or GK and had been spun off from its bankrupt parent and purchased by its employees just prior to the agreement. Therefore, to the extent the Okonite settlement should serve as a guide, the defendants' roughly comparable culpability, the present value of the settlement, and the significantly smaller size of Okonite would suggest that a civil penalty of at least $500,000 against each codefendant would be appropriate.

7. *Conclusion*. The government asks for a civil penalty of $900,000 against GK and of $825,000 against Phelps Dodge, explaining the differential on the basis of the active acquiescence of Brooks at GK, the cash flow problems of Phelps Dodge, and Phelps Dodge's action in terminating Trotter's involvement in paper cable. GK and Phelps Dodge contend that only nominal penalties are appropriate.

The findings and conclusions reached above warrant the imposition of substantial civil penalties. The companies engaged through responsible employees in outright price fixing, and gained significant additional **[**81]** revenues from the collusive agreement to adhere to book pricing. Both companies failed to demonstrate good-faith efforts actively to comply with the Order, and Phelps Dodge took only marginally more effective measures than GK to satisfy its obligations. Notwithstanding Phelps Dodge's recent difficulties, both companies are able to bear substantial penalties, the imposition of which appear to be necessary here to affirm the principle that FTC orders do not fall into desuetude with age.

An assessment in the full amount claimed by the government seems inappropriate, however, because the defendants already have paid considerable sums to civil plaintiffs, and because no evidence was developed that indicated intentionally wrongful conduct by the highest officers of either corporate defendant. Accordingly, civil penalties of $7,500 per day against Phelps Dodge and $8,000 per day against GK for each of the sixty-nine days during which the conspiracy lasted are assessed. Thus, Phelps Dodge is liable for a civil penalty of $517,500, and GK of $552,000, with costs. The Clerk will enter judgment accordingly.

SO ORDERED.

![LexisNexis]

De Ment v. Abbott Capital Corp.

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

June 15, 1984

No. 81 C 2887

Reporter

589 F. Supp. 1378 *; 1984 U.S. Dist. LEXIS 15838 **; Fed. Sec. L. Rep. (CCH) P91,655

H. DUANE DeMENT, et al., Plaintiffs, v. ABBOTT CAPITAL CORP., et al., Defendants

Core Terms

defendants', damages, injunction, warrants, remedies, plaintiffs', equitable, lenders, equitable relief, amended complaint, courts, injunctive relief, expressly provided, summary judgment, divestiture, plaintiff's claim, equitable remedy, right of action, loan agreement, racketeering, enterprise, rescission, violations, ordering, stock

LexisNexis® Headnotes

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

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

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

HN1[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

For civil liability to exist under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961-68, a plaintiff must show that a defendant or defendants acquired or maintained an interest or control in an enterprise through a pattern of racketeering activity, *18 U.S.C.S. § 1962(b)*, participated in the conduct of an enterprise through a pattern of racketeering activity, *18 U.S.C.S. § 1962(c)*, or conspired to violate the other provisions of *18 U.S.C.S. § 1962*. "Pattern of racketeering activity" is defined as the commission of at least two criminal acts of the type listed in *18 U.S.C.S. § 1961(1)*. *18 U.S.C.S. § 1961(5)*.

Civil Procedure > Judgments > Entry of Judgments > Compelling Specific Acts

Civil Procedure > Preliminary Considerations > Equity > General Overview

HN2[] **Entry of Judgments, Compelling Specific Acts**

An order of divestiture is generally considered an equitable remedy.

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

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

HN3[] Private Actions, Racketeer Influenced & Corrupt Organizations

The "relief" portion of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961-68, *18 U.S.C.S. § 1964*, provides that the district courts of the United States shall have jurisdiction to prevent and restrain violation of *18 U.S.C.S. § 1962* by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons. The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

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

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

HN4[] Private Actions, Racketeer Influenced & Corrupt Organizations

18 U.S.C.S. § 1964(c) and *(d)* provide 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. A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Civil Procedure > Remedies > General Overview

Governments > Legislation > Interpretation

Governments > Federal Government > US Congress

HN5[] Civil Procedure, Remedies

Where a statute expressly provides a particular remedy or remedies, a court should be reluctant to read others into it. A court may read additional judicial remedies into elaborate statutory enforcement provisions only where strong indicia of a contrary congressional intent negate the implication that Congress provided precisely the remedies it considered appropriate.

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

Securities Law > RICO Actions > Remedies

Torts > ... > Types of Damages > Compensatory Damages > General Overview

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

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN6[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

Return of out of pocket losses is generally the appropriate remedy for fraud, a common law tort that is somewhat analogous to a Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961-68, violation.

Civil Procedure > Judgments > Entry of Judgments > Compelling Specific Acts

Contracts Law > Remedies > Rescission & Redhibition > General Overview

Civil Procedure > Preliminary Considerations > Equity > General Overview

HN7[] **Entry of Judgments, Compelling Specific Acts**

Cancellation is an equitable remedy.

Civil Procedure > Judgments > Entry of Judgments > Compelling Specific Acts

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

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

Civil Procedure > Preliminary Considerations > Equity > General Overview

HN8[] **Entry of Judgments, Compelling Specific Acts**

That an injunction is not available to a private Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961-68, plaintiff does not mean that relief that consists of a monetary payment is also barred, even if it is characterized as "equitable." The type of relief described in *18 U.S.C.S. § 1964(a)* & *(b)* is the traditional coercive form of injunctive or equitable relief: divestiture, injunction against participating in a business, dissolution, reorganization, and the like. That Congress did not intend for a private party to obtain such drastic forms of relief does not mean that it intended to bar a private party from compensation for harm done due to a RICO violation merely because the relief is characterized as "equitable".

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

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

Securities Law > RICO Actions > Remedies

HN9[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

18 U.S.C.S. § 1964(c) expressly grants a private plaintiff the right to sue for damages caused by a Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. § 1961-68, and defines the proper recovery broadly. Any person injured by reason of a violation of the chapter shall recover threefold the damages he sustains. If the "damages sustained" by a victim of a RICO violation include lost profits, there is no bar in the statute to recovery of those losses. Recovery of lost profits should be subject to the ordinary limitations concerning remoteness, or proximate cause, and speculativeness, or certainty.

Securities Law > Blue Sky Laws > Civil Liability > General Overview

Securities Law > Blue Sky Laws > Offers & Sales

HN10[] **Blue Sky Laws, Civil Liability**

The only private right of action expressly provided in the Illinois Securities Act (Act), § 137.1 - 137.16 (1983), is contained in Ill. Rev. Stat. ch. 121 1/2, § 137.13 (1983), which provides that a purchaser may rescind a sale of a security made in violation of the Act.

Counsel: [1]** Gary M. Elden, Daniel A. Edelman, Joyce L. Logan, Reuben & Proctcor, Chicago, Illinois, for Plaintiffs.

Michael P. Connelly, Chicago, Illinois, for Defendants.

Judges: Prentice H. Marshall, Judge.

Opinion by: MARSHALL

Opinion

[*1379] MEMORANDUM OPINION

HON. PRENTICE H. MARSHALL, Judge:

According to the complaint in this action, Eagle Monitoring Systems ("Eagle"), a business that designed systems to monitor complex machinery, began as a partnership between plaintiffs H. Duane DeMent and Keith Kopp in 1971. Being inexperienced in business matters, they sought management and financial advice from defendant Richard E. Lassar and his firm, Richard E. Lassar & Associates ("Lassar & Associates"). In 1973, Lassar advised plaintiffs to incorporate. Plaintiffs did so and sold 6 2/3% of the Eagle stock to Lassar for $10,000 and 6 2/3% to a friend of Lassar for another $10,000. There is no allegation that this sale was tainted by fraud. Eagle entered into an agreement with Lassar for the payment of a monthly retainer and **[*1380]** finder's fee for any financing Lassar obtained for Eagle.

Eagle incorporated on Lassar's advice in 1973. As it expanded, its need for financing grew; Lassar suggested **[**2]** that Eagle seek financing from small business investment companies ("SBICs"). Lassar arranged a loan by several SBICs including defendant Abbott Capital Corp. ("Abbott"). Under the proposed loan, the SBICs were to loan Eagle $100,000. Eagle was to grant the lenders warrants exercisable for five years or the life of the loan for 25 to 50% of Eagle's stock. The proposed agreement also imposed several restrictive covenants. According to plaintiffs, Lassar deliberately delayed the closing of the loan, though he knew Eagle's financial situation was precarious. In addition, plaintiffs allege, Lassar did not disclose to them that he was affiliated with several of the lenders, including Abbott.

At the scheduled closing of the loan, Commerce Capital Corp., another SBIC and a defendant here, objected to the agreement and insisted on additional consideration. Plaintiffs claim that this was planned in advance with an associate of Lassar as a means of coercing Eagle to give up more in return for the loan.

Because of their desperate need for financing, plaintiffs allege, they had no alternative but to accept the additional terms proposed by Commerce Capital. Lassar and Abbott added still more **[**3]** terms before the next closing, including an eight-year management contract between Abbott and Eagle for $4800 per year (which plaintiffs claim was a sham covering a fee that actually went to Lassar in violation of Small Business Administration regulations), more restrictive covenants, a personal guaranty of the loan by DeMent and Kopp, and a requirement that the lenders be permitted to exercise their warrants for a price based on a net worth test. Lassar, still operating under the alleged undisclosed conflict of interest, advised plaintiffs to accept the loan because there was no alternative, and plaintiffs agreed.

The rescheduled closing took place in June 1974; at that time, two more terms were added, including a term that allegedly had the effect of permitting the lenders to exercise the warrants at an extremely low cost. Plaintiffs claim that they did not comprehend the significance of the term but assented to it on Lassar's advice.

Eagle performed its obligations under the loan agreement until April 1981, though it claims that Abbott did not provide it with the management services it had contracted to provide. In April 1981, Eagle agreed to sell its assets to another company, **[**4]** TRW, for $3.2 million in cash and TRW's assumption of Eagle's operating liabilities. The lenders then elected to exercise their warrants and tendered $240 for 25% of Eagle's stock. In light of the TRW proposal, the stock was actually worth $800,000. [1] Plaintiffs claim that the $240 price relied on by the lenders was not the correct price for exercise of the warrants. Eagle refused to honor the warrants, and the proceeds from the TRW acquisition were placed in trust. Eagle commenced this action at or about the same time.

Plaintiffs' amended complaint is stated in nine counts and alleges violations of various **[**5]** federal and Illinois statutes, common law torts, and breaches of contract. Defendants have moved for summary judgment on counts 1 and 3. Count 1 arises under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), *18 U.S.C. §§ 1961-68 (1982)*; count 3 arises under *§§ 12* F & I of the Illinois Securities Act, Ill. Rev. Stat. ch. 121 1/2, §§ 137.12 F, I (1983).

RICO

HN1[] For civil liability to exist under RICO, plaintiffs must show that a defendant or defendants acquired or maintained an interest or control in an enterprise through a **[*1381]** pattern of racketeering activity, *18 U.S.C. § 1962(b)*, participated in the conduct of an enterprise through a pattern of racketeering activity, *id*. *§ 1962(c)*, or conspired to violate the other provisions of *§ 1962*, *see id*. *§ 1962(d)*. "Pattern of racketeering activity" is defined as the commission of at least two criminal acts of the type listed in *id*. *§ 1961(1)*. *See id*. *§ 1961(5)*. Here plaintiffs

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[1] According to plaintiffs, TRW had previously offered to purchase Eagle in 1978 for 70,000 shares of TRW stock, which then sold for $60 per share. The deal was never consummated, allegedly because TRW was concerned that the warrants held by the SBICs would create problems after the acquisition, and because TRW believed that Eagle lacked the management services that Abbott and Lassar were supposed to provide.

allege that defendants' activities were respect to plaintiffs and other small businesses amounted to violations of the federal mail fraud and wire fraud statutes. *18 U.S.C. §§ 1341*, *1343 (1982)*. The relief plaintiffs seek **[**6]** for the RICO violation is as follows:

> a. An order pursuant to *18 U.S.C. § 1961(a)* preventing and restraining defendants from committing further violations of *18 U.S.C. § 1962*, and ordering them to divest themselves of any purported interest in EMS Liquidating Corporation [which was formed after the sale of Eagle's assets to TR];
> b. Awarding EMS Liquidating Corporation three times the actual damages it has sustained as a result of defendants' unlawful conduct, which damages include:
> i. All excessive interest paid lenders pursuant to the Abbott Loan Agreement;
> ii. All management fees paid Abbott pursuant to the Abbott Loan Agreement;
> iii. All director's fees paid Abbott pursuant to the Abbott Loan Agreement;
> iv. All consulting fees paid Lassar & Associates and/or Lassar individually, at any time; and
> v. Any and all existing or potential equity lost by Eagle pursuant to lenders' exercise or attempted exercise of their warrants;
> c. Costs, including reasonable attorney's fees; and
> d. Such other relief as the Court may deem just.

Amended Complaint para. 71.

Defendants' argument with respect to plaintiffs' RICO claim is that plaintiffs seek **[**7]** relief that is equitable in nature and that equitable relief is not available to a private RICO plaintiff. The only reported decision directly discussing this issue at any length is *Kaushal v. State Bank of India, 556 F. Supp. 576 (N.D. Ill. 1983)*, in which our colleague Judge Milton Shadur concluded that the equitable remedies of injunction and divestiture were not available to a private RICO plaintiff. Defendants urge us to follow *Kaushal*.

As we have noted, defendants argue (1) that plaintiff seek equitable relief, and (2) that a private RICO plaintiff is not entitled to equitable relief. Plaintiffs have responded only to the first part of defendants' argument, claiming that the relief they seek is not equitable. They state in their brief that they disagree with defendants' assertion as to the availability of equitable relief, but they do not argue the point, stating only that they "will address that question if the Court desires." Response to Motion for Partial Summary Judgment at 6. As far as we are concerned, plaintiffs have made their election. We see no need for another round of briefs. Plaintiffs had an opportunity to address all the arguments advanced by defendants, **[**8]** and they have chosen to address only some of them. The question of the availability of equitable relief to a private RICO plaintiff is before us.

1. *Paragraph 71(a)*

Paragraph 71(a) of the amended complaint clearly seeks equitable relief in part; plaintiffs ask for an order restraining defendants from committing further RICO violations. In their response to the motion for summary judgment, at page 5 n. *, plaintiffs state that this is moot. We will take them at their word, and the first part of para. 71(a) is therefore stricken.

The remainder of para. 71(a) also seeks relief in the form of a mandatory injunction: plaintiffs ask us to order defendants to divest themselves of any purported interest in EMS Liquidating Corporation. It is unclear **[*1382]** whether plaintiffs' suggestion of mootness applies to this part of para. 71(a) as well. Certainly the last part of para. 71(a) has not been mooted by factual developments in the case; presumably defendants still hold the warrants, which constitute an "interest" of sorts in EMS. It also appears from the parties' trial briefs that some of the defendants had become shareholders in Eagle even before the Abbott loan agreement was **[**9]** concluded. It may be that plaintiffs seek divestiture of this interest too. ***HN2***[] An order of divestiture is generally considered an equitable remedy. *See* *United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974)* (criminal RICO case), *cert. denied*, *420 U.S. 925, 43 L. Ed. 2d 395, 95 S. Ct. 1121 (1975)*. Thus, the relief sought in para. 71(a) appears to be injunctive in nature, and if a private RICO plaintiff cannot obtain an injunction under the statute, para. 71(a) should be stricken.

Judge Shadur's opinion in *Kaushal v. State Bank of India* sets forth most of the arguments on both sides of the injunctive/equitable relief issue. **HN3**[] The "relief" portion of RICO, 18 U.S.C. § 1964 (1982), provides as follows:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violation of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor **[**10]** as the enterprise engaged in, the activities of which affect interstate commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
> (b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> **HN4**[] (c) 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 threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.
>
> (d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil **[**11]** proceeding brought by the United States.

18 U.S.C. § 1964(a) - (d) (1982).

Some commentators have argued that the use of "and shall" in § 1964(c) rather than "to" before the treble damages recovery clause implies that the private damages remedy is in addition to other remedies, including equitable relief. *See* Blakey & Gettings, Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts -- Criminal and Civil Remedies, 53 Temple L.Q. 1009, 1038 & n. 133 (1980). However, the Supreme Court twice construed provisions of the original Sherman Act that were nearly identical to § 1962(a) & (c) not to permit a private antitrust plaintiff to obtain injunctive relief. *See* Minnesota v. Northern Securities Co., 194 U.S. 48, 48 L. Ed. 870, 24 S. Ct. 598 (1904); Paine Lumber Co. v. Neal, 244 U.S. 459, 61 L. Ed. 1256, 37 S. Ct. 718 (1917). [2] Section 16 of the Clayton Act, 15 U.S.C. § 26 (1982), expressly provided for private injunctive relief to overcome *Northern Securities. See* A. Bridges, Private Rico Litigation Based Upon "Fraud in the Sale of Securities," 18 **[*1383]** Ga. L. Rev. 43, 74-75 (1983). Had Congress intended a private RICO plaintiff to be able **[**12]** to obtain injunctive relief, it surely would have avoided language that had previously been held by the Supreme Court not to permit such relief.

Further, as Judge Shadur points out, the Senate bill that was the initial RICO proposal, S. 30, 91st Cong., 1st Sess. (1969), did not contain a private right of action at all, and the committee report discussed only civil RICO actions by the United States. S. Rep. No. 617, 91st Cong., 1st Sess. 24, 34, 80-83, 160 (1969). The Senate bill was amended in committee in the House to add a private treble damages remedy. H.R. Rep. No. 1549, 91st Cong., 2d Sess. 35, 58 *reprinted in* 1970 U.S. Code Cong. & Admin. News 4007, 4010, 4034. Thus, as originally written, § 1964(a) conferred jurisdiction **[**13]** on the courts, and § 1964(b) defined who could invoke it. Section 1964(c) appears independent of § 1964(a). "The House Committee's addition of the private damages remedy had not altered the public-action thrust of the other subsection of S. 30 § 1964." Kaushal, 556 F. Supp. at 583.

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[2] *Kaushal* did not address these cases, but it did note that the current ***antitrust law*** contains the "and shall recover" language in a section separate from that specifically authorizing private injunctive relief, a section not contained in RICO. Kaushal, 556 F. Supp. at 583 & n. 22.

Finally, and perhaps most persuasively, a proposed amendment to RICO that would have added an express right to injunctive relief for private plaintiffs was turned away on the floor of the House. In responding to the proposed amendment, one of the managers of the bill in the House stated that

> [the proposed amendment] does offer an *additional civil remedy* which I think properly might be suited to the special mechanism fashioned in title IV. . . . It has its counterpart almost *in haec verba* in the antitrust statutes, and yet I suggest to [Rep. Steiger] that prudence would dictate that the Judiciary Committee very carefully explore the potential consequences that *this new remedy* might have. . . . I would hope that the gentleman might agree to . . . withdraw his amendment from consideration with the understanding that it might properly be considered by the Judiciary Committee **[**14]** when the Congress reconvenes following the elections or some other appropriate time.

116 Cong. Rec. 35,346 (daily ed. Oct. 7, 1970) (remarks of Rep. Poff) (emphasis supplied), *quoted in* A. Bridges, Private RICO Litigation Based Upon "Fraud in the Sale of Securities," *18 Ga. L. Rev. 43, 75-76 (1983)*. Such an amendment was never considered again. Bridges, *supra* at 76. This discussion indicates that those sponsoring the bill viewed injunctive relief as a remedy in addition to that provided by *§ 1964(c)* as ultimately passed.

As Judge Shadur pointed out in *Kaushal*, under *Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979)*, ***HN5***[] where a statute expressly provides a particular remedy or remedies, a court should be reluctant to read others into it. Further, a court may read additional judicial remedies into "elaborate [statutory] enforcement provisions" only where "strong indicia of a contrary congressional intent" negate the implication that "Congress provided precisely the remedies it considered appropriate." *Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 14-15, 69 L. Ed.* ***[**15]*** *2d 435, 101 S. Ct. 2615 (1981)*. Here, not only is there no indication of congressional intent to provide for private injunctive relief, there is in fact strong indication that the contrary was intended. Under *Transamerica Mortgage* and *Sea Clammers*, therefore, a private RICO plaintiff should not be able to obtain an injunction. This means that the injunction and divestiture remedies sought by plaintiffs in para. 71(a) of the amended complaint are not available. [3] That subparagraph is therefore stricken.

2. *Paragraph 71(b)*

Paragraph 71(b) of the amended complaint in essence seeks return of the "excessive" **[*1384]** consideration allegedly paid to defendants, as well as the sums lost due to defendants' exercise of the warrants. Defendants characterize **[**16]** this as an equitable remedy.

HN6[] Return of out of pocket losses is generally the appropriate remedy for fraud, a common law tort that is somewhat analogous to the RICO violation claimed here. *See* *Smith v. Bolles, 132 U.S. 125, 129-30, 33 L. Ed. 279, 10 S. Ct. 39 (1889)*; *Madigan, Inc. v. Goodman, 498 F.2d 233, 239 (7th Cir. 1974)* (securities fraud action). Defendants suggest that what plaintiffs seek is in reality rescission and restitution, which defendants characterize as an equitable remedy. However, even before the merger of law and equity, a plaintiff could obtain such relief at law. *See* 1 G. Palmer, Law of Restitution § 3.7 at 260, § 3.16(b) at 328-29 (1978); 5 J. Moore, Moore's Federal Practice para. 38.23 at 38-188 (1982); W. Prosser, Law of Torts §§ 94, 105, 110 (1971). *See also* *Myzel v. Fields, 386 F.2d 718, 741 (8th Cir. 1967)* (characterizing relief as legal, not equitable), *cert. denied*, *390 U.S. 951, 19 L. Ed. 2d 1143, 88 S. Ct. 1043 (1968)*; *Equitable Life & Casualty Insurance Co. v. Lee, 310 F.2d 262, 266-67 (9th Cir. 1962)* (same). Thus, to the extent plaintiffs seek return of "excess" consideration paid to defendants due to fraud or breach of **[**17]** fiduciary duty, the relief they seek is not equitable in nature.

On the other hand, as defendants point out, to the extent plaintiffs seek to deny defendants the sums defendants claim are owed them due to their exercise of the warrants, it is possible to characterize the remedy sought as cancellation of the warrants. ***HN7***[] Cancellation is an equitable remedy. *See* *Roberts v. Sears, Roebuck & Co., 617 F.2d 460, 464 (7th Cir.)*, *cert. denied*, *449 U.S. 975, 66 L. Ed. 2d 237, 101 S. Ct. 386 (1980)*. However, in the

[3] We do not reach the issue whether preliminary injunctive relief would be available to a private RICO plaintiff in extraordinary circumstances, such as where necessary to prevent a disposition or dissipation of assets pending a final money judgment.

present posture of the parties' relationship, it is also possible to characterize the relief sought as a return of the value of the consideration paid defendants for the Abbott loan. In other words, one could in essence permit defendants to exercise the warrants, which would entitle them to a share of the funds in trust, but then provide that the value obtained that is attributable to their fraud must be returned to plaintiffs. Such relief would not be equitable in nature. [4]

[18]** Even if plaintiffs' requested relief must be characterized as "equitable" rescission, that does not necessarily end matters. The opinions the address the availability of "equitable" relief under RICO in a private lawsuit all concern, with one exception, relief that is injunctive in nature. *See* *Trane Co. v. O'Connor Securities, 718 F.2d 26, 28 (2d Cir. 1983)* (preliminary injunction; characterizing issue as whether private plaintiff can obtain "injunctive" relief); *Dan River, Inc. v. Icahn, 701 F.2d 278, 290 (4th Cir. 1983)* (preliminary injunction); *Aetna Casualty & Surety Co. v. Liebowitz, 570 F. Supp. 908, 910-11 (E.D.N.Y. 1983)* (preliminary injunction), *aff'd*, *730 F.2d 905 (2d Cir. 1984)*; *Kaushal, 556 F. Supp. at 581-84* (divestiture and blocking of sale of business); *Ashland Oil, Inc. v. Gleave, 540 F. Supp. 81, 84-86 (W.D.N.Y. 1982)* (attachment). *But see Car Carriers, Inc. v. Ford Motor Co., 583 F. Supp. 221 (N.D. Ill. 1984)* (rescission) (dictum).

HN8[] That an injunction is not available to a private RICO plaintiff does not mean that relief that consists of a monetary payment is also barred, even if it is characterized as "equitable." The type of relief **[**19]** described in *§ 1964(a)* & *(b)* is the traditional coercive form of injunctive or equitable relief: divestiture, injunction against participating in a business, dissolution, reorganization, and the like. That Congress did not intend for a private party to obtain such drastic forms of relief does not mean that it intended to bar a private party from *compensation* for harm done due to a RICO violation merely because the relief is characterized as "equitable". We therefore **[*1385]** hold that even if para. 71(b) consists of equitable restitution, it describes a form of relief available to a private RICO plaintiff. [5] The relief described in para. 71(b) is therefore proper in the present action.

[20]** 3. *Other relief*.

In response to the motion for summary judgment, plaintiffs pointed out that some of the relief they seek clearly is not equitable in nature. In particular, plaintiffs seek damages for defendants' alleged thwarting of the proposed sale of Eagle to TRW in 1978, *see* n. 1 *supra*, and infliction of injury to Eagle's business by the allegedly unreasonable restrictions imposed upon it by Abbott and the other lenders. *See* Response to Motion for Partial Summary Judgment at 6; Plaintiffs' Trial Brief at 43-44, 46-47. Defendants' reply to this assertion was twofold: that defendants did not thwart or impede the proposed TRW sale, and that plaintiffs' requested damages are speculative as a matter of law. This prompted a motion by plaintiffs to strike what they termed the new factual material in defendants' reply or alternatively to permit plaintiffs to respond to it.

We agree with plaintiffs that defendants' argument that they did not thwart the TRW deal is factual in nature; it is based on citations to deposition testimony and documents. It is therefore out of place in the present motion, which was based entirely on the purported legal insufficiency of plaintiffs' **[**21]** RICO claim. In any event, defendants' argument appears insufficient to warrant striking the TRW damage claim at this stage of the litigation. Defendants' factual argument is that TRW did not view the lenders' warrants as a barrier to the 1978 sale, and that defendants were willing to convert the warrants to stock in order to deal with any concern of TRW. This does not appear to deal with the full scope of plaintiffs' claim. Plaintiffs' claim includes the assertion that another barrier to the sale was the fact that the restrictive covenants imposed by Abbott and the other lenders would continue even after the sale, thus

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[4] That the funds happen to be held in trust at present does not affect matters. We would not be "ordering" the trustee to pay to one party or another but rather permitting one or the other party to receive the funds held in trust.

[5] In *Car Carriers, Inc. v. Ford Motor Co., 583 F. Supp. 221 (N.D. Ill. 1984)*, Judge Shadur addressed a RICO claim in which "equitable rescission" of a lease was sought. *Id. at 227*. Though other grounds for dismissal existed thus obviating the need to address the availability of such a remedy under RICO, Judge Shadur suggested that were he called upon to do so, he would hold that *Kaushal* applied to equitable rescission as well. *Id*. To the extent that Judge Shadur's *dictum* in *Car Carriers* conflicts with what we state above, we respectfully disagree.

limiting the scope of Eagle's business. *See* Motion Regarding New Matter Raised in Defendants' Reply at 3. Thus, plaintiffs' TRW claim would appear to survive defendants' argument of factual insufficiency.

Defendants' second argument is not a factual argument; rather, it is a response invited by plaintiffs' reliance on the thwarted TRW deal to avoid defendants' argument that a private RICO plaintiff cannot obtain equitable relief. In light of our previous disposition of defendants' motion with respect to para. 71(b) of the amended complaint, plaintiffs do not "need" **[**22]** to rely on the TRW damages to keep their RICO claim alive. However, it may nonetheless be the case that the damages plaintiffs seek for that claim cannot be recovered under RICO. We will therefore address defendants' legal argument.

The cases defendants cite in support of their argument are securities fraud cases in which the courts held that the defrauded plaintiff is limited to recovery of out-of-pocket losses and cannot recover the expected profits he might have gained absent the fraud. *See* *Estate Counseling Service, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 303 F.2d 527, 533 (10th Cir. 1962)*; *Herzfeld v. Laventhol, Krekstein, Horwath & Horwath, 378 F. Supp. 112, 129 & n. 30 (S.D.N.Y. 1974)*. We are not persuaded by defendants' implicit suggestion that the measure of damages under the securities fraud laws also applies under RICO. One must bear in mind that the above cases, which arose under *15 U.S.C. § 78j(b) (1982)* and *17 C.F.R. § 240.10b-5 (1983)*, involved a judicially-created right of action not expressly provided for by Congress. **[*1386]** In the present case, ***HN9***[] *§ 1964(c)* expressly grants a private plaintiff the right to sue for damages caused by a RICO **[**23]** violation, [6] and defines the proper recovery broadly: "any person injured . . . by reason of a violation of this chapter . . . shall recover threefold the damages he sustains. . . ." If the "damages sustained" by a victim of a RICO violation include lost profits, we see no bar in the statute to recovery of those losses. Of course, recovery of lost profits should be subject to the ordinary limitations concerning remoteness (or proximate cause) and speculativeness (or certainty), but on the present record we cannot say that the damages sought here are so remote from the wrongdoing or speculative and uncertain that they are unrecoverable as a matter of law. It will, of course, be up to plaintiffs to prove at trial their entitlement to damages.

ILLINOIS SECURITIES ACT

Count 3 is brought **[**24]** pursuant to the Illinois Securities Act, Ill. Rev. Stat. ch. 121 1/2, §§ 137.1 - 137.16 (1983). Plaintiffs claim that defendants' conduct violated *id*. § 137.12 F & I, which provide that it violates the Act for any person to defraud another in connection with the purchase or sale of a security. ***HN10***[] The only private right of action expressly provided in the Act is contained in *id*. § 137.13, which provides that a purchaser may rescind a sale of a security made in violation of the Act. Plaintiffs, of course, are not purchasers; they sold securities to defendants. However, they seek rescission and an award of damages due to defendants' alleged misconduct. Amended Complaint para. 83. Defendants argue that this is beyond that is contemplated by the Illinois Act.

Plaintiffs' response is that we should imply a damages remedy under the Act for a defrauded seller, even though no remedy at all is provided for sellers and no damage remedy is expressly provided even for purchasers. The only case under the Act on which plaintiffs rely is *Anvil Investment Co. v. Thornhill Condominiums, Ltd., 85 Ill. App. 3d 1108, 407 N.E.2d 645, 41 Ill. Dec. 147 (1st Dist. 1980)*, in which the court approved **[**25]** an award to a purchaser of securities of *punitive* (not compensatory) damages against two persons who had violated a prohibition contained in § 137.12. Plaintiffs also rely generally on *Sawyer Realty Group, Inc. v. Jarvis Corp., 89 Ill. 2d 379, 432 N.E.2d 849, 59 Ill. Dec. 905 (1982)*, in which the Illinois Supreme Court discussed when a private remedy should be inferred from a statute that does not expressly provide for one. In *Sawyer*, the court stated that where a statute is enacted to protect a particular class of individuals, courts may imply a private cause of action for a violation of the statute even though no express remedy has been provided by the legislature. *Id*. at 386, 432 N.E.2d 852. The court noted that Illinois courts appear to be more willing to permit private remedies where none are expressly provided than are the federal courts. *Id. at 389, 432 N.E.2d at 853*. The court stated that

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[6] We do not hold to the view that a RICO plaintiff must show damages amounting to "racketeering enterprise injury" or the like. We have previously rejected that view. *Addis v. Moser*, No. 83 C 6118 (N.D. Ill. Feb. 15, 1984).

> it is clear that it is not necessary to show a specific legislative intent to create a private right of action. If there is no indication that the remedies available are only those the legislature expressed in the Act, then where it is consistent with the underlying **[**26]** purpose of the Act and necessary to achieve the aim of the legislation, a private right of action can be implied.

Id. at 386, 432 N.E.2d at 852. In *Sawyer*, the existence of other express remedies, including a private right of injunctive relief, governmental enforcement, and an express private remedy for limited compensatory damages did not lead the court to hold that the remedies expressly provided were the sole remedies available. Thus, the Illinois Supreme Court does not appear to follow *Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19, 62 L. Ed. 2d 146, 100 S. Ct. 242* ***[*1387]*** *(1979)*, which was cited in *Sawyer*, in which the United States Supreme Court held that the existence of some express remedies was evidence of legislative intent to preclude other remedies.

The Seventh Circuit has cautioned the district courts that when we interpret state law, it is not our role "to effect dramatic innovation in that body of law." *Murphy v. White Hen Pantry Co., 691 F.2d 350, 355 (7th Cir. 1982)*. The pertinent provisions of the Illinois Securities Act have been in existence since 1953, and no Illinois court has ever held in a reported decision that **[**27]** a seller of securities is entitled to pursue private remedies under the Act. In addition, since the anti-fraud prohibitions of the Illinois Act are paralleled in the federal securities laws, particularly *15 U.S.C. § 78j(b) (1982)*, upon which plaintiffs rely in count 2 and which unquestionably provides for a private cause of action for rescission or damages, we do not think it prudent in the present action to add to the remedies provided by the Illinois legislature, in the absence of more specific direction from the Illinois courts. [7] For this reason, count 3 of the amended complaint is dismissed. We will enter judgment on count 3 after all claims have been disposed of. *Fed. R. Civ. P. 54(b)*.

[28]** To summarize, defendants' motion for summary judgment is granted in part and denied in part. Paragraph 71(a) of the amended complaint is stricken, and count 3 is dismissed; defendants' motion is otherwise denied.

End of Document

[7] We note that *Anvil Investment*, which upheld an award of punitive damages to a purchaser defrauded in violation of the Illinois Act, relied solely on *federal* case authority for the proposition that awards of punitive damages may be made under a statute absent specific legislative authorization. 85 Ill. App. 3d at __, 407 N.E.2d at 653. Further, the court seemingly disregarded a federal decision from which it quoted extensively, which held that punitive damages were unavailable under the federal statute parallel to the provision of the Illinois Act at issue in *Anvil. Id*. (citing *Globus v. Law Research Service, Inc. 418 F.2d 1276 (2d Cir. 1969))*.

Midwestern Waffles, Inc. v. Waffle House, Inc.

United States Court of Appeals for the Eleventh Circuit

June 18, 1984

No. 83-8424

Reporter

734 F.2d 705 *; 1984 U.S. App. LEXIS 21430 **; 1984-2 Trade Cas. (CCH) P66,067

MIDWESTERN WAFFLES, INC., and Rex P. Waldrop, Plaintiffs-Appellants, Cross-Appellees, v. WAFFLE HOUSE, INC., et al., Defendants-Appellees, Cross-Appellants

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

Core Terms

territorial, franchise, franchisees, restaurants, antitrust, defendants', summary judgment motion, plaintiffs', franchisor, horizontal, Distributors, monopoly, anti trust law, allocated, Sherman Act, tie, tying product, vending, anticompetitive, vertical, summary judgment, supplemental, discovery, relevant market, restrictions, products, damages, entitled to summary judgment, financial interest, probative evidence

LexisNexis® Headnotes

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

Antitrust & Trade Law > Clayton Act > General Overview

HN1[] **Private Actions, Remedies**

See *15 U.S.C.S. § 15*.

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

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

HN2[] **Private Actions, Standing**

To have standing to bring an anti-trust action a plaintiff must have suffered antitrust injury, which is injury of the type the antitrust laws were intended to prevent and which flows from that which makes a defendant's acts unlawful. The injury must reflect the anticompetitive effect of either the violation of ***antitrust law*** or of the anticompetitive acts made possible by the violation, and it should be the type of loss which a violation of ***antitrust law*** would be likely to cause. To have standing a person must be one against whom anticompetitive activity is directed, and not one who has merely suffered indirect, secondary, or remote injury. Incidental or consequential injury or injury remotely caused by an antitrust violation does not give a plaintiff standing to complain that he has been injured by reason of anything forbidden in the antitrust laws.

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

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

The prevailing standard of analysis under *§ 1* of the Sherman Act for non-price vertical restrictions is the rule of reason. Under this rule the finder of fact weighs all circumstances of a case to determine whether a restrictive practice imposes an unreasonable restraint on competition and should therefore be prohibited. If so, it is per se illegal.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Covenants not to Compete

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

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

HN4[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

In order to prove that a franchiser's allocation of territories, each of which is an exclusive territory, is a horizontal restriction, plaintiffs will have to show that the franchiser and those of its franchisees alleged to be part of the combination or conspiracy agreed among themselves as to the division of territories. If the franchiser alone allocated the territories there is no per se violation of ***antitrust law*** because exclusive dealing arrangements are to be analyzed under the rule of reason. That the franchisor itself operates restaurants in certain territories does not, alone, change the standard of analysis.

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

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

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

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

HN5[] **Tying Arrangements, Clayton Act**

A tie is an arrangement under which a seller agrees to sell one product, the tying product, only on the condition that the buyer also purchase a second product, the tied product. A tie is a per se violation of ***antitrust law***, however, only if the seller has sufficient economic power with respect to the tying product to restrain free competition in the market for the tied product and if a not insubstantial amount of interstate commerce is affected. Additionally, a tie is illegal only if the seller of the tying product has a financial interest in the source of the tied product.

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

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Fees

Contracts Law > Personal Property > Personalty Leases > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

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

HN6[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Lease payments, a license fee, and a security deposit paid to a franchisor have all been found not to be separate payments for a product distinct from the franchise. However, vending services are not such an essential ingredient of a franchised system's formula for success that they should be treated as part of the franchise itself.

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

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

HN7[] **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

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

HN8[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Even if plaintiffs can show the existence of an illegal tie, defendants can still defeat the claim by showing that the tie constitutes a necessary device for controlling the quality of the end product sold to the consuming public by a franchisee. This defense is available because of the unique nature of franchises and the fact that in the franchise context ties may serve legitimate purposes. For this defense to be successful, however, defendants would have to show that the tie is the method of maintaining quality that imposes the least burden on commerce.

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

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

HN9[] **Monopolies & Monopolization, Actual Monopolization**

See *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*.

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

Trademark Law > ... > Similarity of Marks > Appearance, Meaning & Sound > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN10[] **Monopolies & Monopolization, Actual Monopolization**

A party has monopoly power if it has over any part of trade or commerce the power of controlling prices or unreasonably restricting competition. In a sense, there is monopoly power over every non-standard commodity because each manufacturer has the power over price and production of his product. However, this power which a manufacturer has over a trademarked or unique product is not the power that constitutes an illegal monopoly. Instead, whether there is control of the relevant market depends on the availability of alternative commodities and the interchangeability of products which have similar uses considering price, characteristics, and adaptability. If price is controlled and competition restricted with respect to a product for which there are no reasonable substitutes available in the market, there is monopoly power.

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

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

HN11[] **Private Actions, Remedies**

In order to survive a motion for summary judgment a plaintiff in an antitrust action must show substantial probative evidence of antitrust injury. Self-serving statements by a plaintiff's corporate officers are not, alone, substantial enough evidence of antitrust injury for a plaintiff to survive a motion for summary judgment.

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN12[] **Affirmative Defenses, Statute of Limitations**

Where rights and liabilities are finalized by a contract or by denial of a contract, and any damages are at that time provable with certainty, the statute of limitations begins to run at that time.

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

HN13[] **Private Actions, Remedies**

Mere acquiescence in a restrictive practice does not preclude an antitrust action.

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

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 > Materiality of Facts

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

HN14[] Summary Judgment, Motions for Summary Judgment

Fed. R. Civ. P. 56(c) provides that 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 a judgment as a matter of law. Antitrust cases by their very nature are often poorly suited for disposition by summary judgment motion, since antitrust cases often raise questions of motive, credibility, and conspiracy. On the other hand, it is now settled that summary judgment is appropriate in those antitrust cases where plaintiffs, after having engaged in extensive discovery, fail to produce significant probative evidence in support of the allegations in their complaint.

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

HN15[] Price Fixing & Restraints of Trade, Tying Arrangements

To ascertain whether an unlawful arrangement for the sale of products has caused injury to the purchaser, the cost or value of the products involved, free from the unlawful arrangement, must first be ascertained.

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

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

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

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

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

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

HN16[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

A non-price horizontal restraint of trade such as territorial restrictions between competitors are illegal per se, because they have no purpose except the stifling of competition. On the other hand, territorial restrictions of a "vertical" nature (between the parties at different levels of the market structure) -- such as those which may be contained in franchising agreements -- are analyzed under a rule of reason, because they promote interbrand competition by allowing the franchisor or manufacturer to achieve certain efficiencies in the distribution of his goods and services. The reasonableness of a particular non-price vertical restraint is judged by whether it produces an anticompetitive effect in interbrand competition in the relevant geographic and product markets and not merely by whether it reduces intrabrand competition.

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

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

Torts > Business Torts > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

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

HN17[] **Distributorships & Franchises, Antitrust Issues**

Franchisors, like other businessmen generally, have the right to select unilaterally those with whom they deal and to exercise their own discretion in continuing or terminating existing franchisees. The antitrust laws are designed to protect the consumer interest in competition, and courts recognize that giving wide latitude to businesses in choosing methods of distribution and particular distributors promotes competition. Thus, the threat of a treble damages judgment arises only from those refusals to deal which are part of a plan of anti-competitive conduct involving more than one party.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Business & Corporate Law > Distributorships & Franchises > General Overview

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

HN18[] **Distributorships & Franchises, Antitrust Issues**

In a franchisor-franchisee context, the cases uphold the right of a franchisor to refuse to grant a franchisee or to terminate a franchise as long as no anti-competitive motives for or effects of the franchisor's action exists.

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

HN19[] **Private Actions, Remedies**

In any antitrust case the plaintiff must show antitrust injury of two types. First, he must show an injury to himself causally linked to illegal activities of the defendant. Second, he must show that the defendants' activities have the effect of stifling competition.

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

HN20[] **Clayton Act, Claims**

Section 4 of the Clayton Act, *15 U.S.C.S. § 15* conditions a private action on a showing of economic injury to its business or property. Even if the practice is a per se violation of the law, the plaintiff must show economic injury to itself. Said another way, plaintiff must show the fact of injury which means that what the defendant did impacted in some way on plaintiff's business. To show injury means that plaintiff must be able to demonstrate that it suffered economic damages which are quantifiable.

Counsel: W. Clark Goodwin, Birmingham, Alabama, Manning G. Warren, III, Birmingham, Alabama, J. Michael Rediker, Birmingham, Alabama, K. Morgan Varner, III, Atlanta, Georgia, for Appellant.

Earle B. May, Jr., Atlanta, Georgia, Kevin E. Grady, Atlanta, Georgia, James W. Gewin, Birmingham, Alabama, for Appellee.

Judges: Tjoflat and Johnson, Circuit Judges, and Tuttle, Senior Circuit Judge.

Opinion by: PER CURIAM

Opinion

[*709] We AFFIRM the partial summary judgment of the district court, entered pursuant to *Fed.R.Civ.P. 54(b)*, for the reasons set forth in its dispositive orders of March 15, 1982, and December 30, 1982, annexed hereto as Exhibits A and B, respectively.

EXHIBIT A

ORDER

INTRODUCTION

Before the court in this antitrust action are plaintiffs' motion for reconsideration of their motion for partial summary judgment and defendants' motion for reconsideration of their motion for summary judgment. Although the parties contend they cannot agree on any facts, the court will base this order on facts which appear from the record to be undisputed.

FACTS

Waffle House, Inc. (hereinafter "Waffle **[**2]** House") is a Georgia corporation with its principal offices in the Atlanta area. Its stock is owned principally by its officers and employees. Midwestern Waffles, Inc. (hereinafter "Midwestern Waffles") is an **[*710]** Illinois corporation of which Rex Waldrop and Edwin Waldrop are shareholders.

Waffle House operates a trademark restaurant system with some unique features. It owns and operates some restaurants on the retail level in certain territories, and other territories have been exclusively allocated to franchisees for operation of Waffle House restaurants. Waffle House or Waffle House employees, officers, or shareholders have interests in corporations which own and operate certain of the Waffle House franchises.

Plaintiffs asked defendants for a Waffle House franchise in Selma, Alabama in late September or early October of 1972. Plaintiffs were told that the area was not available for a franchise because Alabama had already been allocated between the company and other franchisees for operation of Waffle House restaurants. Central Illinois was a territory available for a franchise at the time, and in late 1972 Midwestern Waffles, known at the time as Waldrop-Henry **[**3]** Waffles, Inc., became a Waffle House franchisee for that territory.

Rex Waldrop initially remained in Selma, Alabama while Steve Henry worked as the general manager for Midwestern Waffles in Illinois. After Steve Henry's resignation from Midwestern Waffles and the expansion of the franchise into the St. Louis area, Rex Waldrop moved to St. Louis to become general manager for Midwestern Waffles.

Midwestern Waffles opened two Waffle House restaurants, one in 1974 and one in 1976. Plaintiffs executed a Standard Franchise Agreement prior to the opening of each restaurant, and they also executed Area Development Agreements which controlled where they opened restaurants and whether they built additional ones. Orders were placed for plaintiffs' restaurant equipment with The Hickman Company, in which Waffle House had a financial interest. Metro Distributors, Inc., in which Waffle House also had a financial interest, helped arrange for vending machines for plaintiffs' restaurants. In 1977 Waffle House bought plaintiffs' restaurants from them, and plaintiffs are dissatisfied with the price paid them and the method of arriving at the price.

REX WALDROP'S STANDING

Plaintiffs have brought **[**4]** this action pursuant to *15 U.S.C. § 15* which provides in pertinent part as follows:

> ***HN1***[] Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Defendants contend Rex Waldrop does not have standing to bring this action in his capacity as an officer, employee or stockholder of Midwestern Waffles, Inc. Mr. Waldrop asserts, however, that he has suffered injuries personal to him, specifically lost opportunities and expenses incurred because he left his job in Alabama and moved to Illinois, and he contends he has standing to seek recovery for those non-derivative injuries.

HN2[] To have standing to bring an anti-trust action a plaintiff must have suffered antitrust injury, which is injury of the type the antitrust laws were intended to prevent and which flows from that which makes a defendant's acts unlawful. The injury **[**5]** must reflect the anticompetitive effect of either the violation of ***antitrust law*** or of the anticompetitive acts made possible by the violation, and it should be the type of loss which a violation of ***antitrust law*** would be likely to cause. *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 [97 S. Ct. 690, 50 L. Ed. 2d 701]* (1977). To have standing a person must be one against whom anticompetitive activity is directed, and not one who has merely suffered indirect, secondary, or remote injury. *Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir.1975)*. Incidental or consequential injury or injury remotely caused **[*711]** by an antitrust violation does not give a plaintiff standing to complain that he has been injured by reason of anything forbidden in the antitrust laws. *Id.*

The court finds that the personal damages which Rex Waldrop seeks to recover are, at best, incidental to activity forbidden by ***antitrust law*** and not the type injury the antitrust laws were intended to prevent. *Markas [Martens] v. Barrett, 245 F.2d 844 (5th Cir.1957)*. Accordingly, the court finds that Rex Waldrop does not have standing to bring this action.

TERRITORIAL ALLOCATION

[6]** Plaintiffs contend that Waffle House and certain of its franchisees conspired to violate *§ 1* of the Sherman Act, *15 U.S.C. § 1*, by horizontally dividing, allocating, and imposing restrictions regarding territories in which they and third parties could operate. If a horizontal restriction is proved a *per se* violation would be established. *Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001 (5th Cir.1981)*.

Defendants contend their allocation of territories is a vertical restriction. ***HN3***[] The prevailing standard of analysis under *§ 1* of the Sherman Act for non-price vertical restrictions is the rule of reason. Under this rule the finder of fact weighs all circumstances of a case to determine whether a restrictive practice imposes an unreasonable restraint on competition and should therefore be prohibited. *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 [97 S. Ct. 2549, 53 L. Ed. 2d 568]* (1977). If so, it is *per se* illegal. *Red Diamond Supply, Inc. v. Liquid Carbonic Corporation, 637 F.2d 1001 (5th Cir.1981)*.

HN4[] In order to prove that Waffle House's allocation of territories, each of which is an exclusive territory, is a horizontal restriction, **[**7]** plaintiffs will have to show that Waffle House and those of its franchisees alleged to be part of the combination or conspiracy agreed among themselves as to the division of territories. If Waffle House alone allocated the territories there is no *per se* violation of ***antitrust law*** because exclusive dealing arrangements are to be analyzed under the rule of reason. *Aladdin Oil Company v. Texaco, Inc., 603 F.2d 1107 (5th Cir.1979)*. That Waffle House itself operates restaurants in certain territories does not, alone, change the standard of analysis. *Red Diamond Supply, Inc. v. Liquid Carbonic Corporation, supra; H & B Equipment Company, Inc. v. International Harvester Company, 577 F.2d 239 (5th Cir.1978)*.

Whether or not Waffle House's territorial allocation is a vertical restriction or a horizontal restriction cannot be decided on motions for summary judgment because there is a question of fact as to who actually makes the decisions about division and allocation of territories. Plaintiffs have described in detail their evidence that certain franchisees which are affiliated with Waffle House participate in the decisions regarding allocation of territories. Defendants, however, **[**8]** have shown the existence of evidence that the decision is made by Waffle House alone without participation by any of the Waffle House employees, officers, or stockholders who own or are affiliated with franchises. Plaintiffs ask the court to look at the realities of the process of territorial allocation, citing authority for the proposition that a restriction which appears on paper to be vertical may nevertheless be horizontal in practice and that such a restriction is illegal *per se*. It is as to the realities of how allocation of territories are made that questions of fact exist. Accordingly, summary judgment on the issue of territorial allocation cannot be granted.

TYING

Plaintiffs contend that Waffle House's requirements that its franchisees purchase equipment from approved sources constitute *per se* illegal ties in violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1*. ***HN5***[] A tie is an arrangement under which a seller agrees to sell one product, the tying product, only on the condition that the buyer also purchase a second product, the tied product. A tie is a *per se* violation of ***antitrust law***, however, only if the seller **[*712]** has sufficient economic power with **[**9]** respect to the tying product to restrain free competition in the market for the tied product and if a not insubstantial amount of interstate commerce is affected. *United States Steel Corporation v. Fortner Enterprises, Inc., 429 U.S. 610 [97 S. Ct. 861, 51 L. Ed. 2d 80]* (1977); *Kentucky Fried Chicken Corporation v. Diversified Packaging Corporation, 549 F.2d 368 (5th Cir.1977)*. Additionally, a tie is illegal only if the seller of the tying product has a financial interest in the source of the tied product. *Keener v. Sizzler Family Steak Houses, 597 F.2d 453 (5th Cir.1979)*.

Plaintiffs contend the Waffle House franchise is the tying product in this case and that equipment and vending services, which franchisees were required to obtain from an approved source, are the tied products. The Hickman Company was the only approved source for certain equipment, and Metro Distributors, Inc. was the only approved source for vending services.

Defendants contend that as to the vending services there are not two separate products which could be tied because vending income, part of which was collected by Metro Distributors, Inc. and paid to Waffle House, was an additional franchise **[**10]** fee and not a separate payment for a product distinct from the franchise. ***HN6***[] Although such has been held to be the case with respect to lease payments, a license fee, and a security deposit paid to a franchisor, *Principe v. McDonald's Corporation, 631 F.2d 303 (4th Cir.1980)*, *cert. denied*, [451] U.S. [970, *101 S. Ct. 2047, 68 L. Ed. 2d 349]* (May 4, 1981), the court finds that vending services are not such "an essential ingredient of the franchised system's formula for success" that they should be treated as part of the franchise itself. *631 F.2d at 309*.

There is some question as to whether a trademarked product has sufficient economic power that it can be an illegally tying product. In *Kentucky Fried Chicken Corporation v. Diversified Packaging Corporation, supra*, the franchisor conceded this point. A few courts have been presented with the issue, but the question has not been settled as a matter of law.

The leading case on economic power in the tying context is *United States Steel Corporation v. Fortner Enterprises, Inc., supra*, in which the Supreme Court emphasized the importance of uniqueness of the alleged tying product. This court finds that it must be **[**11]** determined by the trier of fact whether the Waffle House franchise system is unique in the sense required by the Supreme Court. If competitors are in some way prevented from offering a franchise comparable to a Waffle House franchise, the court will find that a Waffle House franchise can be a tying product.

There is no contention that there is not a sufficient amount of interstate commerce affected for an illegal tie to be found, and it is undisputed that Waffle House has a financial interest in the Hickman Company and in Metro Distributors, Inc. There are, however, questions of fact about the extent to which plaintiffs' purchase of the Waffle House franchise was conditioned on the purchase of certain equipment from The Hickman Company and vending services from Metro Distributors, Inc.

HN7[] An approved source requirement is not, alone, illegal. *Kentucky Fried Chicken Corporation v. Diversified Packaging Corporation, supra.* 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. *Id.* Defendants contend that plaintiffs never sought to purchase equipment or obtain vending services from **[**12]** sources other than The Hickman Company and Metro Distributors, Inc. Plaintiffs' position is that to have done so would have been futile because they had been told that no other sources would be approved. Each of these contentions presents disputes of fact. Unless plaintiffs can prove they were coerced into purchasing equipment and vending services from The Hickman Company and Metro Distributors, Inc., their claim that illegal ties existed will fail.

[*713] ***HN8***[] Even if plaintiffs can show the existence of an illegal tie, defendants can still defeat the claim by showing that the tie constitutes a necessary device for controlling the quality of the end product sold to the consuming public by a franchisee. This defense is available because of the unique nature of franchises and the fact that in the franchise context ties may serve legitimate purposes. *Kentucky Fried Chicken Corporation v. Diversified Packaging Corporation, supra.* For this defense to be successful, however, defendants would have to show that the tie is the method of maintaining quality that imposes the least burden on commerce. *Id.*

Defendants assert that plaintiffs have not shown that The Hickman Company **[**13]** or Metro Distributors, Inc. charged more than market rates for the equipment or the vending services. Although the issue is not determinative of whether an illegal tie existed, *United States Steel Corporation v. Fortner Enterprises, Inc., supra*, it is relevant to the issue of whether plaintiffs have suffered antitrust injury. The question of injury is treated separately in this order.

MONOPOLY

Plaintiffs contend that defendants have violated *§ 2* of the Sherman Act, *15 U.S.C. § 2*, which provides in pertinent part as follows:

> ***HN9***[] 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 . . .

Plaintiffs' contention in this respect depends on a finding that the relevant product market for the alleged monopoly is the Waffle House franchise system. Because the court finds this not to be the case, it will be unnecessary to consider whether the other elements of a monopoly, attempted monopoly, or conspiracy to monopolize are present.

The leading case on relevant product **[**14]** market is *United States v. E.I. DuPont de Nemours & Company, 351 U.S. 377 [76 S. Ct. 994, 100 L. Ed. 1264]* (1956). In that case the Supreme Court stated that ***HN10***[] a party has monopoly power if it has over any part of trade or commerce the power of controlling prices or unreasonably restricting competition. The Court recognized that in a sense there is monopoly power over every non-standard commodity because each manufacturer has the power over price and production of his product. The Court found, however, that this power which a manufacturer has over a trademarked or unique product is not the power that constitutes an illegal monopoly. Instead, whether there is control of the relevant market depends on the availability of alternative commodities and the interchangability of products which have similar uses considering price, characteristics, and adaptability. If price is controlled and competition restricted with respect to a product for which there are no reasonable substitutes available in the market, there is monopoly power.

In *United States v. E.I. DuPont de Nemours & Company*, the Supreme Court considered whether DuPont was guilty of a monopoly because it controlled **[**15]** the cellophane market. The Court found that the relevant product market was the market for flexible packaging materials and not for cellophane alone because other flexible packaging materials are reasonably interchangeable with cellophane for the purposes for which cellophane is produced, taking price, use, and qualities into consideration. Similarly, this court finds that the relevant product market for determining whether Waffle House is engaged in a monopoly is restaurants similar to Waffle Houses -- those with similar menus, similar hours, and similar service. The court does not find that the relevant product market is all restaurants of every type, but it does find that there are other restaurants in the market available to consumers as reasonable substitutes for Waffle Houses. It is these restaurants which, along with Waffle Houses, constitute the relevant product **[*714]** market. Waffle House is thus not engaged in a monopoly in violation of *§ 2* of the Sherman Act.

This conclusion is not inconsistent with a conclusion which might be reached that the Waffle House franchise system is sufficiently unique to have the economic power required for a tie to be found. It **[**16]** is the Waffle House franchise system, not the restaurants alone, which is the potentially tying product. The restaurants and the food served there are relevant to the determination of monopoly power.

Because the court has found no monopoly exists, it is unnecessary for it to consider any other elements of an alleged violation of *§ 2* of the Sherman Act. As to plaintiffs' claims that defendants have violated *§ 2* of the Sherman Act by engaging in a monopoly, attempting a monopoly, or conspiring to monopolize, defendants are granted summary judgment.

MISCELLANEOUS ALLEGED RESTRAINTS OF TRADE

Plaintiffs allege that defendants have engaged in other restraints of trade such as requiring Waffle House's approval for building plans and specifications, requiring franchisees to devote full time to the operation of their restaurants, and requiring employees to wear particular attire. Defendants, in support of their motion for summary judgment, have cited authority for the fact that these alleged restraints of trade are ancillary to the Waffle House franchise and therefore not unlawful and that some have been specifically held valid. Plaintiffs have not responded to this argument advanced **[**17]** by defendants, and the court accordingly grants defendants' motion for summary judgment as to these miscellaneous alleged restraints of trade. Thus the only antitrust claims left in this action are plaintiffs' claims that defendants have engaged in horizontal territorial allocation and illegal tying in violation of *§ 1* of the Sherman Act.

ANTITRUST INJURY

HN11[] In order to survive a motion for summary judgment a plaintiff in an antitrust action must show substantial probative evidence of antitrust injury. *H & B Equipment Company, Inc. v. International Harvester Company, 577 F.2d 239 (5th Cir.1978)*. Self-serving statements by a plaintiff's corporate officers are not, alone, substantial enough evidence of antitrust injury for a plaintiff to survive a motion for summary judgment. *Id.* Defendants contend plaintiffs have failed to show that they have substantial probative evidence of antitrust injury.

The discovery period in this case is still open for certain limited purposes. It is possible that the additional discovery which the court has approved will lead to evidence of antitrust injury. Accordingly, the court will defer ruling on the portion of defendants' motion for **[**18]** summary judgment which alleges that plaintiffs have not shown sufficient antitrust injury to be entitled to a trial of their antitrust claims. Within thirty (30) days of the close of the discovery period plaintiff Midwestern Waffles shall file a supplemental response to the portion of defendants' motion for summary judgment which raises the issue of antitrust injury. Plaintiff's supplemental response shall address only the issue of antitrust injury, and on the basis of that response the court will determine whether there exists the substantial probative evidence of injury required to survive a motion for summary judgment.

STATUTE OF LIMITATIONS

Defendants' refusal to grant plaintiffs a franchise in Alabama occurred more than four years prior to the filing of the complaint in this action. Defendants contend plaintiffs' claim based on the alleged horizontal allocation of territories is barred by the statute of limitations. *15 U.S.C. § 15*. Defendants do not contend plaintiffs' tying claim is barred because each payment under a contract which constitutes an illegal tie is new injury. Plaintiffs contend their later requests for a franchise in Alabama or in another southern state **[**19]** were new injuries which gave rise to new **[*715]** causes of action for horizontal territorial allocation.

HN12[] Where rights and liabilities are finalized by a contract or by denial of a contract, and any damages are at that time provable with certainty, the statute of limitations begins to run at that time. *City of El Paso v. Darbyshire Steel Company, Inc., 575 F.2d 521 (5th Cir.1978)*. Plaintiffs have not shown that the damages they seek for the alleged horizontal territorial allocation could not have been proved at the time defendants first told them no Alabama franchise was available.

There is, however, a question of fact on the issue of the statute of limitations. If plaintiffs' subsequent requests for a franchise territory in Alabama or another southern state were genuine, that is if plaintiffs had reason to believe the original decision not to grant them such a franchise did not still stand, there would be a new alleged injury when a genuine subsequent request was denied. If, however, plaintiffs' subsequent requests were futile and plaintiffs had reason to know they were futile, the statute of limitations will be found to bar plaintiffs' claim that defendants violated **[**20]** ***antitrust law*** by horizontally allocating territories.

STANDING OF MIDWESTERN WAFFLES

Defendants contend plaintiffs cannot complain of the system of territorial allocation because plaintiffs not only agreed to it but specifically asked that their territory be an exclusive one. ***HN13***[] Mere acquiescence in a restrictive practice does not preclude an antitrust action, however. *Perma Life Mufflers, Inc. v. International Parts Corporation, 392 U.S. 134 [88 S. Ct. 1981, 20 L. Ed. 2d 982]* (1968). There is evidence plaintiffs acquiesced in defendants' division of territories for its franchisees and that they sought the protection of an exclusive territory as had other franchisees. There appears to be no evidence, however, of plaintiffs' truly complete involvement and participation in the allegedly illegal arrangement, and even if there was such evidence the Supreme Court did not hold that such conduct would bar an antitrust action. The court finds Midwestern Waffles has standing to challenge defendants' allocation of territories.

STATE LAW CLAIMS

Defendants contend in their motion for summary judgment that Georgia law controls the state law issues in this case because the franchise **[**21]** agreement so provides and because of various contacts with the State of Georgia. Plaintiffs do not dispute this contention, and the court will apply Georgia law.

Defendants contend that Ga.Code Ann. § 2-1409 does not give plaintiffs a private right of action for damages for an antitrust violation and that under the circumstances of this case plaintiffs do not have a claim for unjust enrichment under Ga.Code Ann. § 3-107, a claim for tortious interference with contract, or a claim for unfair competition. Plaintiffs have not disputed any of these contentions, and as to each defendants are granted summary judgment.

Plaintiffs have also alleged fraud and breach of contract. There are some issues of fact as to each claim, such as whether defendants intended not to fulfill promises allegedly made to plaintiffs and whether there were agreements between the parties in addition to those set forth in the written contracts between them. There are not sufficient facts before the court, however, for it to determine what other questions of fact exist as to those claims or whether, instead, defendants are entitled to summary judgment on the claims as they contend. On the basis of the pleadings, **[**22]** the court can merely determine that there could be some set of facts which plaintiffs could prove to entitle them to judgment on the fraud and breach of contract claims. The court cannot find that defendants have shown themselves entitled to judgment as a matter of law on these claims, and defendants' motion for summary judgment on these claims is accordingly denied.

[*716] CONCLUSION

Plaintiffs' motion for partial summary judgment is DENIED. There are questions of fact as to both their claim that defendants violated ***antitrust law*** by horizontally allocating territories to franchisees and their claim that defendants violated ***antitrust law*** by engaging in unlawful tying arrangements. Defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART. The court finds that Rex Waldrop does not have standing to bring this action and that defendants are entitled to summary judgment on plaintiffs' claim that defendants violated *§ 2* of the Sherman Act by engaging in a monopoly. Additionally, defendants are entitled to summary judgment as to plaintiffs' claims of restraints of trade other than the alleged horizontal territorial allocation and the alleged illegal ties, **[**23]** and defendants are entiled to summary judgment on plaintiffs' state law claims for antitrust damages, unjust enrichment, tortious interference with contract, and unfair competition. Midwestern Waffles has standing to challenge defendants' allocation of territories, and as to all other issues raised in defendants' motion for summary judgment, questions of fact exist.

Plaintiff Midwestern Waffles is DIRECTED to file a supplemental response to the portion of defendants' motion for summary judgment which raises the issue of antitrust injury within thirty (30) days of the close of discovery. The Clerk of this Court is DIRECTED to resubmit this file when that supplemental response is filed.

Plaintiffs' motion to compel discovery or to reopen discovery to permit supplementation of responses has also been submitted to the court. That motion has been treated in a separate order and requires no ruling at this time.

EXHIBIT B

ORDER

This antitrust action is again before the court on defendants' motion for summary judgment. Pursuant to this court's order of March 15, 1982, the only antitrust claims left in this action are plaintiff's claims that defendants have engaged in a horizontal **[**24]** territorial allocation and illegal tying, in violation of *Section 1* of the Sherman Act. Further, in response to defendants' contention that plaintiff has failed to show that it has substantial probative evidence of antitrust injury, the court provided the following: "The discovery period in this case is still open for certain limited purposes. It is possible that the additional discovery which the court has approved will lead to evidence of antitrust injury." *Midwestern Waffles, Inc. v. Waffle House, Inc.*, No. C78-223A, at 11 (N.D.Ga. Mar. 15, 1982). On August 20, 1982, plaintiff provided a supplemental response to defendants' motion for summary judgment, which addressed the concerns of antitrust injury.

I. FACTUAL BACKGROUND AND INITIAL CONSIDERATIONS.

In this court's order of March 15, 1982, the court found the following facts from the record to be undisputed. Waffle House, Inc. ("Waffle House") is a Georgia corporation with its principal offices in the Atlanta area. Its stock is owned principally by its officers and employees. Midwestern Waffles, Inc. ("Midwestern Waffles") is an Illinois corporation of which Rex Waldrop and Edwin Waldrop are shareholders.

Waffle **[**25]** House operates a trademark restaurant system with some unique features. It owns and operates some restaurants on the retail level in certain territories, and other territories have been exclusively allocated to franchisees for operation of Waffle House restaurants. Waffle House or Waffle House employees, officers, or shareholders have interests in corporations which own and operate certain of the Waffle House franchises.

Plaintiff asked defendants for a Waffle House franchise in Selma, Alabama, in late September or early October of 1972. Plaintiff was told that the area was not available for a franchise because Alabama had already been allocated between the company and other franchisees for operation of Waffle House restaurants. Central Illinois

[*717] was a territory available for a franchise at the time, and in late 1972, Midwestern Waffles, known at the time as Waldrop-Henry Waffles, Inc., became a Waffle House franchisee for that territory.

Rex Waldrop initially remained in Selma, Alabama, while Steve Henry worked as the general manager for Midwestern Waffles in Illinois. After Steve Henry's resignation from Midwestern Waffles and the expansion of the franchise into **[**26]** the St. Louis area, Rex Waldrop moved to St. Louis to become general manager for Midwestern Waffles.

Midwestern Waffles opened two Waffle House restaurants, one in 1974 and one in 1976. Plaintiff executed a Standard Franchise Agreement prior to the opening of each restaurant, and they also executed Area Development Agreements which controlled where they opened restaurants and whether they built additional ones. Again in 1974, Edwin and Rex Waldrop requested that they be given the Selma or other area in Alabama which had not been developed. This was denied.

Orders were placed for plaintiff's restaurant equipment with The Hickman Company, in which Waffle House had a financial interest. Metro Distributors, Inc., in which Waffle House also had a financial interest, helped arrange for vending machines for plaintiff's restaurants. In 1977, Waffle House bought plaintiff's restaurants from them, and plaintiff is dissatisfied with the price paid it and the method of arriving at that price.

Rule 56 of the Federal Rules of Civil Procedure ***HN14***[] provides that "the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, **[**27]** 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)*. Antitrust cases by their very nature are often poorly suited for disposition by summary judgment motion, since antitrust cases often raise questions of motive, credibility, and conspiracy. 10 C. Wright & A. Miller, Federal Practice & Procedure, § 2732, at 608-10 (1973). *See Poller v. Columbia Broadcasting System, Inc.*, 386 [368] U.S. 464 [*82 S. Ct. 486, 7 L. Ed. 2d 458]* (1962). On the other hand, "it is now settled that summary judgment is appropriate in those antitrust cases where plaintiffs, after having engaged in extensive discovery, fail to produce 'significant probative evidence' in support of the allegations in their complaint." *Zenith Radio Corp. v. Matsushita Electric Industrial Co., 513 F. Supp. 1100, 1140 (E.D.Pa.1981)*. *See Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 553-54 (5th Cir.1980)*, *cert. denied*, [*454 U.S. 927] 102 S. Ct. 427 [70 L. Ed. 2d 236]* (1981).

II. WHETHER PLAINTIFF HAS ESTABLISHED ANY EVIDENCE OF INJURY FROM ANY ALLEGED ILLEGAL **[**28]** TYING ARRANGEMENTS.

Plaintiff's allegations regarding any illegal tying arrangements are as follows. During the time relevant to the complaint in this action, Waffle House required its franchisees to purchase certain equipment for the operation of the franchisees' stores. This requirement was imposed by certain provisions of the franchise agreements. Plaintiff's Supplemental Statement of Facts, para. 14. [1] The standard procedure for Waffle House to follow when granting a new franchise was to effect the purchase of the initial equipment package required by the franchise agreement by having an employee of Waffle House, instead of the franchisee, place the order with The Hickman Company on behalf of the new franchisee. This action was taken with no prior consultation with the franchisee. *Id.*, para. 15. The plaintiff was never furnished with specifications of what equipment was required for a Waffle House restaurant, and, no such specifications existed, since such matters were under the control of The Hickman Company. *Id.*, para. 16. *See also* Affidavit of Rex P. Waldrop, paras. 9-15 (attached **[*718]** to Plaintiff's Motion for Summary Judgment with Supporting Papers, **[**29]** filed January 28, 1980). As a result, plaintiff was effectively coerced into purchasing its equipment from The Hickman Company. Statement, para. 17. Metro Distributors, Inc. was the only agent designated by Waffle House in accordance with paragraph 31 of the franchise agreement through which the franchisee could acquire vending machines to be used in its restaurants. *Id.*, para. 18. Both Waffle House and Metro Distributors, Inc., received a percentage of the revenue from the operation of vending machines in the franchisees' stores. *Id.*, para. 19.

[1] Editors Note: No text for footnote 1 appears on the manuscript copy of the order.

Given these allegations, plaintiff contends that two demonstrations of injury result. First, plaintiff points to evidence in the record that a portion of the vending machine net profits was payable to defendants. Plaintiff states that the vending machine revenue received by plaintiff was one-half of that received by defendants, and therefore "this is clear evidence **[**30]** of a decrease in revenues *directly related* to defendants' tie-in." Memorandum of Authorities in Support of Plaintiff's Supplemental Response to Defendants' Motion for Summary Judgment, at 24 (emphasis in original). Second, plaintiff points to the record as showing that defendant Hickman Company purchased standard equipment from various manufacturers and resold that equipment to franchisees at a cost plus a mark-up. Plaintiff asserts that the mark-up to franchisees such as the plaintiff was greater than that charged to the company-owned stores, thereby showing not only the coercive power of defendants, but also showing the injury suffered by the plaintiff. *Id.*

The seminal case which articulated a standard for determining the existence of injury in tie-in situations is *Siegel v. Chicken Delight, Inc., 448 F.2d 43* (9th Cir.), *cert. denied*, *405 U.S. 955 [92 S. Ct. 1173, 31 L. Ed. 2d 232]* (1972). In *Siegel*, the franchisor required all prospective franchisees to purchase from it cookers, fryers, packing supplies, and mixes as a condition of obtaining a license to use the franchisor trademark. Holding that economic harm was not inferable automatically from the **[**31]** occurrence of tie-in, the Ninth Circuit offered a specific guideline from which the fact of concrete financial damage must be demonstrated:

> ***HN15***[] To ascertain whether an unlawful arrangement for the sale of products has caused injury to the purchaser, the cost or value of the products involved, free from the unlawful arrangement, must first be ascertained.

448 F.2d at 52. Recently, the Eleventh Circuit in *Kypta v. McDonald's Corp., 671 F.2d 1282 (11th Cir.1982)*, indicated that *Siegel* stands for the proposition that injury resulting from a tie-in must be shown by establishing that payments for both the tied and tying products exceeded their combined fair market value. *Id., at 1285*. The court amplified as follows:

> The rationale behind this requirement is apparent: A determination of the value of the tied products alone would not indicate whether the plaintiff indeed suffered any net economic harm, since a lower price might conceivably have been exacted by the franchisor for the tying product. Unless the fair market value of both the tied and tying products are determined and an overcharge and a complete price found, no injury can be claimed; suit, **[**32]** then, would be foreclosed.

Id. In *Kypta*, a franchisee brought an action against a franchisor alleging antitrust violations by requiring all franchisees to be tenants of the franchisor and to pay the franchisor a non-assignable, interest-free security deposit. The court held that since the franchisee failed to come forward with any evidence of actual injury caused by the alleged real estate tie-in, the franchisee could not recover against the franchisor.

With respect to plaintiff's assertion of injury resulting from the purchase of equipment from The Hickman Company, plaintiff fails to show the value of both the Waffle House franchise license and equipment purchased from Hickman. Furthermore, plaintiff does not refer to any comparable **[*719]** equipment that could have been obtained from other sources at cheaper prices, thereby estimating the value of the package compared to other alternative products. Plaintiff simply relies on the fact that Hickman charged the Waffle House Company restaurants less than it charged franchisees. This, however, provides no evidence that plaintiff suffered any net economic harm from the alleged illegal tying arrangement involving **[**33]** Hickman. In addition, defendants explain this difference in price as a result of the recommendations by Waffle House's accounting firm, beginning in 1976, that generally accepted accounting principles precluded Hickman Company, a wholly owned subsidiary of Waffle House, from factoring in any profit on sales to Waffle House. Defendants' Memorandum in Response to Plaintiff's "Papers" on the Issue of Antitrust Injury, at 5. Simply put, the difference in price charged by The Hickman Company in no way indicates that plaintiff could have obtained equivalent equipment at a lower price from other sources, or that the value of both the Waffle House franchise license and Hickman equipment was less than the price paid by plaintiff.

With respect to plaintiff's assertion of injury on the alleged illegal tying arrangement involving vending services provided by Metro Distributors, plaintiff relies on the payment of 50% of vending income to Waffle House and Metro, and argues that this amount itself establishes antitrust injury. Again, plaintiff has failed to offer any evidence that the overall package was overpriced, and that plaintiff suffered any net economic injury. Furthermore, plaintiff's **[**34]** argument "that a portion of the vending machine net profits were payable to defendants, a practice which would not have existed but for the tie-in," Memorandum of Plaintiff at 24, is misplaced. Plaintiff has not shown that alternative sources of comparable products would have been available, but for the alleged tie. *See Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108, 120 (C.D.Cal.1978)*, *aff'd*, *664 F.2d 1348 (9th Cir.1982)*.

Accordingly, defendants are entitled to summary judgment on plaintiff's antitrust claims involving Hickman and Metro for the alleged illegal tying arrangements. *Kypta v. McDonald's Corp., supra.*

III. WHETHER PLAINTIFF HAS ESTABLISHED ANY EVIDENCE OF ANTITRUST INJURY FROM ANY ALLEGED ILLEGAL DIVISION OF TERRITORIES.

In addition to alleging unlawful tying arrangements, plaintiff has alleged that defendant has unlawfully allocated markets. Also, it is alleged that defendant's failure to facilitate expansion within the Illinois territory prevented plaintiff from commercially exploiting the territory which it was granted, thus coercing a forced sale of plaintiff's properties to Waffle House in furtherance of an attempt to monopolize the market. **[**35]** The allegations regarding this attempt to monopolize have previously been decided by this court adversely to plaintiff. Accordingly, the court is of the opinion that none of the alleged foot-dragging and other reputed acts of bad faith relative to the development of the Illinois market are relevant to a decision on the allegations of unlawful territorial allocation.

Plaintiff contends that it was affected in two ways by the territorial allocation policies of Waffle House. First, it was denied the right to enter the Alabama market. *See* Plaintiff's Supplemental Statement of Facts, paras. 10-12. Second, after it was granted a franchise in Illinois, it was denied the right to expand beyond its franchise area. *See id.*, paras. 21, 24, 25, 30.

Plaintiff relies heavily on the fact that officials at Waffle House who had some power over the approval of franchise territories were also owners of franchisees. It is understood that some of these franchisees held a territorial allocation in the State of Alabama. From this, the plaintiff would have the court conclude that the market allocation was horizontal instead of vertical. Generally, horizontal allocations of markets are **[**36]** said to be *per se* violations of the ***antitrust law***, and, therefore, it is **[*720]** unnecessary to make any further showing of their anticompetitive effect.

As the court has noticed previously, there seems to be a genuine issue respecting whether these officials used their power with Waffle House to protect the franchise territories already assigned to their own companies. Under the facts of this case, however, that issue is not material or relevant.

It is said that ***HN16***[] a non-price horizontal restraint of trade such as territorial restrictions between competitors are illegal *per se*, because they have no purpose except the stifling of competition. *United States v. Topco Associates, 405 U.S. 596 [92 S. Ct. 1126, 31 L. Ed. 2d 515]* (1972); *United States v. Sealy, 388 U.S. 350 [87 S. Ct. 1847, 18 L. Ed. 2d 1238]* (1967). On the other hand, territorial restrictions of a "vertical" nature (between the parties at different levels of the market structure) -- such as those which may be contained in franchising agreements -- are analyzed under a rule of reason, because they promote interbrand competition by allowing the franchisor or manufacturer to achieve certain efficiencies **[**37]** in the distribution of his goods and services. *Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 [97 S. Ct. 2549, 53 L. Ed. 2d 568]* (1977). The reasonableness of a particular non-price vertical restraint is judged by whether it produces an anticompetitive effect in interbrand competition in the relevant geographic and product markets and not merely by whether it reduces intrabrand competition. *Carlson Machine Tools, Inc. v. American Tool, Inc., 678 F.2d 1253, 1262 (5th Cir.1982)*.

This distinction is plausible where the allocation facilitates price maintenance in the relevant product market, but it is implausible where the allocation does not act as a bar to entry or competition in the relevant market. As noted previously, whatever the relevant market is here, it is a great deal broader than the Waffle House system and encompasses much, if not all, of the fast food industry. [2] Where the relevant market is so much larger than that portion which may be influenced by certain horizontal competitors, it cannot be seriously contended that whatever restrictions are imposed in fact appreciably stifle competition. Consequently, after further reflection, this court is of **[**38]** the opinion that for the purposes of this case, the territorial allocations of Waffle House should be viewed as though they are vertical and shall be therefore analyzed under the rule of reason.

[39]** A different approach leads to this same point for the beginning of the analysis. Because of the symbiotic relationship between Waffle House and some of its franchisees, and because Waffle House itself operates restaurants, it might be considered that a dual distributorship exists in the case at bar. Dual distributorships exist where the franchisor not only licenses independent franchisees but also operates its own franchises. As the franchisor, the company is vertically related to its franchisees. As a franchisee it is horizontally related. There is an emerging tendency by the courts to view the primary relationship between a dual distributor and an independent franchisee as vertical where the restrictions do not lessen interbrand competition or decrease the availability of goods or services. *See, e.g., Copy-Data Systems, Inc. v. Toshiba America, Inc., 663 F.2d 405 (2d Cir.1981)*; *Krehl v. Baskin-Robbins* ***[*721]*** *Ice Cream Co., 664 F.2d 1348 (9th Cir.1982)*.

Because there is no evidence here that the territorial allocation made by Waffle House even under the circumstances alleged by the plaintiff, has the tendency to reduce interbrand competition, reduce the availability **[**40]** of services within the relevant market area, or artificially maintain prices, a rule of reason analysis is appropriate.

HN17[] Franchisors, like other businessmen generally, have the right to select unilaterally those with whom they deal and to exercise their own discretion in continuing or terminating existing franchisees. *Compare United States v. Colgate, 250 U.S. 300 [39 S. Ct. 465, 63 L. Ed. 992]* (1919). The antitrust laws are designed to protect the consumer interest in competition, *Reiter v. Sonotone Corp., 442 U.S. 330 [99 S. Ct. 2326, 60 L. Ed. 2d 931]* (1979), and courts recognize that giving wide latitude to businesses in choosing methods of distribution and particular distributors promotes competition. *A.H. Cox & Co. v. Star Machinery Co., 653 F.2d 1302 (9th Cir.1981)*. Thus, the threat of a treble damages judgment arises only from those refusals to deal which are part of a plan of anti-competitive conduct involving more than one party. *Brattleboro Auto Sales, Inc. v. Subaru, Inc., 633 F.2d 649 (2d Cir.1980)*; *Hawkins v. Holiday Inns, Inc., 634 F.2d 342 (6th Cir. 1980)*, *cert. denied*, *451 U.S. 987 [101 S. Ct. 2322, 68 L. Ed. 2d 845]* (1981).

HN18[] In a **[**41]** franchisor-franchisee context, the cases uphold the right of a franchisor to refuse to grant a franchisee or to terminate a franchise as long as no anti-competitive motives for or effects of the franchisor's action exists. For example, in *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc., 637 F.2d 1376* (9th Cir.), *cert. denied*, *454 U.S. 831 [102 S. Ct. 128, 70 L. Ed. 2d 109]* (1981), an automobile dealer brought an action against an automobile distributor and another dealer alleging federal antitrust violations as a result of the distributor's rejection of plaintiff's franchise application. The district court granted summary judgment for the distributor. The Ninth Circuit affirmed. On the issue of group boycott or concerted refusal to deal, the court held that because of the distributor's small percentage of the relevant market, the distributor's decision not to appoint an additional dealer cannot be perceived as so plainly anticompetitive so as to utilize a *per se* rule. *Id. at 1388*. As the court cogently stated:

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[2] The process of defining a relevant market is well stated by Professor Areeda:

> A vast number of firms might have some actual or potential effect on a defendant's behavior. Many of them, however, will not have a significant effect and we attempt to exclude them from the "relevant market" for appraising defendant's power. We try to include in the relevant market only those suppliers -- of this same or related product in the same or related geographic area -- whose existence significantly restrains defendant's power. This process of inclusion and exclusion is spoken of as "market definition."

P. Areeda, Antitrust Analysis: Problems, Text, Cases para. 231, at 239-40 (1981).

Here, generally speaking, the relevant market is restaurants similar to Waffle House -- those with similar menus, hours, and service.

"Appellant has simply failed to evince 'significant probative evidence' of a substantially adverse effect on competition." *Id.* Furthermore, **[**42]** the court provided the following interest analysis:

> Businessmen may, within certain limits, decide to deal with whom they wish. Our conclusion, or a plaintiff's, that a defendant exercised poor business judgment, that a defendant treated someone unfairly, or that a potential competitor has been injured does not mean that the antitrust laws have been violated. The cases discussed above indicate that the courts are reluctant to interfere with a company's business decision to distribute its products in a particular fashion. We do not expect businesses to be run in an altruistic fashion, but, particularly when there is vigorous interbrand competition, "the interests of the manufacturer and a consumer with regard to product distribution coincide." 92 Harv.L.Rev. 1160, 1164 (1979). It is the interests of FDI to see that its product is distributed in an efficient fashion. The economic interests of FDI dictate that it seek to improve sales. It is clear that the desire to stimulate sales was a factor in FDI's decision not to appoint an additional dealer. Appellant seems to recognize this, but it continues to attach talismanic significance to the existence of an additional competitor. **[**43]** The antitrust laws are concerned with competition and we must recognize that FDI's decision not to appoint an additional dealer in an effort to expand its small share of the market had the potential to benefit competition. Accordingly we cannot say that the use of a *per se* rule would be justified. There is assuredly no "significant probative evidence" which would indicate that the **[*722]** challenged product had or was likely to have a pernicious effect on competition or lacked any redeeming virtue.

Id. at 1387-88. *See also* *Continental TV v. GTE, 433 U.S. 36, 58 [97 S. Ct. 2549, 2561, 53 L. Ed. 2d 568]* (1977); *Walner v. Baskin-Robbins Ice Cream Co., 514 F. Supp. 1028 (N.D.Tex.1981)* (franchisor's refusal to approve transfers of franchises upheld in absence of evidence of anti-competitive effect).

Indeed, franchising has stimulated the entry of additional competitors into the marketplace because of the numerous advantages that it offers to both the franchisor and franchisee. From the standpoint of the franchisee, franchising offers:

> (i) The likelihood of lower start-up capital;
>
> (ii) Management assistance and technical training provided **[**44]** by the franchisor;
> (iii) The pre-existing good will and consumer acceptance inherent in dealing with a proven product;
> (iv) Economies in purchasing and advertising equivalent to those available to chain store businesses.

2 Von Kalinowski, Antitrust Laws and Trade Regulation, § 6H.01, at 6H-3-4 (1981). From the standpoint of the franchisor, franchising provides the following advantages:

> (1) Minimal capital investment;
> (2) Site selection;
> (3) Dealer selection;
> (4) Quality control;
> (5) Consistent pattern of dealings;
> (6) Pricing policies; and
> (7) Territorial controls.

Id. at 6H-3-4. Considering the relevant market in this case, it can be noticed that the franchising system has worked well in fostering entrance into the marketplace by many different purveyors of fast food. There is no showing here that the territorial allocation has any pernicious effect on competition within the marketplace or that it lacks any virtue. It is, then, not immediately obvious that the fact pattern before the court shows an anticompetitive effect.

Further, the refusal to allow Midwestern to operate in Alabama or elsewhere outside of Illinois does not **[**45]** restrict its right to trade at all in that market. Plaintiff has no protected right to operate under defendants' trademark and utilize defendants' expertise and good will in a market of its own choosing. As early as 1919, the Supreme Court stated:

> The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade in commerce -- in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.

Colgate, 250 U.S. at 307 [39 S. Ct. at 468]. It cannot be said, then, that plaintiff's frustrated wishes to operate a Waffle House restaurant in Alabama constitute a harm protectible under the ***antitrust law*** contained in *15 U.S.C. § 1*.

Further, the court would note that plaintiff **[**46]** cannot seriously contend that those things allegedly done by Waffle House which plaintiff contends prohibited it from expanding within its allocated Illinois territory is the result of any conspiracy among the franchisees controlled by Waffle House personnel and Waffle House. The final outcome of the adventure in Illinois speaks too strongly to the contrary. Waffle House bought out Midwestern. It kept the territory. There is no evidence that a specially favored franchisee profited from Midwestern's allegedly coerced sellout.

IV. ANTITRUST INJURY.

HN19[] In any antitrust case the plaintiff must show antitrust injury of two types. First, he must show an injury to himself causally linked to illegal activities of the **[*723]** defendant. Second, he must show that the defendants' activities have the effect of stifling competition. *Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 [97 S. Ct. 690, 50 L. Ed. 2d 701]* (1977). As just discussed, this court is of the opinion that the territorial allocation policies of Waffle House do not materially affect the competitive environment within the relevant market. Even if a contrary result were reached under either a rule **[**47]** of reason analysis or because the territorial allocation was said to be horizontal and thus a *per se* violation, the court finds that the defendant has not demonstrated an injury to itself proximately caused by the territorial allocations.

In support of its position that it was injured from territorial restrictions, plaintiff submits the following:

> (a) An affidavit from James L. Dent, Jr. which purports to establish that franchise operations will make more money if they are able to benefit from "economies of scale." *See* Plaintiff's Memorandum of Authorities, at 19-20; Affidavit of James L. Dent, Jr., paras. 6-7.
>
> (b) A comparison of profits between Midwestern's operations and those of other franchisees, such as Columbia Foods and Treetop, to establish that the operation of more restaurants suggests that more net profits will be generated. *See* Plaintiff's Memorandum of Authorities, at 16, 20; Statement, para. 35.
>
> (c) A comparison of the profits of plaintiff's two restaurants in Illinois before and after plaintiff ceased to operate them. *See* Plaintiff's Memorandum of Authorities, at 22, 25; Statement, para. 34.

This evidence shows only that Midwestern **[**48]** Waffles could have made more money in the franchise area it was granted if Waffle House had allowed it to establish additional restaurants so that it could benefit from the "economies of scale." The conduct which allegedly caused this injury was the failure of Waffle House to allow Midwestern to expand out of its franchise territory and/or into Alabama. There is no allegation by plaintiff that the territory granted was so restricted that it could not allow economies of scale if developed. For example, the court would notice that within the areas bounded by suburban St. Louis and 42 counties in central Illinois, there were undoubtedly many other locations well suited for the erection of additional restaurants.

Plaintiff must show that it was prepared and ready, willing and able to expand into other territories if it had been allowed. Beyond stating that it asked leave to operate in Alabama and other states, it has shown nothing concerning its ability to finance such expansion or to manage it. On this point alone it fails even to create an issue of fact for a jury. *Hayes v. Solomon, 597 F.2d 958 (5th Cir.1979)*. Further, it makes no effort to project any economic losses from **[**49]** its inability to operate restaurants in Selma or Alabama or Texas or elsewhere, taking into account the competitive environments in those other markets, the geographic dispersion of its operations as it might affect the economies of scale, and its ability to operate any Waffle House on a profitable basis. Nowhere does the court find any analysis of the cost of capital or facilities or projections made taking into account variations in the cost of supplies, food, and labor. The plaintiff contends that it was injured because it was not allowed to enter into trade. It was, in fact, allowed to enter into trade in one market area, and from the evidence adduced, it never made a profit. This court will not assume that plaintiff could have operated Waffle House restaurants in Alabama any more successfully than it operated them in Illinois in the absence of some concrete evidence of that fact in the record.

Accordingly, the court is of the opinion that the plaintiff has failed to demonstrate an economic injury to its business or property, [3] much less injury proximately caused by the territorial allocations of the defendant.

[50]** **[*724]** V. CONCLUSION.

On March 15, 1982, this court made four conclusions: (1) Rex Waldrop does not have standing; (2) defendants are entitled to summary judgment on plaintiff's claim that defendants violated *Section 2* of the Sherman Act by engaging in a monopoly; (3) defendants are entitled to summary judgment as to plaintiff's claims of restraints of trade, other than the alleged horizontal territorial allocation and the alleged illegal ties; and (4) defendants are entitled to summary judgment on plaintiff's state law claims for antitrust damages, unjust enrichment, tortious interference with contract, and unfair competition.

Given the conclusions reached today, defendants' motion for summary judgment is hereby GRANTED.

The Clerk of Court is hereby DIRECTED to enter judgment for the defendants.

End of Document

[3] Section 4 of the Clayton Act *15 U.S.C. § 15* ***HN20***[] conditions a private action on this showing. Even if the practice is a *per se* violation of the law, the plaintiff must show economic injury to itself. *Warriner Hermetics, Inc. v. Copeland Refrigeration, 463 F.2d 1002, 1016 (5th Cir.1972)*. Said another way, plaintiff must show the fact of injury which means that what the defendant did impacted in some way on plaintiff's business. To show injury means that plaintiff must be able to demonstrate that it suffered economic damages which are quantifiable. *McClure v. Undersea Industries, 671 F.2d 1287, 1289 (11th Cir.1982)*. *See also Keener v. Sizzler Family Steak Houses, 597 F.2d 453 (5th Cir.1979)*; *H & B Equipment Co. v. International Harvester Co., 577 F.2d 239 (5th Cir.1978)*; *Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690, 694-95 (5th Cir.1975)*, *cert. denied*, ***424 U.S. 943 [96 S. Ct. 1412, 47 L. Ed. 2d 349]*** (1976); *Pitchford v. Pepi, Inc., 531 F.2d 92, 104-05 (3d Cir.1975)*, *cert. denied*, ***426 U.S. 935 [96 S. Ct. 2649, 49 L. Ed. 2d 387]*** (1976); *Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 20* (5th Cir.), *reh'g en banc denied*, *496 F.2d 878* (5th Cir.), *cert. dismissed*, ***419 U.S. 987 [95 S. Ct. 246, 42 L. Ed. 2d 260]*** (1974).

Copperweld Corp. v. Independence Tube Corp.

Supreme Court of the United States

December 5, 1983, Argued ; June 19, 1984, Decided

No. 82-1260

Reporter

467 U.S. 752 *; 104 S. Ct. 2731 **; 81 L. Ed. 2d 628 ***; 1984 U.S. LEXIS 115 ****; 52 U.S.L.W. 4821; 1984-2 Trade Cas. (CCH) P66,065

COPPERWELD CORP. ET AL. v. INDEPENDENCE TUBE CORP.

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Disposition: 691 F.2d 310, reversed.

Core Terms

conspiracy, Sherman Act, wholly owned subsidiary, subsidiary, integration, affiliation, conspiring, intra-enterprise, Cab, affiliated corporation, anticompetitive, concerted, enterprise, unilateral, cases, acquisition, antitrust, effected, entities, tubing, combinations, coordinated, compete, common ownership, competitor, restrain, unreasonable restraint, antitrust liability, restraint of trade, parent corporation

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 > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN2[] **Monopolies & Monopolization, Actual Monopolization**

The Sherman Act contains a basic distinction between concerted and independent action. The conduct of a single firm is governed by 15 U.S.C.S. § 2 alone and is unlawful only when it threatens actual monopolization. It is not enough that a single firm appears to restrain trade unreasonably, for even a vigorous competitor may leave that impression.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Antitrust & Trade Law, Sherman Act

See 15 U.S.C.S. § 2.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Mergers & Acquisitions Law > Antitrust > Joint Ventures

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

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Vertical Acquisitions

HN4[] Price Fixing & Restraints of Trade, Horizontal Market Allocation

Section 1 of the Sherman Act, 15 U.S.C.S. § 1, reaches unreasonable restraints of trade effected by a contract, combination or conspiracy between separate entities. It does not reach conduct that is "wholly unilateral." Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2. Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused. Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect. Whatever form the inquiry takes, however, it is not necessary to prove that concerted activity threatens monopolization.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Antitrust & Trade Law, Sherman Act

A *15 U.S.C.S. § 1* agreement may be found when the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

Antitrust & Trade Law > Sherman Act > General Overview

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

A parent corporation and its wholly owned subsidiary are incapable of conspiring with each other for purposes of *§ 1* of the Sherman Act. To the extent that prior decisions of the United States Supreme Court are to the contrary, they are disapproved and overruled.

Lawyers' Edition Display

Decision

Parent corporation and its wholly owned subsidiary held incapable of conspiring with each other for purposes of 1 of Sherman Act (*15 USCS 1*).

Summary

A steel tubing company brought an antitrust suit in the United States District Court for the Northern District of Illinois against a competing corporation, that corporation's wholly owned subsidiary, and a supplier of tubing mills. The jury found that the parent corporation and its wholly owned subsidiary had conspired to violate 1 of the Sherman Act (*15 USCS 1*), but that the supplier was not part of the conspiracy. The jury also found that the parent company, but not the subsidiary, had interfered with the tubing company's contractual relationship with the supplier, that the subsidiary, but not the parent, had interfered with the tubing company's contractual relationship with a potential customer and had slandered the tubing company, and that the supplier had breached its contract to supply a tubing mill. The United States Court of Appeals for the Seventh Circuit affirmed (*691 F2d 310*).

On certiorari, the United States Supreme Court reversed. In an opinion by Burger, Ch. J., joined by Blackmun, Powell, Rehnquist, and O'Connor, JJ., it was held that a parent corporation and its wholly owned subsidiary are legally incapable of conspiring with each other under 1 of the Sherman Act. The court said that the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of 1, and that 1 is limited to concerted conduct and does not prohibit conduct that is wholly unilateral.

Stevens, J., joined by Brennan and Marshall, JJ., dissented, expressing the view that a parent corporation and a wholly owned subsidiary corporation are capable of conspiring in violation of 1 and that the rule announced in the majority opinion was inconsistent with what the Supreme Court has held on at least seven previous occasions.

White, J., did not participate.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34 > parent and subsidiary corporation -- conspiracy -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]

A parent corporation and its wholly owned subsidiary are legally incapable of conspiring with each other under 1 of the Sherman Act (*15 USCS 1*); the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of 1. (Stevens, Brennan, and Marshall, JJ., dissented from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34 > pattern of acquisitions -- illegal combination -- > Headnote:
LEdHN[2][] [2]

A pattern of acquisitions may itself create a combination illegal under 1 of the Sherman Act (*15 USCS 1*), especially when an original anticompetitive purpose is evident from the affiliated corporations' subsequent conduct.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > combination between subsidiaries and wholesalers -- resale price -- > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]

A combination involving a maximum resale pricing scheme between subsidiaries and wholesalers can violate 1 of the Sherman Act (*15 USCS 1*).

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > conduct of single firm -- > Headnote:
LEdHN[4][] [4]

Under the Sherman Act, the conduct of a single firm is governed by 2 of the Act (*15 USCS 2*) alone and is unlawful only when it threatens actual monopolization; it is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > concerted and unilateral conduct -- > Headnote:
LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]

By making a conspiracy to monopolize unlawful, 2 of the Sherman Act (*15 USCS 2*) reaches both concerted and unilateral behavior, but purely unilateral conduct is illegal only under 2 and not under 1 of the Act (*15 USCS 1*); monopolization without conspiracy is unlawful under 2, but restraint of trade without a conspiracy or combination is not unlawful under 1.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §6 > purpose of antitrust laws -- > Headnote:
LEdHN[6A][] [6A]***LEdHN[6B]***[] [6B]

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

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > separate entities -- unilateral conduct -- > Headnote:
LEdHN[7][] [7]

Section 1 of the Sherman Act (*15 USCS 1*) reaches unreasonable restraints of trade effected by a contract, combination, or conspiracy between separate entities; it does not reach conduct that is wholly unilateral.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > horizontal price fixing -- market allocation -- > Headnote:
LEdHN[8][] [8]

Horizontal price-fixing agreements and market allocation agreements are illegal per se under 1 of the Sherman Act (*15 USCS 1*) without inquiry into the harm they have actually caused.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > mergers -- joint ventures -- vertical agreements -- > Headnote:
LEdHN[9][] [9]

For purposes of 1 of the Sherman Act (*15 USCS 1*), mergers, joint ventures, and various vertical agreements are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > concerted activity -- > Headnote:
LEdHN[10][] [10]

It is not necessary to prove that concerted activity threatens monopolization in order for there to be a violation of 1 of the Sherman Act (*15 USCS 1*).

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34 > conspiracy -- officers or employees of same firm -- > Headnote:
LEdHN[11][] [11]

Officers or employees of the same firm do not provide the plurality of actors imperative for a conspiracy under 1 of the Sherman Act (*15 USCS 1*); an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that 1 was designed to police.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34 > conspiracy -- corporate officers -- > Headnote:
LEdHN[12A][] [12A]***LEdHN[12B]***[] [12B]***LEdHN[12C]***[] [12C]***LEdHN[12D]***[] [12D]

Corporations are incapable of conspiring with their own officers or employees for purposes of 1 of the Sherman Act (*15 USCS 1*).

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > activities of single firm -- > Headnote:
LEdHN[13A][] [13A]***LEdHN[13B]***[] [13B]

Section 1 of the Sherman Act (*15 USCS 1*) excludes from unlawful combinations or conspiracies the activities of a single firm.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §34 > conduct of corporation and unincorporated division -- > Headnote:
LEdHN[14][] [14]

Section 1 of the Sherman Act (*15 USCS 1*) is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions; the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §10 > conspiracy -- unity of purpose -- > Headnote:
LEdHN[15][] [15]

An agreement violating 1 of the Sherman Act (*15 USCS 1*) may be found when the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > single firm -- anticompetitive conduct -- > Headnote:
LEdHN[16][] [16]

The Sherman Act does not prohibit a single firm's anticompetitive conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to liability under 1 of the Act (*15 USCS 1*).

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > Sherman Act -- concerted conduct -- > Headnote:
LEdHN[17][] [17]

Section 1 of the Sherman Act (*15 USCS 1*) is limited to concerted conduct.

Syllabus

Petitioner Copperweld Corp. purchased petitioner Regal Tube Co., a manufacturer of steel tubing, from Lear Siegler, Inc., which had operated Regal as an unincorporated division, and which under the sale agreement was bound not to compete with Regal for five years. Copperweld then transferred Regal's assets to a newly formed, wholly owned subsidiary. Shortly before Copperweld acquired Regal, David Grohne, who previously had been an officer of Regal, became an officer of Lear Siegler, and, while continuing to work for Lear Siegler, formed respondent corporation to compete with Regal. Respondent then gave Yoder Co. a purchase order for a tubing mill, but Yoder voided the order when it received a letter from Copperweld warning that Copperweld would be greatly **[****2]** concerned if Grohne contemplated competing with Regal and promising to take the necessary steps to protect Copperweld's rights under the noncompetition agreement with Lear Siegler. Respondent then arranged to have a mill supplied by another company. Thereafter, respondent filed an action in Federal District Court against petitioners and Yoder. The jury found, *inter alia*, that petitioners had conspired to violate *§ 1* of the Sherman Act but that Yoder was not part of the conspiracy, and awarded treble damages against petitioners. The Court of Appeals affirmed. Noting that the exoneration of Yoder from antitrust liability left a parent corporation and its wholly owned subsidiary as the only parties to the *§ 1* conspiracy, the court questioned the wisdom of subjecting an "intra-enterprise" conspiracy to antitrust liability, but held that such liability was appropriate "when there is enough separation between the two entities to make treating them as two independent actors sensible," and that there was sufficient evidence for the jury to conclude that Regal was more like a separate corporate entity than a mere service arm of the parent.

Held: Petitioner Copperweld and its **[****3]** wholly owned subsidiary, petitioner Regal, are incapable of conspiring with each other for purposes of *§ 1* of the Sherman Act. Pp. 759-777.

(a) While this Court has previously seemed to acquiesce in the "intra-enterprise conspiracy" doctrine, which provides that *§ 1* liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership, the Court has never explored or analyzed in detail the justifications for such a rule. Pp. 759-766.

(b) *Section 1* of the Sherman Act, in contrast to *§ 2*, reaches unreasonable restraints of trade effected by a "contract, combination . . . or conspiracy" between *separate* entities, and does not reach conduct that is "wholly unilateral." Pp. 767-769.

(c) The coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of *§ 1* of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate, and their general corporate objectives are guided or determined not by two separate corporate consciousnesses, but one. With or without a formal "agreement," the subsidiary acts for the parent's **[****4]** benefit. If the parent and subsidiary "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for *§ 1* scrutiny. In reality, the parent and subsidiary *always* have a "unity of purpose or a common design." The "intra-enterprise conspiracy" doctrine relies on artificial distinctions, looking to the form of an enterprise's structure and ignoring the reality. Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary. Here, nothing in the record indicates any meaningful difference between Regal's operations as an unincorporated division of Lear Siegler and its later operations as a wholly owned subsidiary of Copperweld. Pp. 771-774.

(d) The appropriate inquiry in this case is not whether the coordinated conduct of a parent and its wholly owned subsidiary may ever have anticompetitive effects or whether the term "conspiracy" will bear a literal construction that includes a parent and its subsidiaries, but rather whether the logic underlying Congress' decision to exempt unilateral conduct from scrutiny **[****5]** under *§ 1* of the Sherman Act similarly excludes the conduct of a parent and subsidiary. It can only be concluded that the coordinated behavior of a parent and subsidiary falls outside the reach of *§ 1*. Any anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an "intra-enterprise conspiracy" doctrine. A corporation's initial acquisition of control is always subject to scrutiny under *§ 1* of the Sherman Act and *§ 7* of the Clayton Act, and thereafter the enterprise is subject to *§ 2* of the Sherman Act and § 5 of the Federal Trade Commission Act. Pp. 774-777.

Counsel: Erwin N. Griswold argued the cause for petitioners. With him on the briefs were William R. Jentes, Sidney N. Herman, Robert E. Shapiro, and Donald I. Baker.

Deputy Solicitor General Wallace argued the cause for the United States as amicus curiae urging reversal. With him on the brief were Solicitor General Lee, Assistant Attorney General Baxter, Deputy Assistant Attorney General Collins, Carolyn F. Corwin, Barry Grossman, and Nancy C. Garrison.

Victor E. Grimm argued the cause for respondent. With him on the brief **[****6]** were John R. Myers and Scott M. Mendel. [*]

[**7]**

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[*] J. Randolf Wilson, Russell H. Carpenter, Jr., Stephen A. Bokat, Cynthia Wicker, William E. Blasier, and Quentin Riegel filed a brief for the Chamber of Commerce of the United States et al. as amici curiae urging reversal.

A brief of amici curiae urging affirmance was filed for the State of Alabama et al. by Robert K. Corbin, Attorney General of Arizona, and Richard A. Alcorn and Charles L. Eger, Assistant Attorneys General; Charles A. Graddick, Attorney General of Alabama, and Richard Owen, Assistant Attorney General; John Steven Clark, Attorney General of Arkansas, and Jeffrey A. Bell, Assistant Attorney General; Duane Woodard, Attorney General of Colorado, and Thomas P. McMahon, Assistant Attorney General; Neil F. Hartigan, Attorney General of Illinois, and Robert E. Davy, Assistant Attorney General; Thomas J. Miller, Attorney General of Iowa, and John R. Perkins, Assistant Attorney General; Robert T. Stephan, Attorney General of Kansas, and Wayne E. Hundley, Deputy Attorney General; Steven L. Beshear, Attorney General of Kentucky, and James M. Ringo, Assistant Attorney General; Hubert H. Humphrey III, Attorney General of Minnesota, and Stephen P. Kilgriff, Assistant Attorney General; Bill Allain, Attorney General of Mississippi, and Robert Sanders, Special Assistant Attorney General; Mike Greely, Attorney General of Montana, and Joe R. Roberts, Assistant Attorney General; Paul L. Douglas, Attorney General of Nebraska, and Dale A. Comer, Asssistant Attorney General; Robert O. Wefald, Attorney General of North Dakota, and Alan C. Hoberg, Assistant Attorney General; Michael C. Turpen, Attorney General of Oklahoma, and James B. Franks, Assistant Attorney General; Dave Frohnmayer, Attorney General of Oregon; John J. Easton, Jr., Attorney General of Vermont, and Glenn R. Jarrett, Assistant Attorney General; Ken Eikenberry, Attorney General of Washington, John R. Ellis, Deputy Attorney General, and Jon P. Ferguson, Assistant Attorney General; Bronson C. La Follette, Attorney General of Wisconsin, and Michael L. Zaleski, Assistant Attorney General; Joseph I. Lieberman, Attorney General of Connecticut, and Robert M. Langer, Assistant Attorney General; Charles M. Oberly, Attorney General of Delaware, and Vincent M. Amberly, Deputy Attorney General; James E. Tierney, Attorney General of Maine, and Stephen L. Wessler, Senior Assistant Attorney General; Stephen H. Sachs, Attorney General of Maryland, and Charles O. Monk II, Assistant Attorney General; Frank J. Kelley, Attorney General of Michigan, and Edwin M. Bladen, Assistant Attorney General; Paul Bardacke, Attorney General of New Mexico; Rufus L. Edmisten, Attorney General of North Carolina, and H. A. Cole, Jr., Special Deputy Attorney General; Dennis J. Roberts II, Attorney General of Rhode Island, and Faith A. LaSalle, Special Assistant Attorney General; Mark V. Meierhenry, Attorney General of South Dakota, and Dennis R. Holmes, Deputy Attorney General; William M. Leech, Jr., Attorney General of Tennessee, and William J. Haynes, Jr., Deputy Attorney General; David L. Wilkinson, Attorney General of Utah, Stephen G. Schwendiman, Chief, Assistant Attorney General, and Suzanne M. Dallimore, Assistant Attorney General; A. G. McClintock, Attorney General of Wyoming, and Gay Vanderpoel, Senior Assistant Attorney General; Inez Smith Reid, Acting Corporation Council for the District of Columbia, and Francis S. Smith, Assistant Corporation Council.

Briefs of amici curiae were filed for the Canadian Manufacturers Association et al. by John DeQ. Briggs III, Scott E. Flick, and Jan Schneider; and for Kaiser Aluminum & Chemical Corporation by Milton Handler and John A. Moore.

Judges: BURGER, C. J., delivered the opinion of the Court, in which BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, post, p. 778. WHITE, J., took no part in the consideration or decision of the case.

Opinion by: BURGER

Opinion

[*755] **[***633]** **[**2733]** CHIEF JUSTICE **BURGER** delivered the opinion of the Court.

LEdHN[1A][] [1A]We granted certiorari to determine whether a parent corporation and its wholly owned subsidiary are legally capable of **[**2734]** conspiring with each other under *§ 1* of the Sherman Act.

I

A

The predecessor to petitioner Regal Tube Co. was established in Chicago in 1955 to manufacture structural steel **[*756]** tubing used in heavy equipment, cargo vehicles, and construction. From 1955 to 1968 it remained a wholly owned subsidiary of C. E. Robinson Co. In 1968 Lear Siegler, Inc., purchased Regal Tube Co. and operated it as an unincorporated division. David Grohne, who had previously served as vice president and general manager of Regal, became president of the division after the acquisition.

[**8]** In 1972 petitioner Copperweld Corp. purchased the Regal division **[***634]** from Lear Siegler; the sale agreement bound Lear Siegler and its subsidiaries not to compete with Regal in the United States for five years. Copperweld then transferred Regal's assets to a newly formed, wholly owned Pennsylvania corporation, petitioner Regal Tube Co. The new subsidiary continued to conduct its manufacturing operations in Chicago but shared Copperweld's corporate headquarters in Pittsburgh.

Shortly before Copperweld acquired Regal, David Grohne accepted a job as a corporate officer of Lear Siegler. After the acquisition, while continuing to work for Lear Siegler, Grohne set out to establish his own steel tubing business to compete in the same market as Regal. In May 1972 he formed respondent Independence Tube Corp., which soon secured an offer from the Yoder Co. to supply a tubing mill. In December 1972 respondent gave Yoder a purchase order to have a mill ready by the end of December 1973.

When executives at Regal and Copperweld learned of Grohne's plans, they initially hoped that Lear Siegler's non-competition agreement would thwart the new competitor. Although their lawyer advised **[****9]** them that Grohne was not bound by the agreement, he did suggest that petitioners might obtain an injunction against Grohne's activities if he made use of any technical information or trade secrets belonging to Regal. The legal opinion was given to Regal and Copperweld along with a letter to be sent to anyone with whom Grohne attempted to deal. The letter warned that Copperweld would be "greatly concerned if [Grohne] contemplates **[*757]** entering the structural tube market . . . in competition with Regal Tube" and promised to take "any and all steps which are necessary to protect our rights under the terms of our purchase agreement and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler." Petitioners later asserted that the letter was intended only to prevent third parties from developing reliance interests that might later make a court reluctant to enjoin Grohne's operations.

When Yoder accepted respondent's order for a tubing mill on February 19, 1973, Copperweld sent Yoder one of these letters; two days later Yoder voided its acceptance. After respondent's efforts to resurrect the deal failed, respondent arranged to have a mill supplied by **[****10]** another company, which performed its agreement even though it too received a warning letter from Copperweld. Respondent began operations on September 13, 1974, nine months later than it could have if Yoder had supplied the mill when originally agreed.

Although the letter to Yoder was petitioners' most successful effort to discourage those contemplating doing business with respondent, it was not their only one. Copperweld repeatedly contacted banks that were considering financing respondent's operations. One or both petitioners also approached real estate firms that were considering providing plant space to respondent and contacted prospective suppliers and customers of the new company.

B

In 1976 respondent filed this action in the District Court against **[***635]** petitioners and Yoder. [1] The jury found that **[*758]** Copperweld **[**2735]** and Regal had conspired to violate *§ 1* of the Sherman Act, 26 Stat. 209, as amended, *15 U. S. C. § 1*, but that Yoder was not part of the conspiracy. It also found that Copperweld, but not Regal, had interfered with respondent's contractual relationship with Yoder; that Regal, but not Copperweld, had interfered with **[****11]** respondent's contractual relationship with a potential customer of respondent, Deere Plow & Planter Works, and had slandered respondent to Deere; and that Yoder had breached its contract to supply a tubing mill.

[**12]** At a separate damages phase, the judge instructed the jury that the damages for the antitrust violation and for the inducement of the Yoder contract breach should be identical and not double counted. The jury then awarded $ 2,499,009 against petitioners on the antitrust claim, which was trebled to $ 7,497,027. It awarded $ 15,000 against Regal alone on the contractual interference and slander counts pertaining to Deere. The court also awarded attorney's fees and costs after denying petitioners' motions for judgment n.o.v. and for a new trial.

C

The United States Court of Appeals for the Seventh Circuit affirmed. *691 F.2d 310 (1982)*. It noted that the exoneration of Yoder from antitrust liability left a parent corporation and its wholly owned subsidiary as the only parties to the *§ 1* conspiracy. The court questioned the wisdom of subjecting an "intra-enterprise" conspiracy to antitrust liability, when the same conduct by a corporation and an unincorporated **[*759]** division would escape liability for lack of the requisite two legal persons. However, relying on its decision in *Photovest Corp*. v. *Fotomat Corp., 606 F.2d 704 (1979)*, cert. **[****13]** denied, *445 U.S. 917 (1980)*, the Court of Appeals held that liability was appropriate "when there is enough separation between the two entities to make treating them as two independent actors sensible." *691 F.2d, at 318*. It held that the jury instructions took account of the proper factors for determining how much separation Copperweld and Regal in fact maintained in the conduct of their businesses. [2] It also held that there **[***636]** was sufficient evidence for the jury to conclude that Regal was more like a separate corporate entity than a mere service arm of the parent.

[**14]** We granted certiorari to reexamine the intra-enterprise conspiracy doctrine, *462 U.S. 1131 (1983)*, and we reverse.

II

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[1] The chairman of the board and chief executive officer of both Copperweld and Regal, Phillip H. Smith, was also named as a defendant. In addition, respondents originally charged petitioners and Smith with an attempt to monopolize the market for structural steel tubing in violation of *§ 2* of the Sherman Act, 26 Stat. 209, as amended, *15 U. S. C. § 2*. Before trial respondent dismissed Smith as a defendant and dismissed its *§ 2* monopolization count.

Petitioners counterclaimed on the ground that respondent and Grohne had used proprietary information belonging to Regal, had competed unfairly by hiring away key Regal personnel, and had interfered with prospective business relationships by filing the lawsuit on the eve of a large Copperweld debenture offering. At the close of the evidence, the court directed a verdict against petitioners on their counterclaims. The disposition of these claims is not at issue before this Court.

[2] The jury was instructed to consider many different factors: for instance, whether Copperweld and Regal had separate management staffs, separate corporate officers, separate clients, separate records and bank accounts, separate corporate offices, autonomy in setting policy, and so on. The jury also was instructed to consider "any other facts that you find are relevant to a determination of whether or not Copperweld and Regal are separate and distinct companies." App. to Pet. for Cert. B-9.

Review of this case calls directly into question whether the coordinated acts of a parent and its wholly owned subsidiary can, in the legal sense contemplated by *§ 1* of the Sherman Act, constitute a combination or conspiracy. [3] The so-called "intra-enterprise **[**2736]** conspiracy" doctrine provides that *§ 1* liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership. The doctrine derives from declarations in several of this Court's opinions.

[**15] [*760]** In no case has the Court considered the merits of the intra-enterprise conspiracy doctrine in depth. Indeed, the concept arose from a far narrower rule. Although the Court has expressed approval of the doctrine on a number of occasions, a finding of intra-enterprise conspiracy was in all but perhaps one instance unnecessary to the result.

The problem began with *United States v. Yellow Cab Co., 332 U.S. 218 (1947)*. The controlling shareholder of the Checker Cab Manufacturing Corp., Morris Markin, also controlled numerous companies operating taxicabs in four cities. With few exceptions, the operating companies had once been independent and had come under Markin's control by acquisition or merger. The complaint alleged conspiracies under *§§ 1* and *2* of the Sherman Act among Markin, Checker, and five corporations in the operating system. The Court stated that even restraints in a vertically integrated enterprise were not "necessarily" outside of the Sherman Act, observing that an unreasonable restraint

"may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among **[****16]** *those who are otherwise independent*. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. *The corporate interrelationships of the conspirators, in other words, are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form*. See *Appalachian Coals, Inc*. v. *United States, 288 U.S. 344, 360-361, 376-377*.

"And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act. The complaint charges that the restraint of interstate trade was not only **[***637]** effected by the combination of the appellees but was the primary object **[*761]** of the combination. The theory of the complaint . . . is that 'dominating power' over the cab operating companies 'was not obtained by normal expansion . . . but by deliberate, calculated purchase for control.'" *Id., at 227-228* (emphasis added) (quoting *United States v. Reading Co., 253 U.S. 26, 57 (1920))*.

LEdHN[2][] [2] **[****17]** It is the underscored language that later breathed life into the intra-enterprise conspiracy doctrine. The passage as a whole, however, more accurately stands for a quite different proposition. It has long been clear that a pattern of acquisitions may itself create a combination illegal under *§ 1*, especially when an original anticompetitive purpose is evident from the affiliated corporations' subsequent conduct. [4] **[****18]** The

[3] *Section 1* of the Sherman Act provides in pertinent part:

HN1[] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. 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." 26 Stat. 209, as amended, *15 U. S. C. § 1*.

[4] Under the arrangements condemned in *Northern Securities Co*. v. *United States, 193 U.S. 197, 354 (1904)* (plurality opinion), "all the stock [a railroad holding company] held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose." In *Standard Oil Co*. v. *United States, 221 U.S. 1 (1911)*, and *United States v. American Tobacco Co., 221 U.S. 106 (1911)*, the trust or holding company device brought together previously independent firms to lessen competition and achieve monopoly power. Although the Court in the latter case suggested that the contracts between affiliated companies, and not merely the original combination, could be

Yellow Cab passage is most fairly read in light of this settled rule. In *Yellow Cab*, the affiliation of the defendants was irrelevant because the original acquisitions were *themselves* illegal. [5] An **[**2737]** affiliation "flowing from an illegal conspiracy" would not avert sanctions. Common ownership and control were irrelevant because restraint of trade was "the primary object of the combination," which was created in a "'deliberate, **[*762]** calculated'" manner. Other language in the opinion is to the same effect. [6]

[**19]** The **[***638]** Court's opinion relies on *Appalachian Coals, Inc*. v. *United States, 288 U.S. 344 (1933)*; however, examination of that case reveals that it gives very little support for the broad doctrine *Yellow Cab* has been thought to announce. On the contrary, the language of Chief Justice Hughes speaking for the Court in *Appalachian Coals* supports a contrary conclusion. After observing that "[the] restrictions the Act imposes are not mechanical or artificial," *288 U.S., at 360*, he went on to state:

[*763] "The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal -- that one is a legitimate enterprise and the other is not -- makes but an artificial distinction. The Anti-Trust Act aims at substance." *Id., at 377*. [7]

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viewed as the conspiracy, *id., at 184*, the Court left no doubt that "the combination in and of itself" was a restraint of trade and a monopolization, *id., at 187*.

[5] Contrary to the dissent's suggestion, *post*, at 779, 788, n. 18, our point is not that *Yellow Cab* found only the initial acquisition illegal; our point is that the illegality of the initial acquisition was a predicate for its holding that any postacquisition conduct violated the Act.

[6] When discussing the fact that some of the affiliated Chicago operating companies did not compete to obtain exclusive transportation contracts held by another of the affiliated companies, the Court stated:

"[The] fact that the competition restrained is that between affiliated corporations cannot serve to negative the statutory violation where, as here, *the affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete*." *332 U.S., at 229* (emphasis added).

The passage quoted in text is soon followed by a cite to *United States v. Crescent Amusement Co., 323 U.S. 173, 189 (1944)*. *Crescent Amusement* found violations of *§§ 1* and *2* by film exhibitors affiliated (in most cases) by 50 percent ownership. The exhibitors used the monopoly power they possessed in certain towns to force film distributors to give them favorable terms in other towns. The Court found it unnecessary to view the distributors as part of the conspiracy, *id., at 183*, so the Court plainly viewed the affiliated entities themselves as the conspirators. The *Crescent Amusement* Court, however, in affirming an order of divestiture, noted that such a remedy was appropriate when "creation of the combination is itself the violation." *Id., at 189*. This suggests that both *Crescent Amusement* and *Yellow Cab*, which cited the very page on which this passage appears, stand for a narrow rule based on the original illegality of the affiliation.

The dissent misconstrues a later passage in *Crescent Amusement* stating that divestiture need not be limited to those affiliates whose "acquisition was part of the fruits of the conspiracy," *323 U.S., at 189*. See *post*, at 780-781. This meant only that divestiture could apply to affiliates other than those who were driven out of business by the practices of the original conspirators and who were then acquired illegally to increase the combination's monopoly power. See *323 U.S., at 181*. It did not mean that affiliates acquired for lawful purposes were subject to divestiture.

[7] *Appalachian Coals* does state that the key question is whether there is an unreasonable restraint of trade or an attempt to monopolize. "If there is, the combination cannot escape because it has chosen corporate form; and, if there is not, it is not to be condemned because of the absence of corporate integration." *288 U.S., at 377*. *Appalachian Coals*, however, validated a cooperative selling arrangement among independent entities. The statement that intracorporate relationships would be subject to liability under *§ 1* is thus dictum. The statement may also envision merely the limited rule in *Yellow Cab* pertaining to acquisitions that are themselves anticompetitive.

As we shall see, *infra*, at 771-774, it is the intra-enterprise conspiracy doctrine itself that "makes but an artificial distinction" at the expense of substance.

[**20]** The ambiguity of the *Yellow Cab* holding yielded the one case giving support to the intra-enterprise conspiracy doctrine. [8] In *Kiefer-Stewart Co*. v. *Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951)*, the Court held that two wholly owned subsidiaries of a liquor distiller **[**2738]** were guilty under *§ 1* of the Sherman Act for jointly refusing to supply a wholesaler who declined to abide by a maximum resale pricing scheme. The Court offhandedly dismissed the defendants' argument **[*764]** that "their status as 'mere instrumentalities of a single manufacturing-merchandizing unit' makes **[***639]** it impossible for them to have conspired in a manner forbidden by the Sherman Act." *Id., at 215*. With only a citation to *Yellow Cab* and no further analysis, the Court stated that the

"suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws"

and stated that this rule was "especially applicable" when defendants "hold themselves out as competitors." *340 U.S., at 215*.

[**21]** ***LEdHN[3A]***[] [3A]Unlike the *Yellow Cab* passage, this language does not pertain to corporations whose initial affiliation was itself unlawful. In straying beyond *Yellow Cab*, the *Kiefer-Stewart* Court failed to confront the anomalies an intra-enterprise doctrine entails. It is relevant nonetheless that, were the case decided today, the same result probably could be justified on the ground that the subsidiaries conspired with wholesalers other than the plaintiff. [9] An intra-enterprise conspiracy doctrine thus would no longer be necessary to a finding of liability on the facts of *Kiefer-Stewart*.

[**22]** Later cases invoking the intra-enterprise conspiracy doctrine do little more than cite *Yellow Cab* or *Kiefer-Stewart*, and in none of the cases was the doctrine necessary to the result reached. *Timken Roller Bearing Co*. v. *United States, 341 U.S. 593 (1951)*, involved restrictive horizontal agreements **[*765]** between an American corporation and two foreign corporations in which it owned 30 and 50 percent interests respectively. The *Timken* Court cited *Kiefer-Stewart* to show that "[the] fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws." *341 U.S., at 598*. But the relevance of this statement is unclear. The American defendant in *Timken* did not own a majority interest in either of the foreign corporate conspirators and, as the District Court found, it did not control them. [10] **[****23]** Moreover, as in *Yellow*

[8] In two cases decided soon after *Yellow Cab* on facts similar to *Crescent Amusement*, see n. 6, *supra*, affiliated film exhibitors were found to have conspired in violation of *§ 1*. *Schine Chain Theatres, Inc*. v. *United States, 334 U.S. 110 (1948)*; *United States v. Griffith, 334 U.S. 100 (1948)*. *Griffith* simply assumed that the companies were capable of conspiring with each other; *Schine* cited *Yellow Cab* and *Crescent Amusement* for the proposition, *334 U.S., at 116*. In both cases, however, an intra-enterprise conspiracy holding was unnecessary not only because the Court found a *§ 2* violation, but also because the affiliated exhibitors had conspired with independent film distributors. See *ibid.; Griffith, supra, at 103, n. 6, 109*.

[9] ***LEdHN[3B]***[] [3B]

Although the plaintiff apparently never acquiesced in the resale price maintenance scheme, *Kiefer-Stewart Co*. v. *Joseph E. Seagram & Sons, Inc., 182 F.2d 228, 231 (CA7 1950)*, rev'd, *340 U.S. 211 (1951)*, one of the subsidiaries did gain the compliance of other wholesalers after once terminating them for refusing to abide by the pricing scheme. See *182 F.2d, at 231*; *340 U.S., at 213*. A theory of combination between the subsidiaries and the wholesalers could now support *§ 1* relief, whether or not it could have when *Kiefer-Stewart* was decided. See *Albrecht v. Herald Co., 390 U.S. 145, 149-150, and n. 6 (1968)*; *United States v. Parke, Davis & Co., 362 U.S. 29 (1960)*.

Cab, there was evidence that the stock acquisitions were themselves designed to effectuate restrictive practices. [11] The Court's reliance on the intra-enterprise conspiracy **[***640]** doctrine was in no way necessary to the result.

[2739]** The same is true of *Perma Life Mufflers, Inc*. v. *International Parts Corp., 392 U.S. 134 (1968)*, which involved a conspiracy among a parent corporation and three subsidiaries to impose **[****24]** various illegal restrictions on plaintiff franchisees. The Court did suggest that, because the defendants

"availed themselves of the privilege of doing business through separate corporations, the fact of common ownership **[*766]** could not save them from any of the obligations that the law imposes on separate entities [citing *Yellow Cab* and *Timken*]." *Id., at 141-142*.

But the Court noted immediately thereafter that "[in] any event" each plaintiff could "clearly" charge a combination between itself and the defendants or between the defendants and other franchise dealers. *Ibid*. Thus, for the same reason that a finding of liability in *Kiefer-Stewart* could today be justified without reference to the intra-enterprise conspiracy doctrine, see n. 9, *supra*, the doctrine was at most only an alternative holding in *Perma Life Mufflers*.

In short, while this Court has previously seemed to acquiesce in the intra-enterprise conspiracy doctrine, it has never explored or analyzed in detail the justifications for such a rule; the doctrine has played only a relatively minor role in the Court's Sherman Act holdings.

III

Petitioners, joined **[****25]** by the United States as *amicus curiae*, urge us to repudiate the intra-enterprise conspiracy doctrine. [12] The central criticism is that the doctrine gives undue significance to the fact that a subsidiary is separately incorporated and thereby treats as the concerted activity of two **[*767]** entities what is really unilateral behavior flowing from decisions of a single enterprise.

[**26]** We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of *§ 1* of the Sherman Act. We do not consider under what

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[10] See *United States v. Timken Roller Bearing Co., 83 F.Supp. 284, 311-312 (ND Ohio 1949)*, aff'd as modified, *341 U.S. 593 (1951)*. The agreement of an individual named Dewar, who owned 24 and 50 percent of the foreign corporations respectively, was apparently required for the American defendant to have its way.

[11] For almost 20 years before they became affiliated by stock ownership, two of the corporations had been party to the sort of restrictive agreements the *Timken* Court condemned. Three Justices upholding antitrust liability were of the view that Timken's "interests in the [foreign] companies were obtained as part of a plan to promote the illegal trade restraints" and that the "intercorporate relationship" was "the core of the conspiracy." *Id., at 600-601*. Because two Justices found no antitrust violation at all, see *id., at 605* (Frankfurter, J., dissenting); *id., at 606* (Jackson, J., dissenting), and two Justices did not take part, apparently only Chief Justice Vinson and Justice Reed were prepared to hold that there was a violation even if the initial acquisition itself was not illegal. See *id., at 601-602* (Reed, J., joined by Vinson, C. J., concurring).

[12] The doctrine has long been criticized. See, *e. g*., Areeda, Intra-enterprise Conspiracy in Decline, *97 Harv. L. Rev. 451 (1983)*; Handler & Smart, The Present Status of the Intracorporate Conspiracy Doctrine, 3 Cardozo L. Rev. 23 (1981); Kempf, Bathtub Conspiracies: Has *Seagram* Distilled a More Potent Brew?, 24 Bus. Law. 173 (1968); McQuade, Conspiracy, Multicorporate Enterprises, and *Section 1* of the Sherman Act, 41 Va. L. Rev. 183 (1955); Rahl, Conspiracy and the Anti-Trust Laws, 44 Ill. L. Rev. 743 (1950); Sprunk, Intra-Enterprise Conspiracy, 9 ABA Antitrust Section Rep. 20 (1956); Stengel, Intra-Enterprise Conspiracy Under *Section 1* of the Sherman Act, 35 Miss. L. J. 5 (1963); Willis & Pitofsky, Antitrust Consequences of Using Corporate Subsidiaries, 43 N. Y. U. L. Rev. 20 (1968); Note, "Conspiring Entities" Under *Section 1* of the Sherman Act, 95 Harv. L. Rev. 661 (1982); Note, Intra-Enterprise Conspiracy Under *Section 1* of the Sherman Act: A Suggested Standard, 75 Mich. L. Rev. 717 (1977).

circumstances, if any, a **[***641]** parent may be liable for conspiring with an affiliated corporation it does not completely own.

A

LEdHN[4][] [4] ***LEdHN[5A]***[] [5A] ***LEdHN[6A]***[] [6A]The ***HN2***[] Sherman Act contains a "basic distinction between concerted and independent action." *Monsanto Co*. v. *Spray-Rite Service Corp., 465 U.S. 752, 761 (1984)*. The conduct of a single firm is governed by *§ 2* alone and is unlawful only when it threatens actual monopolization. [13] **[****28]** It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may **[**2740]** capture unsatisfied customers from an inefficient **[****27]** rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. [14] In part because it is sometimes difficult to **[*768]** distinguish robust competition from conduct with long-run anticompetitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.

LEdHN[7][] [7] ***LEdHN[8]***[] [8] ***LEdHN[9]***[] [9] ***LEdHN[10]***[] [10]*Section 1* of the Sherman **[****29]** Act, in contrast, ***HN4***[] reaches unreasonable restraints of trade effected by a "contract, combination . . . or conspiracy" between *separate* entities. It does not reach conduct that is "wholly unilateral." *Albrecht v. Herald Co., 390 U.S. 145, 149 (1968)*; accord, *Monsanto Co*. v. *Spray-Rite Corp., supra, at 761*. Concerted activity subject to *§ 1* is judged more sternly than unilateral activity under *§ 2*. Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal *per se* without inquiry into the harm it has actually caused. See generally *Northern Pacific R. Co*. v. *United States, 356 U.S. 1, 5 (1958)*. Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry **[***642]** into market power and market structure designed to assess the combination's actual effect. See, *e. g., Continental T. V., Inc*. v. *GTE Sylvania Inc., 433 U.S. 36 (1977)*; **[****30]** *Chicago Board of Trade v. United States, 246 U.S. 231 (1918)*. Whatever form the inquiry takes, however, it is not necessary to prove that concerted activity threatens monopolization.

The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive **[*769]** risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit.

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[13] ***LEdHN[5B]***[] [5B]

Section 2 of the Sherman Act provides in pertinent part:

HN3[] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 26 Stat. 209, as amended, *15 U. S. C. § 2*. By making a conspiracy to monopolize unlawful, *§ 2* does reach both concerted and unilateral behavior. The point remains, however, that purely unilateral conduct is illegal only under *§ 2* and not under *§ 1*. Monopolization without conspiracy is unlawful under *§ 2*, but restraint of trade without a conspiracy or combination is not unlawful under *§ 1*.

[14] ***LEdHN[6B]***[] [6B]

For example, the Court has declared that *§ 2* does not forbid market power to be acquired "as a consequence of a superior product, [or] business acumen." *United States v. Grinnell Corp., 384 U.S. 563, 571 (1966)*. We have also made clear that the "antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*.'" *Brunswick Corp*. v. *Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977)* (damages for violation of Clayton Act *§ 7*) (quoting *Brown Shoe Co*. v. *United States, 370 U.S. 294, 320 (1962)*).

This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

B

LEdHN[11][] [11] **LEdHN[12A]**[] [12A] **LEdHN[13A]**[] [13A] **[****31]** The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms "contract, combination . . . or conspiracy" in *§ 1*. Nothing in the literal meaning of those terms excludes coordinated conduct among officers or employees of the *same* company. But it is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that *§ 1* was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly **[**2741]** bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a *§ 1* conspiracy. [15]

[**32]** **[*770]** **LEdHN[14]**[] [14]There **[***643]** is also general agreement that *§ 1* is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions. [16] **[****33]** Although this Court has not previously addressed the question, [17] there can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor. The existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labor. A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself; a business enterprise establishes divisions to further its own interests in the most efficient manner. Because coordination between a corporation **[*771]** and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants *§ 1* scrutiny.

Indeed, a rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits. This

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[15] See, *e. g., Schwimmer v. Sony Corp. of America, 677 F.2d 946, 953* (CA2), cert. denied, *459 U.S. 1007 (1982)*; *Tose v. First Pennsylvania Bank, N. A., 648 F.2d 879, 893-894* (CA3), cert. denied, ***454 U.S. 893 (1981)***; *Morton Buildings of Nebraska, Inc*. v. *Morton Buildings, Inc., 531 F.2d 910, 916-917 (CA8 1976)*; *Greenville Publishing Co*. v. *Daily Reflector, Inc., 496 F.2d 391, 399 (CA4 1974)* (dictum); *Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 643, n. 9 (CA9 1969)*; *Poller v. Columbia Broadcasting System, Inc., 109 U. S. App. D. C. 170, 174, 284 F.2d 599, 603 (1960)*, rev'd on other grounds, *368 U.S. 464 (1962)*; *Nelson Radio & Supply Co*. v. *Motorola, Inc., 200 F.2d 911, 914 (CA5 1952)*, cert. denied, ***345 U.S. 925 (1953)***. Accord, Report of the Attorney General's National Committee to Study the Antitrust Laws 31 (1955). At the same time, many courts have created an exception for corporate officers acting on their own behalf. See, *e. g., H & B Equipment Co*. v. *International Harvester Co., 577 F.2d 239, 244 (CA5 1978)* (dictum); *Greenville Publishing, supra; Johnston v. Baker, 445 F.2d 424, 427 (CA3 1971)*.

LEdHN[12B][] [12B] **LEdHN[13B]**[] [13B]Nothing in the language of the Sherman Act is inconsistent with the view that corporations cannot conspire with their own officers. It is true that a "person" under the Act includes both an individual and a corporation. *15 U. S. C. § 7*. But *§ 1* does not declare every combination between two "persons" to be illegal. Instead it makes liable every "person" engaging in a combination or conspiracy "hereby declared to be illegal." As we note, the principles governing *§ 1* liability plainly exclude from unlawful combinations or conspiracies the activities of a single firm.

[16] See *691 F.2d 310, 316 (CA7 1982)* (decision below); *Cliff Food Stores, Inc*. v. *Kroger, Inc., 417 F.2d 203, 205-206 (CA5 1969)*; *Joseph E. Seagram & Sons, Inc*. v. *Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 83-84 (CA9 1969)*, cert. denied, ***396 U.S. 1062 (1970)***; *Poller v. Columbia Broadcasting System, Inc., 109 U. S. App. D. C., at 174, 284 F.2d, at 603*.

[17] The Court left this issue unresolved in *Poller* v. *Columbia Broadcasting System, Inc*., 368 U.S., at 469, n. 4.

would serve no useful antitrust purpose but could well deprive consumers of the efficiencies that decentralized management may bring.

C

LEdHN[1B][] [1B]For similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of *§ 1* of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of **[**2742]** horses drawing a vehicle under the control of a single driver. **[****34]** With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for *§ 1* scrutiny.

LEdHN[15][] [15]Indeed, the very notion of an "agreement" in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning. *HN5*[] A *§ 1* agreement may be found when "the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American* **[***644]** *Tobacco Co*. v. *United States, 328 U.S. 781, 810 (1946)*. But in reality a parent and a wholly owned subsidiary *always* have a "unity of purpose or a common design." They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert **[*772]** full control at any moment if the subsidiary fails to **[****35]** act in the parent's best interests. [18]

[**36]** The intra-enterprise conspiracy doctrine looks to the form of an enterprise's structure and ignores the reality. Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary. A corporation has complete power to maintain a wholly owned subsidiary in either form. The economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition. [19] Rather, a corporation may adopt the subsidiary form of organization for valid management and related purposes. Separate incorporation may improve **[*773]** management, avoid special tax problems arising from multistate operations, or serve other legitimate interests. [20] **[****38]** Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of

[18] As applied to a wholly owned subsidiary, the so-called "single entity" test is thus inadequate to preserve the Sherman Act's distinction between unilateral and concerted conduct. Followed by the Seventh Circuit below as well as by other Courts of Appeals, this test sets forth various criteria for evaluating whether a given parent and subsidiary are capable of conspiring with each other. See n. 2, *supra*; see generally *Ogilvie v. Fotomat Corp., 641 F.2d 581 (CA8 1981)*; *Las Vegas Sun, Inc*. v. *Summa Corp., 610 F.2d 614 (CA9 1979)*, cert. denied, ***447 U.S. 906 (1980)***; *Photovest Corp*. v. *Fotomat Corp., 606 F.2d 704 (CA7 1979)*, cert. denied, ***445 U.S. 917 (1980)***. These criteria measure the "separateness" of the subsidiary: whether it has separate control of its day-to-day operations, separate officers, separate corporate headquarters, and so forth. At least when a subsidiary is wholly owned, however, these factors are not sufficient to describe a separate economic entity for purposes of the Sherman Act. The factors simply describe the manner in which the parent chooses to structure a subunit of itself. They cannot overcome the basic fact that the ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit.

[19] Because an "agreement" between a parent and its wholly owned subsidiary is no more likely to be anticompetitive than an agreement between two divisions of a single corporation, it does not matter that the parent "availed [itself] of the privilege of doing business through separate corporations," *Perma Life Mufflers, Inc*. v. *International Parts Corp., 392 U.S. 134, 141 (1968)*. The purposeful choice of a parent corporation to organize a subunit as a subsidiary is not itself a reason to heighten antitrust scrutiny, because it is not laden with anticompetitive risk.

[20] For example, "[separate] incorporation may reduce federal or state taxes or facilitate compliance with regulatory or reporting laws. Local incorporation may also improve local identification. Investors or lenders may prefer to specialize in a particular aspect of a conglomerate's business. Different parts of the business may require different pension or profitsharing plans or different accounting practices." Areeda, 97 Harv. L. Rev., at 453.

operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability. Because there is nothing inherently anticompetitive about a corporation's **[****37]** decision **[**2743]** to create a subsidiary, the intra-enterprise conspiracy doctrine "[imposes] **[***645]** grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect." *Sunkist Growers, Inc*. v. *Winckler & Smith Citrus Products Co., 370 U.S. 19, 29 (1962)*. [21]

If antitrust liability turned on the garb in which a corporate subunit was clothed, parent corporations would be encouraged to convert subsidiaries into unincorporated divisions. Indeed, this is precisely what the Seagram company did after this Court's decision in *Kiefer-Stewart Co* **[****39]** . v. *Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951)*. [22] Such an **[*774]** incentive serves no valid antitrust goals but merely deprives consumers and producers of the benefits that the subsidiary form may yield.

The error of treating a corporate division differently from a wholly owned subsidiary is readily seen from the facts of this case. Regal was operated as an unincorporated division of Lear Siegler for four years before it became a wholly owned subsidiary of Copperweld. Nothing in this record indicates any meaningful difference between Regal's operations as a division and its later operations as a separate corporation. Certainly nothing suggests that Regal was a greater threat to competition as a subsidiary of Copperweld than as a division of Lear Siegler. Under either arrangement, Regal might have acted to bar **[****40]** a new competitor from entering the market. In one case it could have relied on economic power from other quarters of the Lear Siegler corporation; instead it drew on the strength of its separately incorporated parent, Copperweld. From the standpoint of the antitrust laws, there is no reason to treat one more harshly than the other. As Chief Justice Hughes cautioned, "[realities] must dominate the judgment." *Appalachian Coals, Inc*. v. *United States, 288 U.S., at 360*. [23]

[**41]** D

LEdHN[16][] [16]Any reading of the Sherman Act that remains true to the Act's distinction between unilateral and concerted conduct will necessarily **[***646]** disappoint those who find that distinction arbitrary. It cannot be denied that *§ 1*'s focus on concerted **[*775]** behavior leaves a "gap" in the Act's proscription against unreasonable restraints of trade. See *post*, at 789. An unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such -- but only restraints effected by a contract, combination, or conspiracy -- it leaves untouched a single firm's anticompetitive **[**2744]** conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to *§ 1* liability.

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[21] *Sunkist Growers* provides strong support for the notion that separate incorporation does not necessarily imply a capacity to conspire. The defendants in that case were an agricultural cooperative, its wholly owned subsidiary, and a second cooperative comprising only members of the first. The Court refused to find a *§ 1* or *§ 2* conspiracy among them because they were "one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities." *370 U.S., at 29*. Although this holding derived from statutory immunities granted to agricultural organizations, the reasoning of *Sunkist Growers* supports the broader principle that substance, not form, should determine whether a separately incorporated entity is capable of conspiring under *§ 1*.

[22] See *Joseph E. Seagram & Sons, Inc*. v. *Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (CA9 1969)*, cert. denied, ***396 U.S. 1062 (1970)***.

[23] The dissent argues that references in the legislative history to "trusts" suggest that Congress intended *§ 1* to govern the conduct of all affiliated corporations. See *post*, at 787-788. But those passages explicitly refer to combinations created for the very purpose of restraining trade. None of the cited debates refers to the postacquisition conduct of corporations whose initial affiliation was lawful. Indeed, Senator Sherman stated:

"It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination." 21 Cong. Rec. 2457 (1890).

LEdHN[12C][] [12C] **LEdHN[17]**[] [17] **[****42]** We have already noted that Congress left this "gap" for eminently sound reasons. Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote. See *supra, at 767-769*. Moreover, whatever the wisdom of the distinction, the Act's plain language leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct. Had Congress intended to outlaw unreasonable restraints of trade as such, *§ 1*'s requirement of a contract, combination, or conspiracy would be superfluous, as would the entirety of *§ 2*. [24] Indeed, this Court has recognized **[*776]** that *§ 1* is limited to concerted conduct at least since the days of *United States v. Colgate & Co., 250 U.S. 300 (1919)*. Accord, *post*, at 789.

[**43]** **LEdHN[1C]**[] [1C]The appropriate inquiry in this case, therefore, is not whether the coordinated conduct of a parent and its wholly owned subsidiary may ever have anticompetitive effects, as the dissent suggests. Nor is it whether the term "conspiracy" will bear a literal construction that includes parent corporations and their wholly owned subsidiaries. For if these were the proper inquiries, a **[***647]** single firm's conduct would be subject to *§ 1* scrutiny whenever the coordination of two employees was involved. Such a rule would obliterate the Act's distinction between unilateral and concerted conduct, contrary to the clear intent of Congress as interpreted by the weight of judicial authority. See n. 15, *supra*. Rather, the appropriate inquiry requires us to explain the logic underlying Congress' decision to exempt unilateral conduct from *§ 1* scrutiny, and to assess whether that logic similarly excludes the conduct of a parent and its wholly owned subsidiary. Unless we second-guess the judgment of Congress to limit *§ 1* to concerted conduct, we can only conclude that the coordinated behavior of a parent **[****44]** and its wholly owned subsidiary falls outside the reach of that provision.

Although we recognize that any "gap" the Sherman Act leaves is the sensible result of a purposeful policy decision by Congress, we also note that the size of any such gap is open **[*777]** to serious question. Any anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an intra-enterprise conspiracy doctrine. A corporation's initial acquisition of control will always be subject to scrutiny under *§ 1* of the Sherman Act and *§ 7* of the Clayton Act, 38 Stat. 731, *15 U. S. C. § 18*. Thereafter, the enterprise is fully subject to *§ 2* of the Sherman Act and § 5 of the Federal Trade Commission Act, 38 Stat. 719, *15 U. S. C.* ***[**2745]*** *§ 45*. That these statutes are adequate to control dangerous anticompetitive conduct is suggested by the fact that not a single holding of antitrust liability by this Court would today be different in the absence of an intra-enterprise conspiracy doctrine. It is further suggested by the fact that the Federal Government, in its administration **[****45]** of the antitrust laws, no longer accepts the concept that a corporation and its wholly owned subsidiaries can "combine" or "conspire" under *§ 1*. [25] Elimination of the intra-enterprise conspiracy doctrine with respect to corporations and their wholly owned subsidiaries will therefore not cripple

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[24] **LEdHN[12D]**[] [12D]

Even if common-law intracorporate conspiracies were firmly established when Congress passed the Sherman Act, the obvious incompatibility of an intracorporate conspiracy with *§ 1* is sufficient to refute the dissent's suggestion that Congress intended to incorporate such a definition. See *post*, at 784-787. Moreover, it is far from clear that intracorporate conspiracies were recognized at common law in 1890. Even today courts disagree whether corporate employees can conspire with themselves or with the corporation for purposes of certain statutes, such as *42 U. S. C. § 1985(3)*. Compare, *e. g., Novotny v. Great Am. Fed. Sav. & Loan Assn., 584 F.2d 1235 (CA3 1978)* (en banc), vacated and remanded on other grounds, *442 U.S. 366 (1979)*, with *Dombrowski v. Dowling, 459 F.2d 190 (CA7 1972)*. And in 1890 it was disputed whether a corporation could itself be guilty of a crime that required criminal intent, such as conspiracy. Commentators appear to agree that courts began finding corporate liability for such crimes only around the turn of the century. See generally Edgerton, Corporate Criminal Responsibility, 36 Yale L. J. 827, 828, and n. 11 (1927); Miller, Corporate Criminal Liability: A Principle Extended to Its Limits, 38 Fed. Bar J. 49 (1979); Note, 60 Harv. L. Rev. 283, 284, and n. 9 (1946). Of course, Congress changed that common-law rule when it explicitly provided that a corporation could be guilty of a *§ 1* conspiracy. But the point remains that the Sherman Act did not import a pre-existing common-law tradition recognizing conspiracies between corporations and their own employees.

[25] "[The] [intra-enterprise conspiracy] doctrine has played a relatively minor role in government enforcement actions, and the government has not relied on the doctrine in recent years." Brief for United States as *Amicus Curiae* 26, n. 42.

antitrust enforcement. It will simply eliminate treble damages from private state tort suits masquerading as antitrust actions.

IV

LEdHN[1D][] [1D]We hold that *HN6*[] Copperweld and its wholly owned subsidiary Regal are incapable of conspiring with each other for purposes of *§ 1* of the Sherman Act. To the extent that prior decisions of this Court are to the contrary, they are disapproved and overruled. Accordingly, **[****46]** the judgment of the Court of Appeals is reversed.

It is so ordered.

[*778] JUSTICE WHITE took no part in the consideration or decision of this case.

Dissent by: STEVENS

Dissent

[*648]** JUSTICE STEVENS, with whom JUSTICE **BRENNAN** and JUSTICE **MARSHALL** join, dissenting.

It is safe to assume that corporate affiliates do not vigorously compete with one another. A price-fixing or market-allocation agreement between two or more such corporate entities does not, therefore, eliminate any competition that would otherwise exist. It makes no difference whether such an agreement is labeled a "contract," a "conspiracy," or merely a policy decision, because it surely does not unreasonably restrain competition within the meaning of the Sherman Act. The Rule of Reason has always given the courts adequate latitude to examine the substance rather than the form of an arrangement when answering the question whether collective action has restrained competition within the meaning of *§ 1*.

Today the Court announces a new *per se* rule: a wholly owned subsidiary is incapable of conspiring with its parent under *§ 1* of the Sherman Act. Instead of redefining the word "conspiracy," the Court would **[****47]** be better advised to continue to rely on the Rule of Reason. Precisely because they do not eliminate competition that would otherwise exist but rather enhance the ability to compete, restraints which enable effective integration between a corporate parent and its subsidiary -- the type of arrangement the Court is properly concerned with protecting -- are not prohibited by *§ 1*. Thus, the Court's desire to shield such arrangements from antitrust liability provides no justification for the Court's new rule.

In contrast, the case before us today presents the type of restraint that has precious little to do with effective integration between parent and subsidiary corporations. Rather, the purpose of the challenged conduct was to exclude a potential competitor of the subsidiary from the market. The jury apparently concluded that the two defendant corporations -- **[*779]** Copperweld and its subsidiary Regal -- had successfully delayed Independence's entry into the steel tubing business by applying a form of economic coercion to potential suppliers of financing and capital equipment, as well as to potential customers. Everyone seems to agree that this conduct was tortious as a matter **[****48]** of state law. This type of exclusionary conduct is plainly distinguishable from vertical integration designed to achieve competitive efficiencies. If, as seems to be the case, the challenged conduct was manifestly anti-competitive, it should not be immunized from scrutiny under *§ 1* of the Sherman Act.

[2746]** I

Repudiation of prior cases is not a step that should be taken lightly. As the Court wrote only days ago: "[Any] departure from the doctrine of *stare decisis* demands special justification." *Arizona* v. *Rumsey, ante*, at 212. It is therefore appropriate to begin with an examination of the precedents.

In *United States v. Yellow Cab Co., 332 U.S. 218 (1947)*, the Court explicitly stated that a corporate subsidiary could conspire with its parent:

"The fact that these restraints **[***649]** occur in a setting described by the appellees as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or **[****49]** integrated under common ownership as from a conspiracy among those who are otherwise independent." *Id., at 227*.

The majority attempts to explain *Yellow Cab* by suggesting that it dealt only with unlawful acquisition of subsidiaries. *Ante*, at 761-762. But the Court mentioned acquisitions only as an additional consideration separate from the passage **[*780]** quoted above, [1] and more important, the Court explicitly held that restraints imposed by the corporate parent on the affiliates that it *already* owned in themselves violated *§ 1*. [2]

[**50]** At least three cases involving the motion picture industry also recognize that affiliated corporations may combine or conspire within the meaning of *§ 1*. In *United States v. Crescent Amusement Co., 323 U.S. 173 (1944)*, as the Court recognizes, *ante*, at 762, n. 6, the only conspirators were affiliated corporations. The majority's claim that the case involved only unlawful acquisitions because of the Court's comments concerning divestiture of the affiliates cannot be squared with the passage immediately following that cited by the majority, which states that there had been unlawful conduct going beyond the acquisition of subsidiaries:

"That principle is adequate here to justify divestiture of all interest in some of the affiliates since their acquisition was part of the fruits of the conspiracy. *But the relief need not, and under these facts should not, be so restricted* [to divestiture]. The fact that the companies were affiliated induced joint action and agreement. Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, **[*781]** **[****51]** there will be tempting opportunity for these exhibitors to continue to act in combination against the independents." *323 U.S., at 189-190* (emphasis supplied).

Similarly, in *Schine Chain Theatres, Inc*. v. *United States, 334 U.S. 110 (1948)*, the Court held that concerted action by parents and subsidiaries **[***650]** constituted an unlawful conspiracy. [3] **[**2747]** That was also the holding in *United States v. Griffith, 334 U.S. 100, 109 (1948)*. The majority's observation that in these cases there were alternative grounds that could have been used to reach the same result, *ante*, at 763, n. 8, disguises neither the fact that the holding that actually appears in these opinions rests on conspiracy between affiliated entities, nor that today's holding is inconsistent with what was actually held in these cases.

[**52]** In *Kiefer-Stewart Co*. v. *Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951)*, the Court's holding was plain and unequivocal:

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[1] The language I have quoted, most of which is overlooked by the majority, makes it clear that the Court's adoption of the concept of conspiracy between affiliated corporations was unqualified. As the first word of the sentence indicates, the Court's following statement: "Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed," *332 U.S., at 227*, expresses a separate if related point.

[2] "[By] preventing the cab operating companies under their control from purchasing cabs from manufacturers other than CCM, the appellees deny those companies the opportunity to purchase cabs in a free, competitive market. The Sherman Act has never been thought to sanction such a conspiracy to restrain the free purchase of goods in interstate commerce." *Id., at 226-227* (footnote omitted).

[3] "[The] combining of the open and closed towns for the negotiation of films for the circuit was a restraint of trade and the use of monopoly power in violation of *§ 1* and *§ 2* of the Act. The concerted action of the parent company, its subsidiaries, and the named officers and directors in that endeavor was a conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent. See *United States v. Yellow Cab Co., 332 U.S. 218, 227*; *United States v. Crescent Amusement Co., 323 U.S. 173*." *334 U.S., at 116*.

"Respondents next suggest that their status as 'mere instrumentalities of a single manufacturing-merchandizing unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. *E. g.* United States v. Yellow Cab Co., 332 U.S. 218. The rule is especially applicable where, as here, respondents hold themselves out as competitors." *Id., at 215*.

[*782] This holding is so clear that even the Court, which is not wanting for inventiveness in its reading of the prior cases, cannot explain it away. The Court suggests only that today *Kiefer-Stewart* might be decided on alternative grounds, *ante*, at 764, ignoring the fact that today's holding is inconsistent with the ground on which the case actually was decided. [4]

[**53]** A construction of the statute that reaches agreements between corporate parents and subsidiaries was again embraced by the Court in *Timken Roller Bearing Co*. v. United States, 341 U.S. 593 (1951), [5] **[****54]** and *Perma Life Mufflers, Inc*. v. International Parts Corp., 392 U.S. 134 (1968). [6] **[***651]** The majority only notes that there might have been other grounds for decision available in these cases, *ante*, at 764-766, but again it cannot deny that its new rule is inconsistent with what the Court actually did write in these cases.

[*783] Thus, the rule announced today is inconsistent with what this Court has held on at least seven previous occasions. [7] **[****56]** Perhaps **[**2748]** most illuminating is the fact that until today, whether they favored the doctrine or not, it had been the universal conclusion of both the lower courts [8] and the commentators [9] that this

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[4] In *Kiefer-Stewart*, Seagram unsuccessfully argued that *Yellow Cab* was confined to cases concerning unlawful acquisitions, see Brief for Respondents, O. T. 1950, No. 297, p. 21. Thus the *Kiefer-Stewart* Court considered and rejected exactly the same argument embraced by today's majority.

[5] "The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws. *E. g., Kiefer-Stewart Co*. v. *Seagram & Sons*, [340 U.S.,] at 215. 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." *341 U.S., at 598*.

[6] "There remains for consideration only the Court of Appeals' alternative holding that the Sherman Act claim should be dismissed because respondents were all part of a single business entity and were therefore entitled to cooperate without creating an illegal conspiracy. But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities. See *Timken Co*. v. United States, 341 U.S. 593, 598 (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947)." *392 U.S., at 141-142*.

[7] Also pertinent is United States v. Citizens & Southern National Bank, 422 U.S. 86 (1975), in which the Court wrote:

"The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion -- that is, by competing successfully rather than by arranging treaties with its competitors. This Court has held that even commonly owned firms must compete against each other, if they hold themselves out as distinct entities. 'The corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act.' United States v. Yellow Cab Co., 332 U.S. 218, 227. See also *Kiefer-Stewart Co*. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215; *Timken Roller Bearing Co*. v. United States, 341 U.S. 593, 598; *Perma Life Mufflers, Inc*. v. International Parts Corp., 392 U.S. 134, 141-142." *Id., at 116-117*.

[8] See, *e. g., William Inglis & Sons Baking Co*. v. ***ITT Continental Baking Co., 668 F.2d 1014, 1054*** (CA9), cert. denied, ***459 U.S. 825 (1982)***; Ogilvie v. Fotomat Corp., 641 F.2d 581, 587-588 (CA8 1981); *Las Vegas Sun, Inc*. v. Summa Corp., 610 F.2d 614, 617-618 (CA9 1979), cert. denied, ***447 U.S. 906 (1980)***; *Photovest Corp*. v. Fotomat Corp., 606 F.2d 704, 726 (CA7 1979), cert. denied, ***445 U.S. 917 (1980)***; *Columbia Metal Culvert Co*. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 33-35, and n. 49 (CA3), cert. denied, ***439 U.S. 876 (1978)***; *H & B Equipment Co*. v. International Harvester Co., 577 F.2d 239, 244-245

Court's cases establish that a parent **[*784]** **[****55]** and a **[***652]** wholly owned subsidiary corporation are capable of conspiring in violation of *§ 1*. In this very case the Court of Appeals observed:

"[The] salient factor is that the Supreme Court's decisions, while they need not be read with complete literalism, of course they cannot be ignored. It is no accident that every Court of Appeals to consider the question has concluded that a parent and its subsidiary have the same capacity to conspire, whether or not they can be found to have done so in a particular case." *691 F.2d 310, 317 (CA7 1982)* (footnotes omitted).

[**57]** Thus, we are not writing on a clean slate. "[We] must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co*. v. *Illinois, 431 U.S. 720, 736 (1977)*. [10] There can be no doubt that the Court today changes what has been taken to be the long-settled rule: a rule that Congress did not revise at any point in the last four decades. At a minimum there should be a strong presumption against the approach taken today by the Court. It is to the merits of that approach that I now turn.

II

The language of *§ 1* of the Sherman Act is sweeping in its breadth: "Every contract, combination in the form of trust or **[*785]** otherwise, or conspiracy, in restraint of trade or commerce among the several States, . . . is declared **[****58]** to be illegal." *15 **[**2749]** U. S. C. § 1*. This Court has long recognized that Congress intended this language to have a broad sweep, reaching any form of combination:

"[In] view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint." *Standard Oil Co*. v. *United States, 221 U.S. 1, 59-60 (1911)*.

(CA5 1978); *George R. Whitten, Jr., Inc*. v. *Paddock Pool Builders, Inc., 508 F.2d 547, 557 (CA1 1974)*, cert. denied, ***421 U.S. 1004 (1975)***.

[9] See, *e. g*., Report of the Attorney General's National Committee to Study the Antitrust Laws 30-36 (1955) (hereinafter cited as Attorney General's Committee Report); L. Sullivan, Law of Antitrust § 114 (1977); Areeda, Intraenterprise Conspiracy in Decline, *97 Harv. L. Rev. 451 (1983)*; Handler, Through the Antitrust Looking Glass -- Twenty-First Annual Antitrust Review, 57 Calif. L. Rev. 182, 182-193 (1969); Handler & Smart, The Present Status of the Intracorporate Conspiracy Doctrine, 3 Cardozo L. Rev. 23, 26-61 (1981); McQuade, Conspiracy, Multicorporate Enterprises, and *Section 1* of the Sherman Act, 41 Va. L. Rev. 183, 188-212 (1955); Willis & Pitofsky, Antitrust Consequences of Using Corporate Subsidiaries, 43 N. Y. U. L. Rev. 20, 22-24 (1968); Comment, Intraenterprise Antitrust Conspiracy: A Decisionmaking Approach, *71 Calif. L. Rev. 1732, 1739-1745 (1983)* (hereinafter cited as Comment, Decisionmaking); Comment, All in the Family: When Will Internal Discussions Be Labeled Intra-Enterprise Conspiracy?, 14 Duquesne L. Rev. 63 (1975); Note, "Conspiring Entities" Under *Section 1* of the Sherman Act, 95 Harv. L. Rev. 661 (1982); Note, Intra-Enterprise Conspiracy Under *Section 1* of the Sherman Act: A Suggested Standard, 75 Mich. L. Rev. 717, 718-727 (1977) (hereinafter cited as Note, Suggested Standard).

[10] See also *Monsanto Co*. v. *Spray-Rite Service Co., 465 U.S. 752, 769 (1984)* (BRENNAN, J., concurring).

This broad construction is illustrated by the Court's refusal to limit the statute to actual agreements. Even mere acquiescence in an anticompetitive scheme has been held sufficient to **[****59]** satisfy the statutory language. [11]

Since the statute was written against the background of the common **[***653]** law, [12] **[****61]** reference to the common law is particularly enlightening in construing the statutory requirement of a "contract, combination in the form of trust or otherwise, or conspiracy." Under the common law, the question whether **[*786]** affiliated corporations constitute a plurality of actors within the meaning of the statute is easily answered. The well-settled rule is that a corporation is a separate legal entity; the separate corporate form cannot be disregarded. [13] The Congress that passed the Sherman Act was well acquainted with this rule. See 21 Cong. Rec. 2571 (1890) (remarks of Sen. Teller) ("Each corporation is a creature by itself"). **[****60]** Thus it has long been the law of criminal conspiracy that the officers of even a single corporation are capable of conspiring with each other or the corporation. [14] **[****62]** This Court has held that a corporation can conspire with its employee, [15] and **[**2750]** that a labor union can "combine" with its business agent within the meaning of *§ 1*. [16] This concept explains the *Timken* Court's statement that the affiliated corporations in that case made **[*787]** "agreements between legally separate persons," *341 U.S., at 598*. Thus, today's holding that agreements between parent and subsidiary corporations involve merely unilateral conduct is at odds with the way that this Court has traditionally understood the concept of a combination or conspiracy, and also at odds with the way in which the Congress that enacted the Sherman Act surely understood it.

Holding that affiliated corporations cannot constitute a plurality of actors is also inconsistent with the objectives of the Sherman Act. Congress **[***654]** was particularly concerned with "trusts," hence it named them in *§ 1* as a specific form of "combination" at which the statute was directed. Yet "trusts" consisted of affiliated corporations. As Senator Sherman explained:

"Because these combinations are always in many States and, as the Senator from Missouri says, it will be very easy for them to make a corporation within a State. So they can; but that is only one corporation of the combination. The combination **[****63]** is always of two or more, and in one case of forty-odd corporations, all

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[11] See *Albrecht v. Herald Co., 390 U.S. 145, 149 (1968)*; *United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960)*. See also *Monsanto Co*. v. *Spray-Rite Service Co., 465 U.S., at 764, n. 9*.

[12] *E. g., Associated General Contractors of California, Inc*. v. *Carpenters, 459 U.S. 519, 531-532 (1983)*; *National Society of Professional Engineers v. United States, 435 U.S. 679, 687-688 (1978)*; *Standard Oil*, 221 U.S., at 59.

[13] See, *e. g., Schenley Corp*. v. *United States, 326 U.S. 432, 437 (1946) (per curiam); New Colonial Ice Co*. v. *Helvering, 292 U.S. 435, 440-442 (1934)*; *Burnet v. Clark, 287 U.S. 410 (1932)*; *Louisville, C. & C. R. Co*. v. *Letson, 2 How. 497, 558-559 (1844)*; *Bank of the United States v. Deveaux, 5 Cranch 61 (1809)*.

[14] Attorney General's Committee Report, *supra* n. 9, at 30-31 (citing *Barron v. United States, 5 F.2d 799 (CA1 1925)*; *Mininsohn v. United States, 101 F.2d 477 (CA3 1939)*; *Egan v. United States, 137 F.2d 369* (CA8), cert. denied, ***320 U.S. 788 (1943))***. See also, *e. g., United States v. Hartley, 678 F.2d 961, 971-972 (CA11 1982)*, cert. denied, ***459 U.S. 1170 (1983)***; *Alamo Fence Co. of Houston v. United States, 240 F.2d 179 (CA5 1957)*; *Patterson v. United States, 222 F. 599, 618-619* (CA6), cert. denied, ***238 U.S. 635 (1915)***; *Union Pacific Coal Co*. v. *United States, 173 F. 737 (CA8 1909)*; *United States v. Consolidated Coal Co., 424 F.Supp. 577, 579-581 (SD Ohio 1976)*; *United States v. Griffin, 401 F.Supp. 1222, 1224-1225 (SD Ind. 1975)*, aff'd mem. *sub nom.* **United States v. Metro Management Corp., 541 F.2d 284 (CA7 1976)**; *United States v. Bridell, 180 F.Supp. 268, 273 (ND Ill. 1960)*; *United States v. Kemmel, 160 F.Supp. 718 (MD Pa. 1958)*; Welling, Intracorporate Plurality in Criminal Conspiracy Law, 33 Hastings L. J. 1155, 1191-1199 (1982).

[15] See *Hyde v. United States, 225 U.S. 347, 367-368 (1912)*. See also *United States v. Sampson, 371 U.S. 75 (1962)*; *Fong Foo v. United States, 369 U.S. 141 (1962) (per curiam); Lott v. United States, 367 U.S. 421 (1961)*; *Nye & Nissen v. United States, 336 U.S. 613 (1949)*.

[16] See *Duplex Printing Press Co*. v. *Deering, 254 U.S. 443, 465 (1921)*.

bound together by a link which holds them under the name of trustees, who are themselves incorporated under the laws of one of the States." 21 Cong. Rec. 2569 (1890).

The activities of these "combinations" of affiliated corporations were of special concern:

"[Associated] enterprise and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination commonly called trusts, that seeks to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman, or a president.

[*788] "The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the **[****64]** profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors. . . . It is this kind of a combination we have to deal with now." *Id*., at 2457. [17]

Thus, the corporate subsidiary, when used as a device to eliminate competition, was one of the chief evils to which the Sherman Act was addressed. [18] The anomaly **[**2751]** in today's **[***655]** holding is that the corporate devices most similar to the original "trusts" are now those which free an enterprise from antitrust scrutiny.

[**65]** **[*789]** III

The Court's reason for rejecting the concept of a combination or conspiracy among a parent corporation and its wholly owned subsidiary is that it elevates form over substance -- while in form the two corporations are separate legal entities, in substance they are a single integrated enterprise and hence cannot comprise the plurality of actors necessary to satisfy *§ 1*. *Ante*, at 771-774. In many situations the Court's reasoning is perfectly sensible, for the affiliation of corporate entities often is procompetitive precisely because, as the Court explains, it enhances efficiency. A challenge to conduct that is merely an incident of the desirable integration that accompanies such affiliation should fail. However, the protection of such conduct provides no justification for the Court's new rule, precisely because such conduct cannot be characterized as an unreasonable restraint of trade violative of *§ 1*. Conversely, the problem with the Court's new rule is that it leaves a significant gap in the enforcement of *§ 1* with respect to anticompetitive conduct that is entirely unrelated to the efficiencies associated with integration.

Since at least *United States v. Colgate & Co., 250 U.S. 300 (1919)*, **[****66]** *§ 1* has been construed to require a plurality of actors. This requirement, however, is a consequence of the plain statutory language, not of any economic principle. As an economic matter, what is critical is the presence of market power, rather than a plurality of actors. [19] **[****67]** From a competitive standpoint, a decision of a single firm possessing power to reduce output

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[17] See also 21 Cong. Rec. 2562 (1890) (remarks of Sen. Teller); *id*., at 2570 (remarks of Sen. Sherman); *id*., at 2609 (remarks of Sen. Morgan).

[18] This legislative history thus demonstrates the error in the majority's conclusion that only acquisitions of corporate affiliates fall within *§ 1*. See *ante*, at 761-762. The conduct of the trusts that Senator Sherman and others objected to went much further than mere acquisitions. Indeed, the irony of the Court's approach is that, had it been adopted in 1890, it would have meant that *§ 1* would have no application to trust combinations which had already been formed -- the very trusts to which Senator Sherman was referring.

I cannot believe that the Court really intends to express doubt as to whether the Congress that passed the Sherman Act thought conspiracy doctrine could apply to corporations. *Ante*, at 775-776, n. 24. If that were not the case, then the Sherman Act would have no application to corporations. Since, as is clear and as the Court concedes, the Sherman Act does apply to corporations, there can be no doubt that Congress intended to apply the law of conspiracy to agreements between corporations.

and raise prices above competitive levels has the same consequence as a decision by two firms acting together who have acquired an equivalent amount of market **[*790]** power through an agreement not to compete. [20] **[****68]** Unilateral conduct by a firm **[***656]** with market power has no less anticompetitive potential than conduct by a plurality of actors which generates or exploits the same power, [21] and probably more, since the **[**2752]** unilateral actor avoids the policing problems faced by cartels.

The rule of *Yellow Cab* thus has an economic justification. It addresses a gap in antitrust enforcement by reaching anticompetitive agreements between affiliated corporations which **[*791]** have sufficient market power to restrain marketwide competition, but **[****69]** not sufficient power to be considered monopolists within the ambit of *§ 2* of the Act. [22] **[****70]** The doctrine is also useful when a third party declines to join a conspiracy to restrain trade among affiliated corporations, and is harmed as a result through a boycott or similar tactics designed to penalize the refusal. In such cases, since there has been no agreement with the third party, only an agreement between the affiliated corporations can be the basis for *§ 1* inquiry. [23] Finally, it must be remembered that not all persons who restrain trade wear grey flannel suits. Businesses controlled by organized crime often attempt to gain control of an industry through violence or intimidation of competitors; in such cases *§ 1* can be applied to separately incorporated

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[19] Market power is the ability to raise prices above those that would be charged in a competitive market. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27, n. 46 (1984)*; United States Steel Corp. v. *Fortner Enterprises, Inc., 429 U.S. 610, 620 (1977)*; *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956)*.

[20] Significantly, the Court never suggests that the plurality-of-actors requirement has any intrinsic economic significance. Rather, it suggests that the requirement has evidentiary significance: combinations are more likely to signal anticompetitive conduct than is unilateral activity: "In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction." *Ante*, at 769. That is true, but it is also true of any ordinary commercial contract between separate entities, as can be seen if one substitutes the word "contract" for "conspiracy" in the passage I have quoted. The language of the Sherman Act indicates that it treats "contracts" and "conspiracies" as equivalent concepts -- both satisfy the multiplicity-of-actors requirement -- and yet one of the most fundamental points in antitrust jurisprudence, dating at least to *Standard Oil*, is that there is nothing inherently anticompetitive about a contract. Similarly, an agreement to act "for common benefit" in itself is unremarkable -- all agreements are in some sense a restraint of trade be they contracts or conspiracies. It is only when trade is unreasonably restrained that *§ 1* is implicated. The Court's evidentiary concern lacks merit.

[21] We made this point in the context of resale price maintenance in *United States v. Parke, Davis & Co., 362 U.S. 29 (1960)*:

"The Sherman Act forbids combinations of traders to suppress competition. True, there results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as *Colgate* is not overruled, this result is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of a manufacturer's right 'freely to exercise his own independent discretion as to parties with whom he will deal.'" *Id., at 44* (quoting *Colgate, 250 U.S., at 307*).

[22] "[It] is the potential which this conspiracy concept holds for the development of a rational enforcement policy which, if anything, will ultimately attract the courts. If conduct of a single corporation which restrains trade were to violate *Section 1*, a forceful weapon would be available to the government with which to challenge conduct which in oligopolistic industries creates or reinforces entry barriers. Excessive advertising in the cereal, drug, or detergent industries, annual style changes in the auto industry, and other such practices could be reached as soon as they threatened to inhibit competition; there would be no need to wait until a 'dangerous probability' of monopoly had been reached, the requirement under *Section 2* 'attempt' doctrine. Nor would a single firm restraint of trade rule be overbroad. It would in no way threaten single firm activity -- setting a price, deciding what market it would deal in, or the like -- which did not threaten competitive conditions." L. Sullivan, *supra* n. 9, § 114, at 324 (footnotes omitted).

[23] This was the case in *Kiefer-Stewart*, for example. Seagram had refused to sell liquor to Kiefer-Stewart unless it agreed to an illegal resale price maintenance scheme. Kiefer-Stewart refused to agree, and as a result was injured by losing access to Seagram's products. See *340 U.S., at 213*.

businesses which benefit from such tactics, but which may be ultimately controlled by a single criminal enterprise. [24]

[*792] The **[***657]** rule of *Yellow Cab* and its progeny is not one that condemns every parent-subsidiary relationship. A single firm, no matter what its corporate structure may be, is not expected to compete with itself. [25] **[****72]** Functional **[****71]** integration by its very nature requires unified action; hence in itself it has never been sufficient to establish the **[**2753]** existence of an unreasonable restraint of trade: "In discussing the charge in the *Yellow Cab* case, we said that the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act." *United States v. Columbia Steel Co., 334 U.S. 495, 522 (1948)*. Restraints that act only on the parent or its subsidiary as a consequence of an otherwise lawful integration do not violate *§ 1* of the Sherman Act. [26] But if the behavior at issue is unrelated to any functional integration between the affiliated corporations and **[*793]** imposes a restraint on third parties of sufficient magnitude to restrain marketwide competition, as a matter of economic substance, as well as form, it is appropriate to characterize the conduct as a "combination or conspiracy in restraint of trade." [27]

[**73]** For example, in *Yellow Cab* the Court read the complaint as alleging that integration had assisted the parent in excluding competing manufacturers from the marketplace, *332 U.S., at 226-227*, leading the Court to conclude that "restraint of interstate **[***658]** trade was not only effected by the combination of the appellees but was the primary object of the combination." *Id., at 227*. Similarly, in *Crescent Amusement* the Court noted that corporate affiliation between exhibitors enhanced their buying power and "was one of the instruments in . . . making the conspiracy effective" in excluding independents from the market. *323 U.S., at 189-190*. Thus, in both cases the Court found that the affiliation enhanced the ability of the parent corporation to exclude the competition of third

[24] See *United States v. Turkette, 452 U.S. 576, 588-593 (1981)* (discussing congressional findings underlying the Organized Crime Control Act of 1970). *Section 1* of the Sherman Act has on occasion been used against various types of racketeering activity. See Hartwell, Criminal RICO and Antitrust, 52 Antitrust L. J. 311, 312-313 (1983); McLaren, Antitrust and Competition -- Review of the Past Year and Suggestions for the Future, in New York State Bar Assn., 1971 ***Antitrust Law*** Symposium 1, 3 (1971).

[25] See Comment, Decisionmaking, *supra* n. 9, at 1753-1757; Note, Suggested Standard, *supra* n. 9, at 735-738. Professor Sullivan elaborates:

"Picture, at one end of the spectrum, a family business which operates one retail store in each of three or four adjacent communities. All of the stores are managed as a unit by one individual, the founder of the business who sets policy, does all the buying, decides on all the advertising, sets prices, and hires and fires all employees other than family members. The fact that each store is operated by a separate corporation should not convert a family business into a cartel. . . . If there is, as a practical matter, an integrated ownership and management, this small business is a single firm. And a single firm cannot compete with itself. Hence it cannot restrain price competition with itself, or divide markets with itself, or act as a common purchasing agent for itself or otherwise restrain competition with itself, regardless of how many separate corporations the single firm may, for reasons unrelated to the act, be divided into." L. Sullivan, *supra* n. 9, § 114, at 326-327.

[26] Thus, the Court is wrong to suggest, *ante*, at 771-772, 774-776, and n. 24, that *Yellow Cab* could reach truly unilateral conduct involving only the employees of a single firm.

[27] If the rule of *Yellow Cab* and its progeny could be easily circumvented through, for example, use of unincorporated divisions instead of subsidiaries, then there would be reason to question its efficacy as a tool for rational antitrust enforcement. However, the Court is incorrect when it asserts, *ante*, at 770-771, 772-774, that there is no economic substance in a distinction between unincorporated divisions, which cannot provide a plurality of actors, and wholly owned subsidiaries, which under *Yellow Cab* can. If that were the case, incorporated subsidiaries would never be used to achieve integration -- the ready availability of an unincorporated alternative would always be employed in order to avoid antitrust liability. The answer is provided by the Court itself -- the use of subsidiaries often makes possible operating efficiencies that are unavailable through the use of unincorporated divisions. *Ante*, at 772-774. We may confidently assume that any corporate parent whose contingent antitrust liability exceeds the savings it realizes through the use of subsidiaries already utilizes unincorporated divisions instead of corporate subsidiaries. Thus, it is more than merely a question of form when a decision is made to use corporate subsidiaries instead of unincorporated divisions, and the rule is not that easily circumvented.

parties, and hence raised entry **[*794]** barriers faced by actual and potential competitors. When conduct restrains trade not merely by integrating affiliated corporations but rather by restraining the ability of others to compete, that conduct has competitive significance drastically different from procompetitive integration. [28] In **[**2754]** these **[****74]** cases, the affiliation assisted exclusionary conduct; it was not the competitive equivalent of unilateral integration but instead generated power to restrain marketwide competition.

[**75]** There are other ways in which corporate affiliation can operate to restrain competition. A wholly owned subsidiary might market a "fighting brand" or engage in other predatory behavior that would be more effective if its ownership were concealed than if it was known that only one firm was involved. A predator might be willing to accept the risk of bankrupting a subsidiary when it could not afford to let a division incur similar risks. Affiliated corporations might enhance their power over suppliers by agreeing to refuse to deal with those who deal with an actual or potential competitor **[*795]** of one of them; such a threat might be more potent coming from both corporations than from only one. [29]

[**76]** In **[***659]** this case, it may be that notices to potential suppliers of respondent emanating from Copperweld carried more weight than would notices coming only from Regal. There was evidence suggesting that Regal and Copperweld were not integrated, and that the challenged agreement had little to do with achieving procompetitive efficiencies and much to do with protecting Regal's market position. The Court does not even try to explain why their common ownership meant that Copperweld and Regal were merely obtaining benefits associated with the efficiencies of integration. Both the District Court and the Court of Appeals thought that their agreement had a very different result -- that it raised barriers to entry and imposed an appreciable marketwide restraint. The Court's discussion of the justifications for corporate affiliation is therefore entirely abstract -- while it dutifully lists the procompetitive justifications for corporate affiliation, *ante*, at 772-774, it fails to explain how any of them relate to the conduct at issue in this case. What is challenged here is not the fact of integration between Regal and Copperweld, but their specific agreement with respect to **[****77]** Independence. That agreement concerned the exclusion of **[*796]** Independence from the market, and not any efficiency resulting from integration. The facts of this very case belie the conclusion that affiliated corporations are incapable of engaging in the kind of conduct that threatens marketwide competition. The Court does not even attempt to assess the competitive significance of the conduct under challenge here -- it never tests its economic assumptions against the concrete facts before it. Use of economic theory without reference to the competitive impact of the particular economic arrangement at issue is

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[28] See L. Sullivan, *supra* n. 9, § 114, at 328 ("To have two competitors acting concertedly two separate firms, not just persons, are needed. Thus 'concerted action' by two 'legal persons' which is limited solely to the internal management of a single firm does not restrain competition; but 'concerted action' by two 'legal persons' which erects barriers to entry by another separate firm, a competitor or potential competitor, can be a restraint of trade"); see also Willis & Pitofsky, *supra* n. 9, at 38-41. The Attorney General's National Committee to Study the Antitrust Laws made the same point in 1955:

"The substance of the Supreme Court decisions is that concerted action between a parent and subsidiary or between subsidiaries which has for its purpose or effect coercion or unreasonable restraint on the trade of strangers to those acting in concert is prohibited by *Section 1*. Nothing in these opinions should be interpreted as justifying the conclusion that concerted action solely between a parent and subsidiary or subsidiaries, the purpose and effect of which is not coercive restraint of the trade of strangers to the corporate family, violates *Section 1*. Where such concerted action restrains no trade and is designed to restrain no trade other than that of the parent and its subsidiaries, *Section 1* is not violated." Attorney General's Committee Report, *supra* n. 9, at 34.

[29] Professor Sullivan provides another example:

"[Picture] a parent corporation and its wholly owned subsidiary (or two corporations wholly owned by the same parent or stockholder group) which operate, respectively, a newspaper and a radio station in the same city. If the radio station, which has no local competitors, were to deny advertising to a local business because the latter advertised in a rival newspaper, the integration between the two corporations, however close in terms of ownership or management or both, would not protect them from a charge of conspiracy to restrain trade. . . . [The] concerted action here involved is not merely carrying on the business of a single integrated firm, it is action which is aimed at restraining trade by utilizing such market power as is possessed by the firm because of its radio station in order to erect a competitive barrier in front of a competitor of the firm's newspaper." L. Sullivan, *supra* n. 9, § 114, at 327 (footnote omitted).

properly criticized when it produces overly broad *per se* rules of antitrust liability; [30] criticism is no less warranted when a *per se* rule of antitrust immunity is adopted in the same way.

In sum, the question that the Court should ask is not why a wholly owned subsidiary should be treated **[****78]** differently from a corporate division, since the immunity accorded that type of arrangement is a necessary consequence of *Colgate*. Rather the question should be why two corporations that engage in a predatory course of conduct which produces a marketwide restraint **[**2755]** on competition and which, as separate legal entities, can be easily fit within the language of *§ 1*, should be immunized from liability because they are controlled by the same godfather. That is a question the Court simply fails to confront. I respectfully dissent.

References

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 22

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:339

12 Federal Procedural Forms, L Ed, Monopolies and Restraints of Trade 48:81 et seq.

18 Am Jur Pl & Pr Forms (Rev), Monopolies, Restraints of Trade, and Unfair Trade Practices, Form 13

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15 USCS 1

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L Ed Index to Annos, Restraints of Trade and Monopolies

ALR Quick **[****79]** Index, Restraints of Trade and Monopolies

Federal Quick Index, Monopolies and Restraints of Trade

Annotation References:

Supreme Court's views as to what constitutes per se illegal "price fixing "under the Sherman Act (*15 USCS 1 et seq.*). *64 L Ed 2d 997*.

Business units or persons within single, commonly owned enterprise as conspiring with each other in violation of 1 or 3 of Sherman Act (*15 USCS 1*, *3*). 20 ALR Fed 682.

Measure and elements of damages under *15 USCS 15* entitling person injured in his business or property by reason of anything forbidden in federal antitrust laws to recover treble damages. 16 ALR Fed 14.

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[30] *E. g., Continental T. V., Inc*. v. *GTE Sylvania Inc., 433 U.S. 36 (1977)*.

Clow Corp. v. Witco Chemical Corp.

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

June 20, 1984

No. 82 C 1287

Reporter

1984 U.S. Dist. LEXIS 15714 *; 1984-2 Trade Cas. (CCH) P66,266

CLOW CORPORATION, Plaintiff, vs. WITCO CHEMICAL CORPORATION, Defendant.

Core Terms

resin, pipe, polybutylene, damages, statute of limitations, fraudulent concealment, antitrust, ascertainable, manufacturing, plant, competitors, limitations, extrusion, alleges, conceal, speculative, toll, supply contract, wrongdoing, supplying, sever, accrued cause of action, tolling statute, due diligence, trade secret, misappropriation, anticompetitive, calculated, supplier, argues

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN1[] Regulated Practices, Private Actions

Damages are recoverable under federal ***antitrust law*** only if suit is commenced within four years after the cause of action accrued. *15 U.S.C.S. § 15b*. An antitrust cause of action accrues and the statute of limitation begins to run when the defendant does an anticompetitive act, which injures the plaintiff. Where there is a continuing conspiracy to violate the antitrust laws a cause of action accrues to the plaintiff and the statute of limitations begins running each time he or she is injured by an action of the defendant.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN2[] Regulated Practices, Private Actions

Bald allegations of conspiracy and concealment by a plaintiff do not merit delaying consideration of the applicability of the statute of limitations until trial.

Governments > Fiduciaries

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN3[] Governments, Fiduciaries

A defendant's denial of wrongdoing does not constitute fraudulent concealment absent the existence of a fiduciary relationship or special circumstances making the plaintiff's reliance on the denial reasonable. Plaintiffs may not postpone suit until they have all the information necessary to prove an antitrust action. Any facts that should excite the suspicion of the plaintiff are considered to be the same as actual knowledge of the underlying claims.

Governments > Legislation > Statute of Limitations > General Overview

HN4[] Legislation, Statute of Limitations

Once the plaintiff has knowledge of the operative facts underlying his claim the statute begins to run, even if the plaintiff does not believe the information received or is not convinced of defendant's culpability.

Governments > Legislation > Statute of Limitations > Tolling

Governments > Legislation > Statute of Limitations > General Overview

HN5[] Statute of Limitations, Tolling

Anticipated duress is not sufficient to toll the running of the statute of limitations.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Governments > Legislation > Statute of Limitations > Tolling

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > General Overview

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

HN6[] Tolling of Statute of Limitations, Fraud

Courts have identified two types of fraudulent concealment. Fraudulent concealment may consist of affirmative acts by the defendant after the wrongdoing which are designed to conceal the wrongdoing. Active efforts by defendants to conceal wrongdoing which has already occurred tolls the limitations period until actual discovery by the plaintiff. Fraudulent concealment has also been the term used to describe instances where the underlying events being sued upon may involve fraud that by its nature is concealed. Some courts have stated, for example, that an antitrust conspiracy can be by its nature "self-concealing." In instances of self-concealing fraudulent conduct the plaintiff must still show due diligence and lack of knowledge before it is proper to toll the limitations period.

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN7[] **Statute of Limitations, Time Limitations**

The Supreme Court has established an exception to the statute of limitations in instances where the damage resulting from an anticompetitive act does not appear until later. A cause of action for these speculative future damages accrues only when they are suffered. The plaintiff need only sue to recover these damages within four years from the date they are felt.

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

HN8[] **Private Actions, Remedies**

Speculative damages must be distinguished from mere uncertainty as to the extent or amount of damages, which will not bar recovery under antitrust laws.

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

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Remedies > Damages > General Overview

HN9[] **Private Actions, Remedies**

There is an approach in which damages "reasonably ascertainable" at the time the wrongful act occurred cannot be deemed speculative. Reasonably ascertainable does not mean provable with clear and convincing certainty. Reasonably ascertainable damages do include future damages when it is foreseeable when they will accrue and even the general rate at which they will accrue. When such future damages are foreseeable at the time of the act and could have been recovered or at least stopped by injunction in a lawsuit commenced at that time or within four years thereafter, then no new action accrues.

Commercial Law (UCC) > Sales (Article 2) > General Overview

Contracts Law > Breach > General Overview

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Ignorance

Commercial Law (UCC) > ... > Remedies > Statute of Limitations > General Overview

Commercial Law (UCC) > ... > Remedies > Statute of Limitations > Accrual of Cause of Action

Commercial Law (UCC) > ... > Remedies > Statute of Limitations > Tolling

Commercial Law (UCC) > ... > Remedies > Statute of Limitations > Time Limitations

Contracts Law > Breach > Breach of Contract Actions > General Overview

Contracts Law > Defenses > Affirmative Defenses > Statute of Limitations

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN10[] Commercial Law (UCC), Sales (Article 2)

Section 2-725 of the Uniform Commercial Code, 26 Ill. Rev. Stat. 2-725, provides a four-year statute of limitations for breach of contract claims. 26 Ill. Rev. Stat. 2-725(2) provides in part that a cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge. 26 Ill. Rev. Stat. 2-725(4) provides, however, that the law on tolling the statute of limitations applies to breach of contract actions.

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Torts > Procedural Matters > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Discovery

HN11[] Statute of Limitations, Extensions & Revivals

Despite the fact that actions based on tort ripen for statute of limitations purposes when all the elements of the action duty, breach and resulting injury or damage are present, the mere fact that the extent of plaintiff's damages are not immediately ascertainable does not postpone accrual of the claim.

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

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

Governments > Legislation > Statute of Limitations > General Overview

Torts > Procedural Matters > Discovery

Torts > Procedural Matters > Statute of Limitations > General Overview

HN12[] Tolling of Statute of Limitations, Discovery Rule

Illinois courts have developed a "discovery rule" that provides that the statute of limitations for torts begins to run when the plaintiff knew or reasonably should have known of both its injury and its wrongful causation.

Opinion by: [*1] MORAN

Opinion

MEMORANDUM AND ORDER

In its five-count complaint plaintiff Clow Corporation alleges violations of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*, misappropriation of trade secrets, tortious interference with business relations and breach of contract by the defendant Witco Chemical Corporation. Before the court is Witco's motion for summary judgment on the ground that Clow's complaint is barred by the applicable statutes of limitations.

I.

Clow is a producer and seller of pipe and related products. In the early 1970s Clow established itself as a manufacturer and marketer of pipe and fittings made from a petrochemical resin containing polybutylene as its primary component. This resin is extruded into a variety of products ranging from pipe and tubing to household utility bags. Due to its durability, flexibility and low cost, polybutylene pipe is an attractive alternative to copper, steel and other kinds of plastic pipe. By January 1975 Clow had captured the largest share of the polybutylene pipe and fittings market. Because of its patent rights Witco was the only manufacturer of polybutylene resin from 1973 until October 1977.

The first three counts **[*2]** of the complaint allege that Witco unlawfully exercised its monopoly power and restrained trade in order to facilitate its integration forward into the polybutylene pipe and fittings market. Witco is alleged to have attempted to fragment this market into a large number of small competitors and to eliminate Clow as a strong competitor. Witco allegedly (1) failed to sell adequate amounts of polybutylene resin to Clow and engaged in price discrimination; (2) disparaged Clow and its products; (3) required Clow to pay higher prices for a resin used for hot water pipe that was not materially different from the resin used for cold water pipe; (4) induced Roger Cotten, Clow's most successful sales representative, to sever his ties to Clow and to set up his own manufacturing plant; (5) conspired with Clow's competitors to exclude Clow from important pipe and pipe fittings markets by offering technical assistance and divulging Clow's trade secrets; (6) misappropriated Clow's trade secrets; and (7) sent Clow contaminated and defective resins. Count 4 alleges that Witco tortiously interfered with business relations by inducing Roger Cotten to establish his own polybutylene extrusion plant and **[*3]** to capture Clow's clients. From 1973 to 1975 Cotten was a principal source of Clow's sales of polybutylene pipe and was especially active in promoting Clow's sales in the mobile home industry. Count 5 alleges that Witco breached several polybutylene supply contracts by failing to supply agreed-upon quantities of polybutylene resins.

Clow filed its first complaint on December 19, 1980. It voluntarily dismissed this action five days later when Witco agreed to extend the applicable statute of limitations until June 19, 1981. Subsequent agreements extended the time period until June 30, 1982. Clow filed this complaint on February 26, 1982. The extension agreements, however, preserved Witco's statute of limitations defenses as of December 19, 1982. Thus, the complaint can be treated as having been filed on that date.

II.

HN1[] Damages are recoverable under federal ***antitrust law*** only if suit is "commenced within four years after the cause of action accrued." *15 U.S.C. § 15b*. The four-year period before this case was filed begins on December 19, 1976. An antitrust cause of action accrues and the statute of limitations begins to run when the defendant does an anticompetitive act **[*4]** which injures the plaintiff. *Zenith Radio Corp. v. Hazeltine, 401 U.S. 321, 338 (1971)*. Where there is a continuing conspiracy to violate the antitrust laws a cause of action accrues to the plaintiff and the statute of limitations begins running each time he or she is injured by an action of the defendant. Id.

Clow alleges that the statute of limitations was tolled by Witco's fraudulent concealment of its wrongdoing. In order to avoid the bar of the statute of limitations Clow must establish that (1) Witco fraudulently concealed the nature and substance of its unlawful conduct from Clow; (2) Witco's concealment was successful; and (3) Clow did not know or by the exercise of due diligence could not have known that it had an antitrust cause of action. See *In re Beef Indus. Antitrust Litigation, 660 F.2d 1148, 1169 (5th Cir. 1979)*, cert. denied, *449 U.S. 905 (1980)*; *Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 249-50 (9th Cir. 1978)*. While Clow has the ultimte burden of persuasion on the fraudulent concealment issue, at this juncture Witco, as a moving party, has the burden of demonstrating the absence of any material fact. See generally In re Beef Industry Antitrust **[*5]** Litigation, supra, 600 F.2d at 1170-71. Even so, ***HN2***[] bald allegations of conspiracy and concealment by a plaintiff do not merit delaying consideration of the applicability of the statute of limitations until trial. *Baker v. E & F Investment, 420 F.2d 1191, 1198 (7th Cir. 1970)*.

The complaint makes the following allegation of fraudulent concealment:

Clow had no knowledge of the unlawful acts and practices of Witco and its co-conspirators until the filing of Cotten, et al., v. Witco Chemical Company, et al., No. 76-3978 (E.D. La. 1976), nor could it have discovered such acts and practices by the exercise of due diligence because they had been fraudulently concealed by Witco and its co-conspirators.

(Complaint, P21.) Cotten was a suit filed by Roger Cotten on December 21, 1976, which contained many of the same allegations as the instant complaint. While Clow's allegation of fraudulent concealment is of questionable particularity, see *Rutledge, supra, 576 F.2d at 250*; *Dayco Corp. v. Goodyear Tire & Rubber Corp., 523 F.2d 389, 394 (6th Cir. 1975)*; *Weinberger v. Retail Credit Co., 498 F.2d 552, 555 (4th Cir. 1974)*; *Laundry Equipment & Sales Corp. v. Borg-Warner Corp., 334 F.2d 788 (7th* **[*6]** *Cir. 1964)*; *Moviecolor Limited v. Eastman Kodak Co., 286 F.2d 80, 88* (2d Cir.), cert. denied, *368 U.S. 821 (1961)*, we need not concern ourselves with that issue, since the pending motion is one for summary judgment after full discovery. The uncontroverted facts developed during that discovery do not justify tolling the statute of limitations in this case by reason of fraudulent concealment.

III.

A.

In its complaint Clow identified two goals of Witco's alleged anticompetitive behavior. The first goal was facilitation of Witco's entry into the polybutylene pipe and fittings market. The second purpose was maintenance of its monopoly position in the polybutylene resin market by preventing Clow from developing into a monoposony. Clow identified Witco's alleged efforts to fragment the market for polybutylene pipe and fittings as the key component of Witco's plan.

Clow had knowledge of both of these goals prior to December 16, 1976. Clow knew before this date that Witco was planning to begin manufacturing large diameter polybutylene pipe. In addition, Clow's July 7, 1976 strategic plan identified a threat posed by a "[r]esin supplier -- Witco -- actively attempting to broaden **[*7]** number of [polybutylene] extruders."

The record also reveals that prior to December 1976 Clow had knowledge of most of the facts which underlie the specific allegations of the complaint. In the 1974-76 period Clow complained on various occasion that Witco was not only failing to meet the terms of its resin supply contracts but was also discriminating unfairly against Clow vis-a-vis other extruders in the allocation of the resin. During this period Clow was also aware that Witco was supplying Clow's actual and potential competitors with resin. The competitors which Clow knew Witco was supplying included Roger Cotten. The Witco-Cotten connection is, of course, the centerpiece of Clow's complaint.

Clow argues that it relied on Witco's assurances that Clow was being treated fairly in the allocation of the resins. ***HN3***[] A defendant's denial of wrongdoing does not constitute fraudulent concealment absent the existence of a fiduciary relationship or special circumstances making the plaintiff's reliance on the denial reasonable. *Rutledge, supra, 576 F.2d at 250*. Neither exception is applicable here. Plaintiffs may not postpone suit until they have all the information necessary to prove **[*8]** an antitrust action. *Starview Outdoor Theatre v. Paramount Film Distributing Corp., 254 F.Supp. 855, 858 (N.D. Ill. 1966)*. Any facts that should excite the suspicion of the plaintiff are considered to be the same as actual knowledge of the underlying claims. *Dayco Corp., supra, 523 F.2d at 394*.

Clow became aware of the single instance of alleged disparagement which has thus far come to light well before December 19, 1976. Clow's vice-president of operations testified that Clow learned of the disparagement, which occurred in 1974-75, prior to February 1976.

Before December 1976 Clow had become well acquainted with the facts underlying its claim that Witco wrongfully charged more for hot water pipe resin than functionally indistinguishable cold water pipe resin. In 1976 Clow retained an outside laboratory to analyze the ingredients of the resins and told Witco that the result showed only a slight difference in the chemical composition of the resins. Clow eventually dropped its effort to prove that the resins were indistinguishable and to convince Witco to end the price differential. The testimony of a Clow official makes clear, however, that Clow did so not because it relied **[*9]** upon Witco's statements that there were significant differences in the resins:

We didn't think the results were conclusive, and ultimately, we accepted Witco's position because we didn't feel we had any choice to do otherwise, but we neve really believed them, and we did feel that the difference in price was inappropriate and we complained to them about it.

(Madden Dep. at 200-01.) (Emphasis added.)

The record reveals that well before December 1976 Clow also knew of problems in the quality of the resins supplied to it by Witco. Clow complained on numerous occasions to Witco about contaminated resins and received apologies, credits and replacement material. As early as December 1975 Clow also complained to Witco about manufacturing problems caused by defective resins. These processing problems were "intolerable" and imposed a "severe burden" upon Clow.

Roger Cotten and one of his companies acted as Clow's exclusive agents in the sale of polybutylene pipe to the mobile home construction industry. This industry was an important market for polybutylene pipe. Clow alleges in essence that Witco was instrumental in inducing Cotten to set up his own polybutylene pipe and pipe **[*10]** fittings extrusion plant and in severing his relationship with Clow. The record shows that Clow investigated Cotten's activities in early 1975 and uncovered his active involvement in a new extrusion in Alabama. The Clow-Cotten relationship was terminated before July 29, 1976. Since Witco was the only supplier of polybutylene resins Clow knew that Witco had to be supplying Cotten with resins. Indeed, Clow felt the effects of Cotten's new plant and Witco's solicitude toward it well before December 1976:

Our whole polybutylene mobile home tubing program was downhill from 1975 on because of our inability to really do a good job in the marketplace so Cotten was very key to us when he went into the business and became a competitor.

(Madden Dep. at 238.)

This record establishes that Clow had sufficient knowledge of the facts such that it could not be deemed a victim of fraudulent concealment. The failure of Witco and Cotten to advertise the existence of their agreement does not toll the running of the statute of limitations. See *Conway v. Bulk Petroleum, 545 F.Supp. 398, 400, n. 3 (N.D. Ill. 1982)*. Alternatively, these same facts should have put Clow on notice that due diligence **[*11]** required at least some investigation on its part into Cotten's venture into manufacturing while nominally still an employee of Clow. See In re Beef Industry Antitrust Litigation, supra, 600 F.2d at 1171 ("[t]hose who have learned of facts "calculated to excite inquiry" must inquire.") ***HN4***[] Once the plaintiff has knowledge of the operative facts underlying his claim the statute begins to run, even if the plaintiff does not believe the information received or is not convinced of defendant's culpability. *Philco Corp. v. Radio Corp. of America, 186 F.Supp. 155, 165-66 (E.D. Pa. 1960)*.

Clow's misappropriation of trade secrets claim (count 3), appears to stem from visits by Witco's personnel to Clow's extrusion facility. Witco allegedly shared information gathered during these visits with Clow's competitors. The limited record indicates that Clow officials became aware of this alleged misappropriation before December 1976.

The heart of Clow's argument is that, while it had some knowledge of the operative facts prior to December 1976, it did not understand their real significance or the dimensions of the assault on its rights until the Cotten litigation was filed and even then its full **[*12]** appreciation of its claims stemmed from later disclosures. The adoption of that argument as a basis for tolling would eviscerate the limitations requirement. Once on notice of the facts previously described Clow had four years to pursue whatever investigation it wished in order to determine whether or not it had wanted to initiate a lawsuit. Such an investigation was not pursued.

B.

Clow interposes several general reasons for tolling the statute of limitations. The first reason stems from the economic relationship between the parties. Clow was the only supplier of resin and Clow argues that it did not aggressively investigate or challenge Witco's behabvior for fear of imperiling its supply of resin. ***HN5***[] Anticipated duress is not sufficient to toll the running of the statute of limitations. See *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1056-57 (5th Cir. 1982)*, cert. denied, *103 S.Ct. 729 (1983)*.

Clow also argues, primarily in relation to the alleged conspiracy between Witco and Cotten, that Witco's acts were by their nature self-concealing and should thus toll the statute of limitations. ***HN6***[] Courts have identified two types of fraudulent **[*13]** concealment. Fraudulent concealment may consist of affirmative acts by the defendant after the wrongdoing which are designed to conceal the wrongdoing. See *Rutledge, supra, 576 F.2d at 250*; *City of Kansas City v. Federal Pac. Electric Co., 310 F.2d 271, 278* (8th Cir.), cert. denied, *371 U.S. 912 (1962)*. Active efforts by defendants to conceal wrongdoing which has already occurred tolls the limitations period until actual discovery by the plaintiff. *Tomera v. Galt, 511 F.2d 504, 510 (7th Cir. 1975)*. Fraudulent concealment has also been the term used to describe instances where the underlying events being sued upon may involve fraud that by its nature is concealed. Some courts have stated, for example, that an antitrust conspiracy can be by its nature "self-concealing." See *King & King Enterprises v. Champlin Petroleum Co., 657 F.2d 1147, 1156 (10th Cir. 1981)*, cert. denied, *454 U.S. 1164 (1982)*; *Baker v. F & F Investments, 420 F.2d 1191, 1199* (7th Cir.), cert. denied, *400 U.S. 821 (1970)*. In instances of self-concealing fraudulent conduct the plaintiff must still show due diligence and lack of knowledge before it is proper to toll the limitations period. *Tomera, supra, 511 F.2d **[*14]** at 511 (7th Cir. 1975)*. *Board of Education of Evanston v. Admiral Heating & Ventilation, Inc., 94 F.R.D. 300, 301-02 (N.D. Ill. 1982)*.

As demonstrated above, Clow either knew of the facts underlying its antitrust claims or failed to exercise due diligence in discovering the bases for these claims. Compare *King & King, supra, 657 F.2d at 1155-56*; State of Illinois v. Sperry Rand Corp., 237 F.Supp. at 520 (N.D. Ill. 1965). Thus, Clow's self-concealing fraud argument must necessarily fail.Clow can only point to Witco's silence and denials of wrongdoing as positive acts by which Clow allegedly attempted to conceal its anticompetitive behavior. Such behavior does not constitute fraudulent concealment absent a fiduciary relationship between the parties or some showing that plaintiff was justifiably misled. See *Rutledge, supra, 576 F.2d at 250*. Given its knowledge of the factual bases for its antitrust claims, Clow's argument in this regard must fail as a matter of law.

Finally, Clow resists dismissal on the ground that the damages it suffered as a result of Witco's anticompetitive conduct were too speculative to be ascertainable prior to December 1976. ***HN7***[] The Supreme Court has established **[*15]** an exception to the statute of limitations in instances where the damage resulting from an anticompetitive act does not appear until later. *Zenith Radio Corp. v. Hazeltine, 401 U.S. at 339*. A cause of action for these speculative future damages accrues only when they are suffered. The plaintiff need only sue to recover these damages within four years from the date they are felt. Id. Clow did not plead speculative damages in its complaint, and mentions it for the first time in its brief.

Zenith did not establish any method for determining whether damages were speculative at the time of the wrongful act. Subsequent decisions do not suggest that the speculative damages exception is a broad one. See e.g. *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1053-54*, (5th Cir. 1982). *Siegel Oil Co. v. Gulf Oil Corp., 556 F.Supp. 302 (D. Co. 1982)*. ***HN8***[] Speculative damages must be distinguished from mere uncertainty as to the extent or amount of damages, which will not bar recovery under antitrust laws. See *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931)*; *Barnosky Oils, Inc. v. Union Oil Co. of California, 655 F.2d 74, 83 (6th **[*16]** Cir. 1981)*.

The Siegel court outlined ***HN9***[] an approach in which damages "reasonably ascertainable" at the time the wrongful act occurred cannot be deemed speculative.

[R]easonably ascertainable does not mean provable with clear and convincing certainty. Reasonably ascertainable damages do include future damages when it is foreseeable when they will accrue and even the general rate at which they will accrue. When such future damages are foreseeable at the time of the act and could have been recovered or at least stopped by injunction in a lawsuit commenced at that time (or within [four] years thereafter), then Zenith implies no new action accrues.

556 F.Supp. at 309.

It appears that the market for polybutylene pipe and fittings was burgeoning in the early and mid-1970s and that new extruders were entering the market. Nevertheless, nothing in the record suggests that the damages which Clow alleges it suffered prior to December 1976 were not "reasonably ascertainable" even though particular calculations, as in many antitrust cases, might have been difficult. The damages caused by Witco's failure to adequately supply Clow with resins, and its provision of contaminated or defective **[*17]** resins, could have been calculated with reference to the supply contracts, and Clow's lost sales and higher manufacturing costs. The effects of price discrimination could be ascertained with reference to the prices and terms which Witco offered Clow's competitors. No substantial barriers would have prevented proof of the damages stemming from Witco's disparagement of Clow and its products, from its sales of hot water pipe resin at a higher price and its misappropriation of Clow's trade secrets. The effects of Cotten's defection and of the entrance of his own manufacturing facility into the pipe and fittings market were reasonably ascertainable, and before December 1976 Clow knew them to be severe. Calculation of these damages would be eased by the fact that Cotten was Clow's primary salesman in the mobile home market. The damages resulting from Witco's active encouragement of the emergence of competing extrusion companies could have been calculated through an analysis of the respective market shares. In sum, the data available as of December 1976 was sufficient as a matter of law to render damages reasonably ascertainable. See *Argus, Inc. v. Eastman Kodak Co., 552 F.Supp. 589, **[*18]** 597 (S.D.N.Y. 1982)*.

IV.

The parties agree that the Illinois statutes of limitations apply to Clow's state law claims. These claims stem from the same factual allegations that are the bases of Clow's antitrust claims.

HN10[] *Section 2-725 of the Uniform Commercial Code*, 26 Ill.Rev.Stat. 2-725, provides a four-year statute of limitations for breach of contract claims. Clow alleges that Witco breached its supply contract by refusing to deliver agreed-upon quantities of resin and by failing to allocate resins proportionally among manufacturers during periods of shortages. The parties appear to agree that the breaches of contracts occurred before December 1976.

Section 2-725(2) provides in part that "[A] cause of action accrues when the breach occurs, regardless of the aggrieved's party's lack of knowledge." *Section 2-725(4)* provides, however, that the law on tolling the statute of limitations applies to breach of contracts actions. Clow argues that 110 Ill.Rev.Stat. § 13-215, which provides that fraudulent concealment tolls the statute of limitations, prevents its breach of contract action from being time-barred.

This court has already determined that Clow was well aware **[*19]** before December 1976 that Witco had breached the resin supply contracts. It has also concluded that Witco had not engaged in fraudulent concealment in connection with these alleged breaches. Nothing suggests that the Illinois definition of fraudulent concealment differs in any important respect from that used in the antitrust area. See *Zagar v. Health & Hospitals Governing Commission of Cook County, 83 Ill.App.3d 894, 39 Ill.Dec. 112, 404 N.E.2d 496 (1980)*; *Harvey v. Harris Trust and Savings Bank, 73 Ill.App.3d 280, 29 Ill.Dec. 198, 391 N.E.2d 461*, cert. denied, *445 U.S. 929 (1980)*. Consequently, the four-year statute of limitations is not tolled and Clow's breach of contract claim is time-barred.

Clow's tortious interference claim rests upon an allegation that Witco prompted Cotten to discontinue his relationship with Clow, assisted Cotten in setting up an extrusion plant and supplied Cotten with polybutylene resins. The applicable statute of limitations is five years, Ill.Rev.Stat. ch. 110, § 13-205, and thus the limitations period extends back to December 1975. ***HN11***[] Despite the fact that actions based on tort ripen for statute of limitations purposes when all the elements of the **[*20]** action -- duty, breach and resulting injury or damage -- are present, *Ozark Airlines, Inc. v. Fairchild-Hiller Corp., 71 Ill.App.3d 637, 28 Ill.Dec. 277, 280, 390 N.E.2d 444, 447 (1st Dist. 1979)*, the mere fact that the extent of plaintiff's damages are not immediately ascertainable does not postpone accrual of the claim. *Del Bianco v. American Motorists Ins. Co., 73 Ill.App.3d 743, 29 Ill.Dec. 563, 567, 392 N.E.2d 120, 124 (1st Dist. 1979)*.

By December 1975 Clow was aware of the existence and operation of Cotten's extrusion plant and of Witco's provision of resin to the plant. What is unclear is whether the Clow-Cotten relationship had ended as of this date. As early as April 18, 1975, however, a ranking Clow official recommended severing Clow's relationship with Cotten. Given that Cotten was one of Clow's principal salesmen, and given that Witco was the sole supplier of resin, Clow's cause of action accrued prior to December 1975 even if the Clow-Cotten relationship had yet to be formally terminated.

HN12[] Illinois courts have developed a "discovery rule" that provides that the statute of limitations for torts begins to run when the plaintiff knew or reasonably should have known **[*21]** of both its injury and its wrongful causation. See *Witherell v. Weimen, 85 Ill.2d 146, 155, 52 Ill.Dec. 6, 10-11, 421 N.E.2d 869, 873-74 (1981)*. Clow argues that its failure to discover the true nature of the Cotten-Witco relationship until 1980 means that the statute of limitations did not begin running until well after December 1975. This argument fails because Clow reasonably should have known prior to December 1975 of the tortious nature of the Cotten-Witco connection. Cotten was a key Clow salesman. Since Witco was the sole supplier of resin Clow should have deduced that Cotten would not have built his extrusion plant without at least Witco's tacit encouragement. Clow knew in 1975 that Witco was supplying Cotten with resin even though Witco at that time was not fulfilling its supply contracts with Clow. Finally, Clow recognized the wrongful nature of the relationship between Witco and Cotten in early 1975 when a Clow official recommended, soon after Cotten's plant was discovered, that Clow should sever its relationship with Cotten.

Conclusion

Plaintiff's claims are time-barred by applicable statutes of limitations. Defendant's motion for summary judgment is accordingly **[*22]** granted.

Morris Electronics of Syracuse, Inc. v. Mattel, Inc.

United States District Court for the Northern District of New York

June 20, 1984

No. 83-CV-211

Reporter

595 F. Supp. 56 *; 1984 U.S. Dist. LEXIS 15735 **; 1984-2 Trade Cas. (CCH) P66,091

MORRIS ELECTRONICS OF SYRACUSE, INC., Plaintiff, v. MATTEL, INC., MATTEL ELECTRONICS, INC. and LOUIS J. BUDUSON, Individually, and d/b/a SOUND MERCHANDISE, Defendants

Core Terms

retailers, products, customers, allegations, facilities, antitrust, Clayton Act, purchasing, damages, direct-purchasing, defendants', cause of action, discriminated, wholesaler, advertising, electronics, allowances, deliveries, violations, supplier, profits, sales, antitrust violation, retailer-customers, alleged violation, retail customer, proportionately, discriminatory, duplicate, injuries

LexisNexis® Headnotes

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Clayton Act > 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 > Remedies > Damages

HN1[] **Robinson-Patman Act, Claims**

Sections 2(d) and 2(e) of the Clayton Act, as amended by *15 U.S.C.S. §§ 13(d)*, *13(e)* of the Robinson-Patman Act, make it unlawful, in substance, for a seller to furnish promotional and advertising allowances, services, or facilities to a customer in connection with the sale of a product unless such allowances, services or facilities are made available on proportionately equal terms to all other customers that compete for such product on the same level of distribution as the favored customer.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

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

HN2[] Robinson-Patman Act, Claims

Sections 2(d) and 2(e) of the Clayton Act, as amended by *15 U.S.C.S. §§ 13(d)*, *13(e)* of the Robinson-Patman Act, provide as follows: *§ 13*. Discrimination in Price, Services, or Facilities. (d) Payment for services or facilities. It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale, of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities. (e) Furnishing services or facilities. It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

Commercial Law (UCC) > Sales (Article 2) > Remedies > 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 > Prioritizing Resources & Organization for Intellectual Property Act

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

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

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

HN3[] Antitrust & Trade Law, Exemptions & Immunities

"Antitrust standing," that is, the right to assert a private antitrust action for damages, has been conferred by Congress upon any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. Section 4 of the Clayton Act, *15 U.S.C.S. § 15*. On its face, § 4 contains little in the way of restrictive language. And the lack of restrictive language reflects Congress' "expansive remedial purpose" in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations. Two factors that limit the availability of the § 4 remedy: (1) the risk of duplicative recovery; and (2) the remoteness of plaintiff's alleged injury from the defendant's alleged violation. In determining whether the injuries are "too remote" from the antitrust violation to afford standing, the court must consider (a) the physical and economic nexus between the alleged violation and the harm to the plaintiff; and (b) 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.

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

Antitrust & Trade Law > Clayton Act > General Overview

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

HN4[] Private Actions, Standing

Supplier standing should be denied unless (1) the plaintiff's product is virtually identical with that of the defendant, or at least the overwhelming component of the latter in value, and (2) the proximity of interest is very clear, as evidenced by the fact that the defendant's actions clearly dictated a substantial market response by the plaintiff, and (3) the plaintiff is the injured party whose interest will most likely lead him to vindicate the public interest, as for example, where each immediately-affected dealer is little damaged and can easily shift his attention to other products, and (4) duplicate recoveries can be avoided through a lost-profits measure of damages. In any given case a supplier may not in fact have sustained, or be able to prove, an impact in its sales or profits as a result of illegal acts that primarily affect its retailer-customers.

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

Business & Corporate Compliance > ... > Remedies > Buyer's Damages & Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

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

HN5[] Robinson-Patman Act, Remedies

It may well prove to be the case that in certain respects the wholesaler, through refunds or credits to its retailer-customers, may have actually borne the brunt of the antitrust injury. While it is well established that §§ 2(d), 2(e) of the Clayton Act, as amended by 15 U.S.C.S. §§ 13(d), 13(e) of the Robinson-Patman Act, proscribe only discrimination among competitors on the same level of distribution, there is little basis for concluding that Congress meant to afford a remedy to those specifically discriminated against, but not those whose injury closely flows from that which makes the defendant's acts unlawful. Section 2(e) of the Clayton Act requires that the service or facility relate to the resale of the product by the purchaser as opposed to the original sale from the supplier to the purchaser. Thus § 2(e) is violated neither by discriminatory deliveries of products, nor by discriminatory allocation of products. A seller who permits certain of its customers to return unsold goods for credit, while not extending the same privilege to other customers violates § 2(e).

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Judges: Neal P. McCurn, D.J.

Opinion by: McCURN

Opinion

[*57] NEAL P. McCURN, D.J.

MEMORANDUM-DECISION AND ORDER

HN1[] Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, *15 U.S.C. §§ 13(d)* and *13(e) (1976)*, make it unlawful, in substance, for a seller to furnish promotional and advertising allowances, services, or facilities to a customer in connection with the sale of a product unless such allowances, services or facilities are made available on proportionately equal terms to all other customers that compete for such product on the same level of distribution as the favored customer. *See generally, F.T.C. v. Fred Meyer, Inc., 390 U.S. 341, 19 L. Ed. 2d 1222, 88 S. Ct. 904 (1968)*. **[**2]** The central issue on this motion is whether the plaintiff, a wholesaler, may assert a claim for damages for injury to its business as a result of the defendant manufacturer's alleged violation of §§ 2(d) and 2(e) by favoring direct-purchasing retailers over the indirect-purchasing retailers supplied through the plaintiff. The court, for reasons set forth herein, concludes that the plaintiff has antitrust standing to assert such claim, and therefore denies defendants' motion for judgment on the pleadings or, in the alternative, for partial summary judgment.

I.

As alleged in its Amended Complaint, plaintiff Morris Electronics of Syracuse, Inc. ("Morris") is a wholesale dealer in electronics products and appliances. Defendants Mattel, Inc. and its subsidiary Mattel Electronics, Inc. ("Mattel") manufacture, distribute and sell consumer electronics, including its trademarked Intellivision **[*58]** master components and game cartridges. Defendant Buduson is a sales representative of Mattel doing business as Sound Merchandise.

Plaintiff asserts four causes of action, which pertain to Mattel's alleged practices in the sale and marketing of its consumer electronics products. The first **[**3]** cause of action alleges that the defendants unlawfully tied and conditioned the sale to Morris of its Intellivision master components to the sale of its handheld and other consumer electronic games in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1 (1976)*, and *Section 3* of the Clayton Act, *15 U.S.C. § 14 (1976)*. The second cause of action alleges that Mattel unlawfully discriminated in price between Morris and direct purchasing retailers by selling consumer electronics products to direct purchasing retailers at substantially lower prices than to Morris in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, *15 U.S.C. § 13(a) (1976)*. The third cause of action -- which is the subject of this motion -- alleges that Mattel provided promotional and advertising allowances, services and facilities to direct-purchasing retailers in connection with the sale of Mattel's consumer electronics products without providing the same allowances, services and facilities to Morris or Morris' retailer customers on proportionately equal terms, in violation of §§ 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, *15 U.S.C. §§ 13(d)* and *13(e)* ***[**4]*** *(1976)*. Finally, plaintiff's fourth cause of action incorporates the previous allegations, and asserts a violation of the Donnelly Act, *NY GENERAL BUSINESS LAW § 340* (McKinney 1968).

Presently before the court is the defendants' motion, pursuant to *Rule 12(c), Fed. R. Civ. P.*, to dismiss the third cause of action and part of the fourth cause of action in plaintiff's Amended Complaint or, in the alternative, pursuant to *Rule 56 Fed. R. Civ. P.*, for summary judgment as to those claims. Inasmuch as plaintiff does not oppose defendants' motion with respect to part of its fourth cause of action, that motion will be granted, and the court's discussion herein is limited to the sufficiency of plaintiff's claim under §§ 2(d) and 2(e) of the Clayton Act.

II.

For the purpose of considering defendant's *Rule 12(c)* motion, all of the well-pleaded allegations in the complaint are assumed to be true, and all contravening assertions in the defendants' Answer are taken to be false. *National Metropolitan Bank v. United States, 323 U.S. 454, 89 L. Ed. 383, 65 S. Ct. 354 (1945)*. *See generally*, 5 Wright & Miller, Federal Practice & Procedure § 1368 (1969 ed.). [1] Turning, then, to the specific **[**5]** allegations in support of the challenged cause of action, the court must assume the truth of the following:

> 31. . . . In furtherance of the sale of Mattel's products by large direct purchasing retailers, including but not limited to J. C. Penny, Kiddie City, a division of Lionel, K-Mart and Radio Shack, Mattel supplied these direct purchasing retailers with promotional and advertising services and facilities for their use and benefit in connection with their sale of Mattel's products, without offering the same allowances, services and facilities to Morris or Morris' retailer customers on proportionately equal terms as those available to these direct-purchasing retailers or by offering the promotional benefits only on a delayed or in an otherwise discriminatory fashion.

[6]** For example, Mattel provided its direct-purchasing retail customers with advance notification of a rebate that it would offer to promote sales of Intellivision, which notice enabled such direct-purchasing retail customers, but not its indirect-purchasing retail customers, to place timely advertisements **[*59]** of the rebate during the 1982 Christmas season. *Amended Complaint* paras. 32(a)-(d). Morris also discriminated in favor of direct-purchasing retailers by furnishing them with more timely deliveries of products, *id*. P 32(e); more advantageous allocations of in store display materials, *id*.; more advantageous allocations of desired products, *id*.; and more favorable return privileges. *Id*. P 32(f).

As a result of the aforementioned discriminatory conduct, the plaintiff lost profits, sales and goodwill, and its business has been impaired. *Id*. P 35.

III.

HN2[] Sections 2(d) and (e) of the Clayton Act, *15 U.S.C. §§ 13(d)* and *(e)*, provide as follows:

> *§ 13*. *Discrimination in Price, Services, or Facilities*.
>
> . . . .
>
> (d) Payment for services or facilities. It shall be unlawful for any person engaged in commerce to pay or contract for the payment **[**7]** of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale, of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.
>
> (e) Furnishing services or facilities. It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

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[1] Since the parties agree that the issues before the court are issues of law which may be decided from the face of the pleadings, the court will expressly treat the motion brought pursuant to *Rule 12(c)*, and then rule upon the alternative summary judgment motion as a matter of course.

As both parties recognize, these sections only prohibit a seller from discriminating between customers that compete on the same level of distribution; they do not **[**8]** mandate proportional equality between wholesale and retail customers. *F.T.C. v. Fred Meyer, Inc., 390 U.S. 341, 348-349, 19 L. Ed. 2d 1222, 88 S. Ct. 904*. In moving to dismiss, the defendants construe the Amended Complaint as alleging that Mattel discriminated in promotional advertising services and facilities between Morris, a wholesale distributor, and direct-purchasing retailers, such as J. C. Penney. They therefore contend that the plaintiff has failed to state a claim, since it has failed to allege discrimination between customers that compete on the same level of distribution.

The complaint does appear to allege, *inter alia*, that the defendants discriminated between Morris and direct-purchasing retailers, see *Amended Complaint* para. 31 (". . . Mattel supplied these direct purchasing retailers. . . without offering the same . . . to Morris. . . ."), and to that extent, it does not state a claim. However, the complaint also alleges that the defendants unlawfully discriminated between Morris' retail customers and direct-purchasing retailers -- customers that *are* on the same functional level -- and that Morris was injured in its business as a result of that unlawful **[**9]** discrimination. [2] Such allegation, if asserted by one of the injured retailers, would presumably state a claim. The issue, therefore, **[*60]** is whether plaintiff, a wholesaler, has antitrust standing to assert the claim that the defendants' discrimination among retailers injured it in its business. [3]

[10]** IV.

HN3[] "Antitrust standing", that is, the right to assert a private antitrust action for damages, has been conferred by Congress upon "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." Clayton Act § 4, *15 U.S.C. § 15*. As the Supreme Court explained in *Blue Shield of Virginia v. McCready, 457 U.S. 465, 472, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*,

> "On its face, § 4 contains little in the way of restrictive language." And the lack of restrictive language reflects Congress' "expansive remedial purpose" in enacting § 4: Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations. (Citations omitted).

However, as the Court subsequently emphasized in *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 907, 74 L. Ed. 2d 723 (1983)* ("*Associated General*"), "Congress did not intend to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust **[**11]** violation," nor did Congress "intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business."

After summarizing the struggle of federal courts "to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages," the Court in *Associated General* conceded the impossibility of announcing a "black letter rule" that could be uniformly applied. It did, however, identify a number of factors for

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[2] Possibly, plaintiff did not even intend to allege that the defendants discriminated against *it* and in favor of direct purchasing retailers, but rather sought in Amended Complaint para. 31 to allege only that the defendants discriminated against *its customers* by failing to furnish proportionately equal allowances, services or facilities to either those customers, or to it. *See F.T.C. v. Fred Meyer, Inc., 390 U.S. at 358* (Nothing we have said bars a supplier . . . from utilizing his wholesalers to distribute payments or administer a promotional program, so long as the supplier takes responsibility . . . for seeing that the allowances are made available to all who compete in the resale of his product).

[3] Since the issue is standing, and not the substantive scope of §§ 2(d) and 2(e), defendants' reliance on the holdings of *F.T.C. v. Fred Meyer, Inc., Kirby v. P.R. Mallory & Co., Inc., 489 F.2d 904* (7th Cir.) *cert. denied 417 U.S. 911, 41 L. Ed. 2d 215, 94 S. Ct. 2610 (1974)*, and *L.S. Amster & Co., Inc. v. McNeil Laboratories, Inc., 504 F. Supp. 617 (S.D.N.Y. 1980)* is misplaced. None of those decisions squarely address the question of whether a wholesaler has antitrust standing to sue for injuries it sustained as a result of the defendants' discrimination among retailers. Moreover, even if the issue had been addressed by *Kirby* or *L.S. Amster*, the issue would now have to be considered anew in light of recent Supreme Court decisions on antitrust standing, discussed *infra*.

courts to consider when confronted with the recurrent problem of antitrust standing. A recent decision of the Court of Appeals instructs the courts of this circuit "to follow the approaches adumbrated by the Supreme Court in *McCready* and *Associated General* without concern whether the results are consistent with language in earlier Second Circuit cases." *Crimpers Promotions, Inc. v. Home Box Office, Inc., 724 F.2d 290, 293 (2d Cir. 1983)*.

A.

In *McCready*, the Supreme Court focused upon two factors that limit the availability of the § 4 remedy: (1) the risk of duplicative recovery; and (2) the remoteness of plaintiff's alleged injury **[**12]** from the defendant's alleged violation.

In this instance, the risk of duplicative recovery is minimal. As the plaintiff persuasively explains:

> . . . [Morris'] injuries are not based upon obtaining a portion of the damages suffered by its customers. Rather, Morris' claims are based upon the profits lost as a result of (i) the cancellation of previously placed orders for Mattel products and (ii) having to provide credits and refunds to its customers, as a consequence of defendants' failure to meet their Robinson-Patman obligations. *Plaintiff's Letter in Opposition* at 5 (9/16/83).

Without regard, at this juncture, to any other challenge to these bases for recovery, it is evident that the plaintiff seeks to **[*61]** recover for injuries that are distinct from, and do not duplicate, any injuries its customers might have sustained. *Cf*. 2 Areeda & Turner, ***Antitrust Law*** para. 340d at 214 (1978) (commenting that, where a manufacturer sues its customer's competitor, "duplication could be avoided by awarding each [i.e., the manufacturer and his customer] his lost profits").

Turning next to "the conceptually more difficult question," of whether the injuries **[**13]** are "too remote" from the antitrust violation to afford standing, *McCready, 457 U.S. at 476*, the court must consider (a) "the physical and economic nexus between the alleged violation and the harm to the plaintiff"; and (b) "the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4." *Id. at 478*.

The plaintiff herein is clearly not the *most* immediate victim of the alleged violation; its retail customers would bear the brunt of any discrimination in favor of their competitors. Nevertheless, the "nexus" between the alleged violation and the alleged harm is a close one: if Morris' retailer-customers lose sales of Mattel products such as Intellivision master components to their direct-purchasing competitors, Morris is apt to suffer an impact in its sales of those products to its retailer-customers.

To be sure, a supplier "is usually denied standing to complain that he was injured by selling less to one who was injured by the defendant's alleged antitrust violation." 2 Areeda & Turner, *supra*, P 340e at 217. *See also, Crimpers,* ***[**14]*** *supra, 724 F.2d at 294* (dicta). This general rule may have to be reconsidered in light of *McCready* and *Associated General*. But in any event, the plaintiff here does not merely allege a loss of sales in its business due to a general impairment in its customers' businesses, which in turn is due to the defendants' illegal conduct. Rather, plaintiff alleges a loss in sales and profits with respect to particular finished products because its customers' ability to resell those same products is impaired by the defendants' illegal conduct. Such allegation presents a particularly close connection between the violation and the injury and has been recognized as a basis for supplier standing. Areeda & Turner, *supra*, P 340 at 212-13. [4]

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[4] Areeda & Turner comment:

> On balance, we think that ***HN4***[] [supplier] standing should be denied unless (1) *the plaintiff's product is virtually identical with that of the defendant, or at least the overwhelming component of the latter in value*, and (2) the proximity of interest is very clear, as evidenced by the fact that the defendant's actions clearly dictated a substantial market response by the plaintiff, and (3) the plaintiff is the injured party whose interest will most likely lead him to vindicate the public interest -- as for example, where each immediately-affected dealer is little damaged and can easily shift his attention to other products -- and (4) duplicate recoveries can be avoided through a lost-profits measure of damages. *Id. at 213* (emphasis added).

[15]** It is also true that in any given case a supplier may not in fact have sustained -- or be able to prove -- an impact in its sales or profits as a result of illegal acts that primarily affect its retailer-customers. *See Kirby v. P.R. Mallory & Co., Inc., 489 F.2d 904, 911* (7th Cir.), *cert. denied 417 U.S. 911, 41 L. Ed. 2d 215, 94 S. Ct. 2610 (1974)*. But where, as here, the injury is assumed to have occurred for the purpose of this motion, that injury appears to this court to be "precisely 'the type of loss that the claimed violations . . . would be likely to cause. '" *McCready, 457 U.S. at 479*, *quoting Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*.

With regard to the question of whether the alleged injury is a type "about which Congress was likely to have been concerned," *McCready, 457 U.S. at 478*, the court notes, first, "that Robinson-Patman 'was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of **[*62]** their greater purchasing power. '" *Jefferson Cty. Pharmaceutical Ass'n. v. Abbott Laboratories, 460 U.S. 150, 103 S. **[**16]** Ct. 1011, 1017, 74 L. Ed. 2d 882 (1983)*, *citing, inter alia, F.T.C. v. Fred Meyer, Inc., supra.* See also, H. C. Hansen, "Robinson-Patman Law: A Review & Analysis," *51 Fordham L. Rev. 1113, 1120-24 (May 1983)*. More specifically, §§ 2(d) and 2(e) were enacted to prevent sellers from circumventing the ban on price discrimination in § 2(a) by discriminating between buyers through advertising and other sales promotional allowances. *F.T.C. v. Fred Meyer, Inc., 390 U.S. at 350-52*.

Undoubtedly, the special focus of Congress' concern in enacting §§ 2(d) and 2(e) were the independent merchants who competed with large chain stores. As the Court noted in *F.T.C. v. Fred Meyer, Inc., id. at 349-50*:

> The role within the statutory scheme which Congress intended for § 2(d) is well documented in the legislative history. An investigation of chain store buying practices undertaken by the Federal Trade Commission, at Congress' request, had indicated that § 2 of the Clayton Act was an inadequate deterrent against outright price discrimination. The investigation also revealed that certain practices by which large buyers induced concessions which their smaller competitors could not **[**17]** obtain were wholly beyond the reach of § 2. It is significant that congressional concern had focused on the buying practices of large retailers, particularly the chain stores, because it was felt that they were threatening the continued existence of the independent merchant.

Moreover, the Court also explained in that case that "the competition with which Congress was concerned in § 2(d) was that between buyers *who competed in resales* of the supplier's products." *Id. at 356* (emphasis added). The Court therefore concluded that Congress did not intend, in enacting § 2(d), to compel a supplier to pay to a wholesaler promotional allowances that are proportionately equal to those it pays to retailers.

There is, however, no indication in *F.T.C. v. Fred Meyer, Inc*. or its progeny that the injury caused to a wholesaler by a supplier's discrimination *among retailers* was beyond the concern of Congress. The wholesaler is no stranger to the competitive scheme the statute is designed to protect, and when that scheme is disrupted by violations of §§ 2(d) and 2(e), its injury is "inextricably intertwined" with the injury inflicted upon the retailers. *Crimpers, 724 F.2d **[**18]** at 294-95*, *quoting McCready, 457 U.S. at 484*. Indeed, ***HN5***[] it may well prove to be the case that in certain respects the wholesaler, through refunds or credits to its retailer-customers, may have actually borne the brunt of the antitrust injury. *See McCready, 457 U.S. at 483*. Thus, while it is well established that §§ 2(d) and 2(e) proscribe only discrimination among competitors on the same level of distribution, there is little basis for concluding that Congress meant to afford a remedy to those specifically discriminated against, but not those whose injury, like this plaintiff's alleged injury, closely "flows from that which makes the defendant's acts unlawful." *Id. at 484*.

B.

In *Associated General*, the Court resolved an antitrust standing problem by considering a number of factors which overlap, in part, those it considered in *McCready*.

One major factor discussed was "the nature of plaintiff's injury." *103 S. Ct. at 908-10*. Here, plaintiff alleges lost sales and profits with respect to Mattel products as a result of the defendants' §§ 2(d) and 2(e) violations. Clearly, the injury is of a general nature ordinarily asserted by antitrust plaintiffs. And as discussed **[**19]** previously, while the plaintiff's injury is not at the epicenter of Congress' concern, it is sufficiently related to the retailer's injury to warrant an inference that Congress did not intend such injury to go unremedied.

[*63] A second factor in *Associated General*, also addressed in *McCready*, concerned the directness or indirectness of plaintiff's injury. *Id. at 910*. Undoubtedly, plaintiff's allegations reveal a causal connection between the violation and its injury, *id. at 908*; moreover, in the language of torts, the violation would be considered a "proximate cause" of the injury, which was "foreseeable." *See id. at 905-06*, n.'s 24, 25. As discussed above, while the plaintiff was not likely to have been the *most* direct victim of the §§ 2(d) and 2(e) violations, *but see ante at* 14, the nexus between the alleged violation and the alleged harm was close indeed.

The Court in *Associated General* also articulated its version of the "best plaintiff" principle that is often considered when standing is an issue:

> The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest **[**20]** in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of a private attorney general. Denying the Union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied.

Id. at 911. *See also*, Wright, Miller & Cooper, *13 Federal Practice & Procedure: Jurisdiction* § 3531 at 211 (1975 ed.).

In this instance, although the plaintiff is perhaps "more remote" than its retailer-customers, that is counterbalanced since the plaintiff appears uniquely situated to litigate matters that its individual retailer-customers might not be as able to litigate on their own behalf. *See* Areeda & Turner, *supra*, P 340c at 213 (supplier standing is warranted where, *inter alia*, "the plaintiff is the injured party whose interest will most likely lead him to vindicate the public interest -- as, for example, where each immediately-affected dealer is little damaged and can easily shift his attention to other products . . .").

A fourth factor identified in *Associated General* concerned the speculative nature of the damages alleged. **[**21]** *Id. at 911*. In *Associated General*, for instance, a union claimed that an employer association coerced certain third parties to enter into business relations with non-union contractors and subcontractors in violation of the Sherman Act; the Court found plaintiff's claim of damages "highly speculative," due in part to the indirect and remote nature of the union's injury.

Here, in contrast, plaintiff alleges that the defendants discriminated against indirect-purchasing retail merchants in promotional and advertising allowances, services, and facilities in violation of §§ 2(d) and 2(e) of the Clayton Act. As discussed previously, such discriminatory conduct could well impact upon the profits and sales of a wholesaler supplying the affected products to the indirect-purchasing retailers. The court is unprepared, on this motion directed toward the pleadings, to conclude that such damages would necessarily be too speculative to permit this action to proceed. Indeed, the business records of Morris and its customers might with elucidation by expert and non-expert witnesses, reveal the amount of damages plaintiff sustained, if any, with considerable precision. Like the plaintiff in **[**22]** *Crimpers*, Morris' losses "should be proveable under the liberal principles long recognized in antitrust cases." *724 F.2d at 297*.

A final factor discussed in *Associated General* was the projected difficulty in "avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *103 S. Ct. at 912*. In this court's view, set forth previously in the course of discussing the *McCready* factors, duplicate recovery can be avoided by focusing upon plaintiff's lost profits. That lodestar should enable the court to avoid a complex apportionment of damages as well.

Accordingly, while the court acknowledges that the question of plaintiff's standing is not insubstantial, a review of the claim in light of the factors articulated by the Supreme Court in *McCready* and *Associated General* lead to a conclusion **[*64]** that this plaintiff is, on the basis of its pleading, a person "injured in his business or property by reason of anything forbidden in the antitrust laws." Clayton Act § 4.

V.

In the event that this court did not recognize plaintiff's standing to sue for its own injury, plaintiff contended that it would **[**23]** have standing to assert the antitrust claims of its retailer-customers by virtue of several assignments executed and delivered by such customers to the plaintiff. The defendants respond, with considerable support in this court's view, that such assignments are champertous under New York law, *see* *NY JUDICIARY LAW § 489* (McKinney 1983) and therefore void. In view of the court's holding above, that plaintiff has standing to assert a claim for its injuries, it is not necessary to rule upon the validity of the assignments. However, it should be stated at this point that, under the court's reading of the Amended Complaint, plaintiff is suing to recovery only *its* damages, and not any damages sustained by its customers.

VI.

In addition to challenging the third cause of action *in toto* on standing grounds, defendants also challenge specific allegations therein as failing to state a claim under §§ 2(d) and 2(e) of the Clayton Act. Specifically, defendants contend that insofar as the plaintiff alleges that Mattel provided "direct-purchasing retailers with more timely deliveries of product" and "more advantageous allocations of desired products," *Amended Complaint* para. 32(e), **[**24]** "refused to honor written and oral cancellations," and "pre-released" shipments of products to Morris, *Amended Complaint* para. 32(f), it has failed to allege anything forbidden by the statute invoked.

Clearly, there is a division of opinion among courts as to whether such allegations fall within the scope of the §§ 2(d) and 2(e). *Compare, e.g.,* *L & L Oil Co., Inc. v. Murphy Oil Corp., 674 F.2d 1113, 1118-19 (5th Cir. 1982)* (delivery is not a "service or facility" within the meaning of § 2(e); moreover, § 2(e) requires that the service or facility relate to the *resale* of the product, and problems associated with delivery concern only the original sale) *with* *Centex-Winston Corp. v. Edward Hines Lumber Co., 447 F.2d 585* (7th Cir.) *cert. denied*, *405 U.S. 921, 30 L. Ed. 2d 791, 92 S. Ct. 956 (1972)* (delivery is a "service or facility" within the meaning of § 2(e)). In this circuit, one district court adopted the *Centex-Winston* position, *Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc., 371 F. Supp. 701 (S.D.N.Y. 1974)*, and was affirmed, although without discussion of this issue. *493 F.2d 1352 (2d Cir. 1974)*. However, subsequent **[**25]** decisions by other district courts in this circuit have ruled that problems associated with delivery are beyond the scope of § 2(e). *O'Connell v. Citrus Bowl, Inc., 99 F.R.D. 117, 121 (E.D.N.Y. 1983)*; *Diehl & Sons, Inc. v. International Harvester Co., 426 F. Supp. 110 (E.D.N.Y. 1976)*.

After reviewing the language of the statute and the pertinent authorities, this court is convinced, first, that the Second Circuit has not clearly adopted the *Centex-Winston* position, and second, that the *L & L Oil Co., Inc.*, position is correct. As explained at some length in *L & L Oil Co., Inc.*, § 2(e) was "aimed at advertising and other promotional services," *id. at 1118*, and that, "except for "*Centex-Winston* and the cases adopting its holding, the only arrangements courts have found to be services or facilities are those relating to promotional favors." *Id. at 1119*, *citing, inter alia,* *F.T.C. v. Simplicity Pattern, Co., 360 U.S. 55, 3 L. Ed. 2d 1079, 79 S. Ct. 1005 (1959)*. Moreover, there is more than ample authority for *L & L Oil Co., Inc.'s* conclusion that § 2(e) requires that the service or facility relate to the resale of the product by the purchaser **[**26]** as opposed to the original sale from the supplier to the purchaser. *See e.g.,* *Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1327-28 (6th Cir. 1983)*; *Foremost Pro Color v. Eastman Kodak Co., 703 F.2d 534, 546 (9th* **[*65]** *Cir. 1983)*; *O'Connell v. Citrus Bowl, Inc., supra at 121*. *See also*, 5 vonKalinowski, *Antitrust Laws and Trade Regulation* § 35.02 (1983). Thus § 2(e) is violated neither by discriminatory deliveries of products, *L & L Oil Co., Inc.*, nor by discriminatory allocation of products. *Holleb & Co. v. Produce Terminal Cold Storage Co., 532 F.2d 29, 33 (7th Cir. 1976)*; *David R. McGeorge Car Co. v. Leyland Motor Sales, Inc., 504 F.2d 52, 55* (4th Cir.) *cert. denied*, *420 U.S. 992, 43 L. Ed. 2d 674, 95 S. Ct. 1430 (1975)*. *A fortiori* the allegation of pre-released shipments must fall as well.

However, insofar as plaintiff alleges discrimination with respect to written and oral cancellations, it has been held that a seller who permits certain of its customers to return unsold goods for credit, while not extending the same privilege to other customers violates § 2(e). *Bouldis, supra, 711 F.2d at 1328*. At least until such time **[**27]** as the factual basis for plaintiff's allegation with respect to cancellations becomes clearer, the court declines to rule it insufficient under § 2(e).

ACCORDINGLY, the court denies defendants' motion for judgment on the pleadings or, in the alternative, for summary judgment with respect to the third cause of action, except insofar as plaintiff claims violations of §§ 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, based on allegations that Mattel provided "direct purchasing retailers with more timely deliveries of product" and "more advantageous allocations of desired products," *Amended Complaint* para. 32(e), and "pre-released" shipments of products to Morris, *Amended Complaint* para. 32(f), with respect to which allegations the court grants judgment on the pleadings for the defendants; and the court grants defendants' motion for judgment on the pleadings with respect to the fourth cause of action insofar as plaintiff claims violations of *NY GENERAL BUSINESS LAW §§ 340 et seq*. based on allegations of price discrimination.

IT IS SO ORDERED.

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Reborn Enterprises, Inc. v. Fine Child, Inc.

United States District Court for the Southern District of New York

June 20, 1984

No. 82 Civ. 2451 (ADS)

Reporter

590 F. Supp. 1423 *; 1984 U.S. Dist. LEXIS 15732 **; 1984-2 Trade Cas. (CCH) P66,076

REBORN ENTERPRISES, INC., Plaintiff, v. FINE CHILD, INC., ANDREWS MACLAREN, INC., ANDREWS MACLAREN LTD., BEN'S FOR KIDS, INC., JAMES FINE and MARK WEIN, Defendants

Core Terms

stroller, conspiracy, distributor, terminate, retailers, manufacturer, juvenile, summary judgment, customers, selling, products, conspired, prices, east side, antitrust, discount, Upper, suggested retail price, vertical, do business, Sherman Act, complaints, repair, rule of reason, territorial, horizontal, purchaser, maternity, adhered, alleges

LexisNexis® Headnotes

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

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

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

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

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

Summary judgment is to be granted sparingly in antitrust litigation, especially where an allegation of conspiracy raises issues of fact as to motive and intent. In deciding whether to grant summary judgment, moreover, the court must view the facts in the light most favorable to the party opposing the motion, and all possible inferences must be resolved in that party's favor. The moving party has the burden of showing that there is no genuine issue for trial as to any material fact, and that it is entitled to judgment as a matter of law.

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

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

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

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

HN2[] **Summary Judgment, Motions for Summary Judgment**

Where a complete pretrial record shows there is no genuine issue of material fact, and the resisting party does not present a record sufficient to support a reasonable finding in his favor, a district court has a duty to grant the motion for summary judgment.

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

HN3[] **Summary Judgment, Burdens of Proof**

See *Fed. R. Civ. P. 56(e)*.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

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

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

HN4[] **Price Discrimination, Defenses**

Summary judgment is particularly appropriate where extensive discovery has been taken and legitimate business reasons have been advanced for defendants' conduct. Immaterial factual disputes should not block summary judgment.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN5[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, states that every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. But 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 > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN6[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

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 effect 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 > Claims

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

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] Sherman Act, Claims

The starting point for proof of a section 1 Sherman Act, 15 U.S.C.S. § 1, violation is evidence of a contract, combination, or conspiracy between two or more persons. Proof of joint or concerted action is required; proof of unilateral action does not suffice.

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

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

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

HN8[] Monopolies & Monopolization, Conspiracy to Monopolize

Conspiracies are, of course, rarely evidenced by explicit agreements, but must usually be proved by inferences that may fairly be drawn from the behavior of the alleged conspirators. At a minimum, however, 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.

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

HN9[] Monopolies & Monopolization, Conspiracy to Monopolize

Common ownership and control does not liberate corporations from the impact of the antitrust laws. However, a single corporate entity of all its agents and employees are normally treated as a single actor for antitrust purposes except where the individuals or sub-entities are held out as competitors.

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

HN10[] Monopolies & Monopolization, Conspiracy to Monopolize

If no other interpretation of the facts is possible except that a controlled subsidiary, with whom a parent was alleged to have conspired, was created to be and never acted other than as agent for the parent, no valid conspiracy claim is stated because separate entities do not exist to conspire.

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

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

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

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

HN11[] **Vertical Restraints, Resale Price Maintenance**

Price-fixing conspiracies are unlawful per se.

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

HN12[] **Monopolies & Monopolization, Conspiracy to Monopolize**

A mere showing of close relations or frequent meetings between the alleged conspirators will not sustain a plaintiff's burden absent evidence which would permit the inference that these close ties led to an illegal agreement. Nor does a manufacturer's mere receipt of complaints from its wholesalers or agents who compete with the plaintiff, or its consultation with such other competing wholesalers, standing alone, support a finding of conspiracy with them.

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

HN13[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Even where a termination follows the receipt of complaints from wholesalers or agents, there is no basis for inferring the existence of concerted action, absent some other evidence of a tacit understanding or agreement with them. Finally, the mere fact that a business reason advanced by a defendant for its cut-off of a customer is undermined does not, by itself, justify the inference that the conduct was therefore the result of a conspiracy. Even if a manufacturer or supplier, acting independently, gave a false or inaccurate reason for its action, whether because of a desire to avoid controversy or some other consideration, this would not violate any legal obligation to the customer, absent proof of a conspiracy or breach of contract.

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

HN14[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about in response to complaints, could deter or penalize perfectly legitimate conduct. Moreover, retailers are an important source of information for manufacturers and their agents, which the antitrust laws should not operate to foreclose. In sum, to permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of independent business judgment and emasculate the terms of the statute.

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

HN15[] **Price Fixing & Restraints of Trade, Vertical Restraints**

Publication of a suggested retail price list, however, and voluntary adherence to it by plaintiff's competitors, is insufficient to support a finding of a vertical price fixing conspiracy.

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

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

HN16[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

A manufacturer or dealer may announce the terms under which he will market his product and deal only with those customers who agree to abide by those terms. On the other hand, a manufacturer or its agent may not enforce his announced resale prices by active coercion of those who purchase for resale, such as through threats of termination for noncompliance, whether made in combination with others or alone.

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

HN17[] Price Fixing & Restraints of Trade, Vertical Restraints

While evidence of exposition, persuasion, argument, or pressure is alone insufficient to establish coercion, threats of termination, so long as they secure adherence to the fixed price, have been deemed to trigger a finding of an illegal combination.

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

HN18[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

The law is at least clear that proof of consciously parallel business behavior is circumstantial evidence from which an agreement, tacit or express, can be inferred but that such evidence, without more, is insufficient unless the circumstances under which it occurred make the inference of a rational, independent choice less attractive than that of concerted action.

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

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

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

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

HN19[] Antitrust & Trade Law, Sherman Act

While nonprice restrictions furthering a price-fixing scheme designed to keep a supplier's product out of the hands of a discounter are judged under per se analysis, vertical, concerted actions on nonprice restrictions are judged under the rule of reason and violate *section 1* of the Sherman Act, *15 U.S.C.S. § 1*, only if the action is anticompetitive in purpose or effect.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN20[] **Sherman Act, Claims**

The agreement necessary to establish a *section 1* violation of the Sherman Act, *15 U.S.C.S. § 1*, may be found to exist in a territorial restraint case if the defendant, by his own coercive actions, has put together a system of territorial restraints to which his customers or distributors adhere. However, if the decision to terminate was solely based on legitimate business reasons such as plaintiff's excessive and unjustified complaints, and its deteriorating relationship with defendant, then plaintiff's claim must be dismissed.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

Antitrust & Trade Law > Sherman Act > General Overview

HN21[] **Sherman Act, Claims**

A manufacturer can establish a system of exclusive distributorships without violating *section 1* of the Sherman Act, *15 U.S.C.S. § 1*. Such a voluntary choice presumptively establishes that the system is a more efficient method of distributing the manufacturer's product. Even if he is irrational or mistaken, the fact that he has created a monopoly or near monopoly for one or more distributors is not monopolizing conduct on his part, for it has no exclusionary effects on his actual or potential rivals.

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 > Horizontal Market Allocation

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

A horizontal market allocation occurs when competitors on the same level agree only to sell within certain territories. These types of arrangements are per se unlawful.

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

Business & Corporate Law > Distributorships & Franchises > Termination > Grounds

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Penalties

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

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

HN23[] **Distributorships & Franchises, Antitrust Issues**

A manufacturer may unilaterally decide to terminate one distributor in favor of another for any reason. Where a manufacturer simply decides on his own to substitute one dealer for another his decision to sell exclusively to a new dealer does not amount to an antitrust conspiracy with the latter.

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

HN24[] **Monopolies & Monopolization, Conspiracy to Monopolize**

A manufacturer has a right to confer with its distributor on its marketing strategy.

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

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

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

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

HN25[] **Monopolies & Monopolization, Conspiracy to Monopolize**

The antitrust laws permit a terminated distributor to confer with the new one on each of its accounts. The transfer of relevant business information should not be inhibited for fear of spawning antitrust allegations.

Antitrust & Trade Law > Sherman Act > Penalties

Criminal Law & Procedure > ... > Inchoate Crimes > Solicitation > Penalties

Antitrust & Trade Law > Sherman Act > General Overview

HN26[] **Sherman Act, Penalties**

Where the evidence is uncontroverted that defendant acted without soliciting the aid of any other entity, his motives are irrelevant. To establish the illegality of an act under *Section 1* of the Sherman Act, *15 U.S.C.S. § 1*, it is not enough to prove the defendant's motivation was that of punishment for discounting or anything else, however reprehensible.

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

Antitrust & Trade Law > Clayton Act > General Overview

HN27[] Price Fixing & Restraints of Trade, Tying Arrangements

See *15 U.S.C.S. § 14*.

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

Antitrust & Trade Law > Clayton Act > Penalties

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 > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > Sherman Act > Penalties

HN28[] Tying Arrangements, Clayton Act

Tying 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. The seller's leverage in the tying product market enables it to deny competitors free access to the market for the tied product. Tying is a per se violation of both *section 1* of the Sherman Act, *15 U.S.C.S. § 1*, and *section 3* of the Clayton Act, *15 U.S.C.S. § 14*, so long as forcing is likely.

Antitrust & Trade Law > Sherman Act > Claims

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

HN29[] Sherman Act, Claims

A *section 1* Sherman Act, *15 U.S.C.S. § 1*, tying violation has at least five elements: first, a tying and a tied product; second, evidence of actual coercion by the seller that in fact forced the buyer to accept the tied product; third, sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; fourth, anticompetitive effects in the tied market; fifth, involvement of a not insubstantial amount of interstate commerce in the tied product market.

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

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

HN30[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The elements of a violation of section 3 of the Clayton Act, 15 U.S.C.S. § 14, are: (1) sales of goods for use, consumption, or resale within the United States; (2) sales conditioned on the purchaser's not dealing in the goods of a competitor; (3) a potential effect of substantial lessening of competition in the market for the tied product.

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

HN31[] **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. Because this element of forcing is so crucial, per se condemnation -- condemnation without inquiry into actual market conditions -- is only appropriate if the existence of forcing is probable.

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

HN32[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A plaintiff might demonstrate the requisite forcing in two ways. He might establish that he has been required to purchase something which he does not want to take. Or he might show an unremitting policy of tie-in, which, if accompanied by sufficient market power, might substitute for actual coercion.

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

HN33[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Tying arrangements can only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made.

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

HN34[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Absent evidence of forcing, tying arrangements are not unlawful.

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

HN35[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In order to prevail in the absence of per se liability, and in the face of defendants' evidentiary showing, plaintiff must come forward with evidence by which a jury could reasonably conclude that defendants' actions unreasonably restrained competition.

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

HN36[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under the rule of reason analysis, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Among the most important circumstances to be considered are those relating to the competitive characteristics of the relevant market. Proof that the defendant's activities had an impact upon competition in a relevant market is an absolutely essential element of the rule of reason case.

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

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

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

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

HN37[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A determination as to the boundaries of the relevant product market is essential in order to measure the anti-competitive effect, if any, of defendants' actions.

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

HN38[] **Pleadings, Amendment of Pleadings**

Although courts usually exercise their discretion in favor of allowing motions under *Fed. R. Civ. P. 15*, they may also deny such a motion when a party seeks to interpose a claim that lacks merit.

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

Antitrust & Trade Law > ... > Private Actions > Standing > Robinson-Patman Act

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN39[] Clayton Act, Claims

Section 4 of the Clayton Act, 15 U.S.C.S. § 15, confers standing to raise a claim under section 2(a) of the Robinson-Patman Act, 15 U.S.C.S. § 13(a). Notwithstanding the broad language, in order to have standing under section 4, a plaintiff must allege a causative link to his injury which is direct rather than incidental or which indicates that his business or property was in the target area of the defendant's illegal act.

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

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

HN40[] Standing, Clayton Act

Plaintiff need not be an actual purchaser, nor a specifically intended target of the anticompetitive conduct. Without expressly approving the target area test, the Supreme Court recently advised courts assessing plaintiffs' standing under section 4 of the Clayton Act, 15, U.S.C.S. § 15, 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. This inquiry, like that posited by the target area test, recognizes that some consequences may flow from anticompetitive conduct which are simply too remote to give rise to a right for damages.

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

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

HN41[] Monopolies & Monopolization, Actual Monopolization

The offense of monopoly under section 2 of the Sherman Act, 15 U.S.C.S. § 2, has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident, while the essential elements of attempted monopolization are (1) a dangerous probability of success in monopolizing a given product market and (2) a specific intent to destroy competition or build monopoly. Thus, proof of the relevant product market is essential to both these causes of action.

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

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

HN42[] Monopolies & Monopolization, Conspiracy to Monopolize

Finally, the elements of the offense of conspiracy to monopolize are (1) proof of a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of an overt act in furtherance of the conspiracy.

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

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

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

HN43[] **Entitlement as Matter of Law, Appropriateness**

Summary judgment should be granted if but only if the court is satisfied that a properly instructed jury, giving full weight to plaintiff's evidence, drawing every reasonable inference in its favor, and subjecting defendants' evidence to a critical eye, could not rationally find that plaintiff was entitled to any relief.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

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

HN44[] **Supplemental Jurisdiction, Pendent Claims**

Since diversity is lacking the court has no independent jurisdiction of the state law claims beyond its authority to consider them pendent to substantial federal claims. Where the federal claims were not substantial, and the flimsy nature of federal claims may call for dismissal of pendent state claims.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

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

HN45[] **Supplemental Jurisdiction, Pendent Claims**

Certainly, if the federal claims are dismissed before trial the state claims should be dismissed as well. Unless a trial of the operative facts is necessary to resolve claims that the federal court must hear, the federal court has no jurisdiction to take any action with respect to a pendent state law claim.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

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

HN46[] **Jurisdiction, Jurisdictional Sources**

If it appears that the federal claims could be disposed of on a motion for summary judgment, under *Fed. R. Civ. P. 56*, the court should refrain from exercising pendent jurisdiction absent exceptional circumstances.

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Kane Dalsimer, Kane, Sullivan & Kurucz, Esqs., New York, New York, Joseph C. Sullivan, Esq., for Defendants Andrews MacLaren, Inc., and Andrews MacLaren, Ltd.

Judges: Abraham D. Sofaer, D.J.

Opinion by: SOFAER

Opinion

[*1429] OPINION AND ORDER

ABRAHAM D. SOFAER, D.J.:

Reborn Enterprises, Inc. ("Reborn") brought this action in April 1982 against defendants, Andrews MacLaren, Ltd. ("MacLaren Ltd."); Andrews MacLaren Inc. ("MacLaren Inc."); Ben's for Kids, Inc. ("Ben's"); Mark Wein ("Wein"), the since deceased former president of Ben's; Fine Child Inc. ("Fine Child"); and James Fine ("Fine"), president of Fine Child. Reborn seeks damages based upon alleged violations of federal and state antitrust laws and of common law contractual rights. Plaintiff alleges that defendants engaged in conduct constituting *per se* violations of *section* **[**2]** *1* of the Sherman Antitrust Act, *15 U.S.C. § 1*, by forming horizontal and vertical contracts, combinations, and conspiracies to fix prices, by imposing restrictions on the territories in which various retailers could sell the MacLaren Baby Buggy, and by engaging in concerted refusals to deal and tying arrangements. Plaintiff claims that the tying arrangements were also unlawful under *section 3* of the Clayton Act, *15 U.S.C. § 14*. Alternatively, plaintiff maintains that the conduct amounted to an unreasonable restraint of trade under a "rule of reason" analysis. Plaintiff also alleges that defendants monopolized, attempted to monopolize, and conspired to monopolize commerce in violation of *section 2* of the Sherman Act, *15 U.S.C. § 2*, and that defendants Fine Child, Fine, Ben's, and Wein engaged in illegal price discrimination in violation of *section 2* of the Robinson-Patman Act, *15 U.S.C. § 13(a)*, *(d)*, *(f)*. Plaintiff further claims that defendants violated *sections 340* and *369(a)* of New York's Donnelly Act. *N.Y. Gen. Bus. Law §§ 340*, *369(a)*. Finally, Reborn contends that defendants tortiously breached contracts with Reborn and maliciously conspired to interfere with Reborn's advantageous **[**3]** business relationships. Thus, Reborn contends, defendants are jointly and severably liable for compensatory, treble, and punitive damages, as well as for costs and attorney's fees. Reborn requests that the court permanently enjoin defendants from refusing to sell MacLaren strollers, parts, and accessories to Reborn and order them to make such strollers, parts and accessories available to Reborn.

Defendants Fine and Fine Child counterclaimed against Reborn and its attorneys for defamation based on a letter charging defendants with illegal conduct, sent by Reborn's attorneys to all defendants on January 15, 1982. By order dated August **[*1430]** 30, 1982, the defamation claim was severed from the antitrust claims, to be tried separately after all other issues were determined.

After exhaustive discovery, the case was placed on the ready trial calendar in January 1984. At that time, defendants raised a variety of motions which taken together seek dismissal and/or summary judgment against all plaintiff's claims. For the reasons that follow, summary judgment is granted on behalf of all defendants on the federal antitrust claims. The pendent state claims are dismissed without prejudice **[**4]** to plaintiff's right to pursue them in an appropriate court, in which the defamation counterclaim may also be asserted.

I. *Factual Background*

Reborn is a New York corporation that operates eight retail stores in New York, New Jersey, and Connecticut. Its Manhattan store is located on Third Avenue and 82nd Street. Matthew Wallis, who founded Reborn in 1976, is its president and chief executive officer. Reborn is a discount maternity shop selling primarily maternity clothing and, for a time, the MacLaren Baby Buggy. Wallis sometimes also sells non-clothing items such as wallets and pocketbooks that he acquires by buying the inventory of maternity stores which have gone out of business. Wallis' pricing policy is to buy his goods at wholesale, to determine the retail price at which other companies are selling particular items, and then to sell those items for less. Wallis 317.

MacLaren Ltd. is a relatively small British company that manufactures and sells a line of folding baby strollers and related equipment. Its goods are sold throughout Europe and in the United States. Until May 1980, MacLaren Ltd. sold its stroller directly to customers in the United States. On May 1, 1980, **[**5]** MacLaren Ltd. formed a wholly owned subsidiary named MacLaren Inc., a corporation organized under the laws of New York, to act as the sole distributor of its stroller in the United States. This arrangement has continued since that time, except for the period between November 1981 and May 1983, during which Fine Child acted as sole distributor for MacLaren in the United States.

Fine Child was a New York corporation, incorporated in 1975, which sold infant products to juvenile stores. Fine Child was not a prime manufacturer, but sold imported products on a finished goods basis, or on an exclusive license basis. It also sold products it designed and then subcontracted out for manufacturers. Fine 11. James Fine was Fine Child's president, chief executive officer, and sole stockholder. By early 1983, when Fine Child had failed financially and had been taken over by Sassy Seat, Inc., also a juvenile goods company, Fine was hired by Sassy Seat and now serves as the company's president.

Ben's for Kids is a New York corporation consisting of a single retail store located on Third Avenue between 78th and 79th Streets. It sells furniture and clothing for children up to three years of age. Mark **[**6]** Wein was Ben's sole stockholder and chief executive officer during all times relevant to this litigation. His pricing policy was to charge as much as he could get for a product without losing customers. Wein 18. Ms. Kurzman, a MacLaren Inc. employee, had worked at Ben's, and her brother is currently employed there.

During the 1970's, MacLaren Ltd. invented a lightweight infant umbrella stroller which could fold easily and was virtually unbreakable. All parties agree that it is one of the finest of all baby strollers. Plaintiff claims that it is known as the "Rolls Royce" of strollers. Plaintiff's Pretrial Memorandum at 6; Kurzman 43-46. Despite its high price, it sells well because of its outstanding quality. The MacLaren stroller was originally sold in Europe. In 1979 the company decided to "test the waters" in the United States by selling at first to only one juvenile goods store while monitoring the stroller's success. Around this time, Wein spotted the stroller at a trade show in England, and arranged with MacLaren Ltd. to purchase it. From 1979 through early 1980, Ben's purchased directly from MacLaren Ltd. and was the only **[*1431]** store in the United States carrying **[**7]** the stroller.

The stroller sold well at Ben's. MacLaren Ltd. was impressed with the quality of Wein's store, the relationship Wein had with his customers, and his policy of providing extensive post-sale repair service. Then and now MacLaren Ltd. has worked hard to maintain a strong, positive relationship with Ben's. Satisfied that its stroller would sell well in the United States, MacLaren Ltd. formed MacLaren Inc. to handle sales here.

In August 1980, Wallis, owner of the Reborn maternity store, located near Ben's on the Upper East Side of Manhattan, noticed the MacLaren stroller being sold at Ben's. He contacted MacLaren Inc. and sought to place an order. Barbara Kurzman, then employed by MacLaren Inc., visited Reborn. After her visit, she decided it would be unwise for MacLaren Ltd. to do business with Reborn. She reasoned that because it was a maternity shop which sold no juvenile goods, it would ill fit MacLaren's marketing strategy, which was to sell only to juvenile goods shops. Kurzman 46-49. MacLaren believed that a juvenile goods store was more suitable for selling MacLaren strollers than a maternity shop because customers have the opportunity in a juvenile goods store **[**8]** to compare the MacLaren stroller with strollers of other brands and the proprietor has more knowledge about strollers. Kurzman 45-46. Ms. Kurzman also felt it would be unwise for MacLaren to deal with Reborn because of its close proximity to Ben's. Kurzman explained her position to Ian Jones, Export Sales Manager of MacLaren Ltd., and to George Hambleton, Vice President of MacLaren Inc. Kurzman did, however, inform Jones that Reborn wanted to purchase the stroller. Jones made a note on a telex that he would contact Reborn in November 1980, the next time he planned to visit New York.

During Jones' visit in November, he opened new accounts in Manhattan and Brooklyn at Schneider's Juvenile Furniture, Albee's Baby Carriage, Yeedl's, Berkowitz, and Hatzlacha, all well established juvenile goods stores which sold both "hard" and "soft" goods for very young children. ("Hard" goods include juvenile furniture, strollers, high chairs, car seats, carriages, cribs, and the like, while "soft" goods include baby clothing, bibs, and other accessories.) Jones or Kurzman gave Ben's and all other retailers a "suggested price list," and asked them to try and charge about the suggested price. Kurzman **[**9]** 13-16; *see* Hambleton 73-75. During his visit, Jones told Wein he thought it unlikely that any other store on the Upper East Side would receive the stroller, and he did not contact Wallis. Jones 53.

The depositions and other evidence indicate that those involved in sales at both MacLaren Ltd. and MacLaren Inc. were ambivalent about doing business with Reborn. As a maternity store, with no repair facilities, and with the habit of cutting suggested retail prices, Reborn did not fit MacLaren's marketing strategy. Furthermore, MacLaren had carefully cultivated its relationship with Ben's, which was located close to the Reborn store. Consequently, a year passed between Wallis' initial inquiry and MacLaren's decision seriously to examine Reborn as an account.

In March 1981, Kurzman, acting as a representative of MacLaren Inc., visited Reborn, which by then had moved to a larger store. She told Wallis outright that MacLaren was reluctant to deal with him because he sold no other juvenile goods and because there was ample distribution of the stroller on the Upper East Side. She asked Wallis if he would agree not to sell the stroller from his Upper East Side store, and Wallis acceded in **[**10]** order to increase his chances of getting the stroller. Kurzman 113. Kurzman stated "Wallis has given me his word as a gentleman that if indeed we open him as an account, that he will not sell in his New York Store." Kurzman 114. Kurzman also told Wallis that MacLaren would appreciate his selling the stroller close to the suggested retail price. Kurzman 124-25. Nevertheless, after the meeting Kurzman again advised MacLaren **[*1432]** that in her opinion the company should not deal with Reborn.

In April 1981, Mr. Hambleton himself visited Reborn's Manhattan store. Despite Kurzman's suggestion, he agreed to open an account with Wallis because he liked the fact that Reborn had eight outlets and an extensive advertising campaign. He asked Wallis not to sell the stroller from Reborn's Upper East Side store until Hambleton had had a chance to talk to Wein. Hambleton 67-68. Wallis grudgingly agreed. Wallis 214-215. Hambleton did not set a specific time by which he would talk to Wein, and did not condition MacLaren's sale to Wallis upon Wallis' promise not to sell from the Upper East Side. Hambleton also told Wallis that Reborn should try to sell near the suggested retail price if possible, **[**11]** but that MacLaren understood they could not require retailers to adhere to the price. Hambleton 72-73. Wallis agreed to consider this suggestion and entered an order for a quantity of strollers. Plaintiff Exhibit 9.

In early April 1981, the first shipment of MacLaren strollers bound for Reborn was misdelivered to Ben's through an error of the shipping company, whose driver had been accustomed to delivering strollers to Ben's when his truck entered that part of town. Upon learning of the trucker's error, Wein promptly returned the misdelivered goods to the company, and the shipment was then properly delivered to Reborn's Manhattan store. Wallis became very suspicious and agitated by the misdelivery. He persistently called Hambleton and Kurzman, insisting that the misdelivery was purposeful and accusing MacLaren of conspiring to deprive him of the stroller because he was a discounter. When the shipment was redelivered to Reborn, Wallis refused the goods, contending that all the boxes had been opened. The boxes were returned to the warehouse and examined by Kurzman, who claims that only two had been opened. Hambleton 90. The open boxes were sealed, the shipment went back to Wallis, and **[**12]** he accepted it.

After the misdelivery incident, Kurzman, Hambleton, and Wallis had lunch in an attempt to "improve relations." Hambleton 104. At this meeting, Wallis threatened to sue MacLaren. He also said that he had been taping all conversations with MacLaren, Inc., that he believed a sinister motive existed for the misdelivery, and that he feared that MacLaren Inc. was going to cut him off because he was a discounter. Hambleton tried to assure him that Reborn's pricing policy would not influence their decision to do business with him. Wallis remained suspicious.

Throughout April, Wallis repeatedly called Hambleton to find out whether or not he had spoken to Wein, so Wallis could begin selling strollers from Reborn's upper east side store. Hambleton had not done so, allegedly due to the aggravation Wallis had caused him during the month. Wallis nevertheless began to sell the stroller from Reborn's Upper East Side store. Hambleton claims this was done without his approval, but Wallis maintains that Hambleton told him to go ahead. Wallis 215. In any event, no person from MacLaren took any action to prevent Wallis from selling from the Upper East Side once he had begun, and Reborn **[**13]** quickly became one of MacLaren's largest accounts.

After the April misdelivery, Wein called Hambleton of MacLaren Inc. and Alan Nash and Ian Jones of MacLaren Ltd. to ask why MacLaren was selling its stroller to Reborn, a maternity store. He was told by all that the company wanted to see how the arrangement would work out. Subsequently, Wein walked by Reborn's Manhattan store, noticed the stroller displayed in the window, and went in to talk to Wallis. Tempers flared, and Wallis ended up ejecting Wein from the store and summoning the police. Wallis 366.

Despite requests from MacLaren Inc. to try to adhere to the suggested retail price, Reborn continued to discount. Pltf. Pretrial Memo. at 26. MacLaren Inc. began to receive complaints from Wein and its other customers that Reborn was selling the stroller at a predatory price, that it did not **[*1433]** have repair facilities, and that it was inappropriate for a maternity store to sell baby strollers. They did not threaten to stop buying from MacLaren unless Reborn were terminated, but merely voiced dissatisfaction. Weintraub 49; Leffler 30-33; Waxman 57-58. Both Kurzman and Hambleton informed the callers that nothing could be done. **[**14]** Weintraub 49.

A few of MacLaren Inc.'s other accounts sold below the suggested retail price. Complaints had been received about Berkowitz and Hatzlacha. Kurzman told the proprietor of Hatzlacha that MacLaren wanted retailers to sell the stroller near the suggested retail price, because it was trying to introduce a new product in America. Kurzman 68. None of these stores, however, was ever threatened, forced, or coerced into selling at the suggested retail price. When Hatzlacha, for example, continued to sell below that price, MacLaren took no further action.

MacLaren Inc.'s distribution capability was restricted due to its limited personnel and facilities. MacLaren decided that United States distribution of the stroller would be profitable only if an organized national distributor with a staff larger than MacLaren Inc.'s were to handle the operation. Also, Hambleton was becoming increasingly involved in an organization for the blind which consumed almost all of his time. Hambleton 136. After a comprehensive search, MacLaren selected Fine Child, Inc., a New York corporation with an excellent reputation in the sale of infant products to juvenile goods stores, as its new distributor. **[**15]** An agreement in principle was reached between MacLaren and James Fine in October 1981 for a one-year period to commence January 1982. The arrangement was publicly announced in a press release at the Juvenile Products Manufacturers Association Trade Show in Dallas, Texas, on October 25, 1981, and in January 1982 Fine Child replaced MacLaren Inc. as the exclusive distributor of the MacLaren stroller in the United States. Pltf. Exh. 47.

MacLaren and Fine Child understood the distributorship agreement to give Fine Child complete autonomy to choose with whom it would do business, according to Fine's marketing strategy. Cross 106. In addition, the parties agreed that Fine would have authority to resolve disputes if MacLaren Ltd. chose not to get involved:

> In the event of any dispute arising between the Distributor and any purchaser or proposed purchaser in relation to the sale or offer for sale of the Products [Distributor shall] forthwith inform MacLaren of the details and circumstances of the dispute. Within five days of such notice, MacLaren shall at its option elect to pursue or not pursue such dispute, in which latter event the Distributor shall have the exclusive right **[**16]** to pursue, settle or otherwise dispose of the dispute.

Distributorship Agreement para. 4(m), at 7 (Pltf. Exh. 144).

Fine Child's marketing strategy for the national distribution of the stroller was "to concentrate on independent full line juvenile products retailers around the country and perhaps a few department stores with full juvenile departments." Fine believed it was essential that in each store where the stroller would be placed there be sales people knowledgeable about the product. Fine 157. He thought that "consumer word of mouth was far and away the best advertising and best promotion that a product can have; . . . new parents . . . talk to one another a great deal . . . we wanted that kind of consumer to be sold, to have the MacLaren attributes explained to them as thoroughly and as knowledgeably and as convincingly as possible, by those people in the industry, those retailers who have been dealing in these kinds of goods for years and years." Fine 158.

Hambleton and Kurzman provided Fine with information on all MacLaren Inc.'s accounts. Most of the accounts were familiar to Fine because he had previously done business with them. He was not, however, familiar with **[**17]** Reborn. Kurzman and Hambleton told Fine that they had had problems with Wallis, that his store was not a juvenile goods store, that Reborn was a discounter and had inadequate repair facilities, **[*1434]** but that it was one of MacLaren's largest accounts. Kurzman 159. They did not tell Fine whether or not to sell to Wallis, but this presentation might well have suggested that Fine should terminate the account. MacLaren had itself been supplying the account, however, and no evidence supports the contention that MacLaren insisted on its termination.

In October 1981, Reborn attempted to place an order for one hundred B30 model strollers with MacLaren Inc. but was advised by Kurzman that MacLaren was currently out of stock on that model and that MacLaren Inc. would no longer be handling distribution of the strollers in the United States. Wallis demanded to know the identity of the new distributor, but was told that the distributor would contact Wallis. Kurzman meanwhile turned Wallis' order over to Fine. During October Kurzman went to Reborn to pick up a stroller for repair, and told Wallis that the new distributor might not do business with him because he could not adequately repair **[**18]** the strollers. Kurzman 171; Wallis 243. Wallis interpreted this as a threat and evidence of a conspiracy to cut him off because he was a discounter. He conceded, however, that "she didn't tell me what the new people were going to do." Wallis 241. Wallis repeatedly called MacLaren Inc. to get the name of the new distributor and to find out when to expect the strollers. He complained then, and claims now, that MacLaren had changed distributors in order to stop dealing with Reborn because it was a discount store. He was abusive to whomever he spoke, and tied up their switchboard for days. Kurzman 182. He became increasingly agitated, threatened to sue, and alleged the existence of multiple conspiracies to cut him off.

Reborn claims that MacLaren Inc.'s refusal to identify the new distributor was part of a scheme to terminate the account. It contends that all other customers received a formal announcement of the change in October. MacLaren Inc. did in fact prepare a letter informing all of its customers that Fine Child was to become the new United States distributor of the MacLaren stroller. It sent this letter to Fine for him to distribute. He never did so, however, and many customers **[**19]** did not find out about the change until after January 1982, when Fine Child actually assumed control and began handling all orders and billings. Certainly Fine Child's selection was no secret: a press release issued by MacLaren in late October announced the change. Reborn seems correct in contending that MacLaren Inc. treated it differently than other customers during October and November as Kurzman refused to identify Fine Child to Wallis, whereas she did tell others who inquired that Fine Child was to become the new distributor. Kurzman 164. This had no binding effect on Fine Child, however, and in fact had little if any practical effect on Reborn's ability to obtain strollers. On November 19, 1981, Reborn received its last shipment of strollers from MacLaren Inc. Plaintiff's Ex. 26. At about the same time, Kurzman identified Fine Child to Wallis and gave him Fine's telephone number.

Fine, too, treated Reborn differently than he did other potential customers. He was definitely inclined against doing business with Reborn. A Fine Child agent told Mr. Leffler of Darling's in November that Fine Child was not going to sell to Reborn. Leffler 39-40. Kurzman and Jones testified that in **[**20]** November Fine told them that he was not planning to do business with Reborn. Kurzman 194. At the end of November 1981, Fine told Wallis he wanted a written purchase order to evaluate him as a new account, although Fine did not insist on written orders from some other stores. Fine also asked Wallis if he carried any other Fine Child products or juvenile goods. Wallis said no, but requested that Fine send him a catalogue and a price list. Fine 172.

Fine sent nothing to Wallis for at least two weeks. This may have seemed insignificant to Fine, since he was to become distributor on January 1, 1982, and only received the first shipment of strollers for resale at the end of January. To Wallis, however, Fine's failure to follow up on his **[*1435]** conversation in late November proved he was conspiring to terminate the Reborn account. Two weeks after their conversation, Wallis called Fine and accused him of conspiring with Reborn's competitors, creating illegal tying arrangements, and discriminating against Reborn because it was a discounter. Wallis threatened to sue Fine, insisted that he had sued others before, and told Fine that he was recording their conversation. During this second **[**21]** conversation, Fine told Wallis that his company would not do business with Reborn.

Reborn's attorneys began charging Fine Child and all the other defendants with illegal acts in January 1982. During that month Wallis, trying to bypass Fine Child, wrote to MacLaren in England and asked for strollers. MacLaren informed Wallis that at that time they were not in a position to decide who should receive strollers in the United States. This lawsuit followed in February 1982.

Some time during the spring of 1982, after the filing of the suit, Fine Child sold fifty MacLaren strollers to a Massachusetts maternity retail store called Stork Time. Fine believed that Stork Time was not solely a maternity shop, because it also requested and purchased a number of Fine Child's other juvenile products. Fine 234; Pltf.

Exhs. 58-59. In July 1982, Fine discovered that the strollers sold to Stork Time were not in its store but had been resold to Wallis. Fine then stopped dealing with Stork Time. Fine 240.

In May 1983, due to Fine Child's crumbling economic position, MacLaren Ltd. terminated the distributorship agreement. MacLaren Inc. again became the sole distributor and remains so today. Reborn immediately **[**22]** placed an order for strollers, but MacLaren Inc. refused to fill it. Wallis then contacted Maxwell Cross, MacLaren Ltd.'s former marketing manager, and threatened to start a second lawsuit if MacLaren Inc. did not honor his order. Cross 88-90. MacLaren has taken the position that it will do no business with a company with which it is in litigation. Cross 58-59. From December 1981 through the present, Wallis has made no effort to purchase and sell any other high priced, high quality baby stroller, such as Perego or Aprica, MacLaren's stiffest competition.

II. *Summary Judgment*

HN1[] Summary judgment is to be granted sparingly in antitrust litigation, especially where an allegation of conspiracy raises issues of fact as to motive and intent. *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*; *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 554-55 (2d Cir. 1977)*. In deciding whether to grant summary judgment, moreover, the court must view the facts in the light most favorable to the party opposing the motion, and all possible inferences must be resolved in that party's favor. *United States **[**23]** v. Diebold, Inc., 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962)* (per curiam); *Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir. 1980)*. The moving party has the burden of showing that there is no genuine issue for trial as to any material fact, and that it is entitled to judgment as a matter of law.

Summary judgment is nevertheless appropriate in some antitrust cases. ***HN2***[] Where a complete pretrial record shows there is "no genuine issue of material fact, and . . . the resisting party does not present a record sufficient to support a reasonable finding in his favor, a district court has a duty to grant the motion for summary judgment." *Filco v. Amana Refrigeration, Inc., 709 F.2d 1257, 1260 (9th Cir. 1983)*, *cert. dismissed*, *464 U.S. 956, 104 S. Ct. 385, 78 L. Ed. 2d 331 (1984)*; *see* *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-90, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)*. *Rule 56(e)* makes clear the task of the party opposing the motion:

> ***HN3***[] When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but **[**24]** his response . . . must set **[*1436]** forth specific facts showing there is a genuine issue for trial.

See *SEC v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir.1978)*; II P. Areeda & D. Turner, ***Antitrust Law*** para. 316 (1978). The Supreme Court has approved awards of summary judgment in antitrust cases, *see, e.g., First National Bank of Arizona, 391 U.S. at 274-88*, as has the Second Circuit, *see, e.g., Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., 614 F.2d 832, 839-42 (2d Cir. 1980)*; *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co., 513 F.2d 102, 109-11 & n. 10 (2d Cir. 1975)*. ***HN4***[] Summary judgment is particularly appropriate where, as here, extensive discovery has been taken, *Giant Paper and Film Corp. v. Albemarle Paper Co., 430 F. Supp. 981, 983-84 (S.D.N.Y. 1977)*, and legitimate business reasons have been advanced for defendants' conduct, *First National Bank of Arizona, 391 U.S. at 289*. Immaterial factual disputes should not block summary judgment. *SEC v. Research Automation Corp., 585 F.2d at 35*. Finally, while plaintiff correctly complains that defendants have failed to submit the statement of material facts as **[**25]** to which the movants contend there is no genuine issue required by Local Rule 3(g), that failure is merely a technical omission in this case, since defendants' responses to plaintiff's pretrial order set forth the facts upon which they seek judgment.

III. *Alleged Sherman Act § 1 Conspiracies*

Reborn maintains that various horizontal and vertical conspiracies whose object was to terminate it as a retail distributor of the MacLaren Baby Buggy existed among the defendants. Reborn alleges conspiracies to fix prices, to allocate markets, to boycott, and to establish tying arrangements, all allegedly violations of *section 1* of the Sherman Act. *15 U.S.C. § 1*.

HN5[] *Section 1* of the Sherman Act states: "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." But while "the Sherman Act speaks of restraint of trade in absolute terms, it has long been established that *§ 1* proscribes only unreasonable restraints. *Standard Oil Co. v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*." *Borger v. Yamaha International Corp., 625 F.2d 390, 396 **[**26]** (2d Cir. 1980)*. *HN6*[] 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." *Northern Pacific Railway Co. 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 effect of the arrangement, its possible redeeming virtues, and the availability of alternative ways of achieving any legitimate objectives with fewer threats to competition." II Areeda & Turner, para. 314 at 49.

HN7[] The starting point for proof of a *section 1* violation is evidence of a contract, combination, or conspiracy between two or more persons. "Proof of joint or concerted action is required; proof of unilateral action does not suffice." *Schwimmer v. Sony Corp. of America, 677 F.2d 946, 952 (2d Cir.1982)*. For example, a unilateral decision by any defendant not **[**27]** to deal with Reborn for any reason would not amount to a violation of *section 1* of the Sherman Act. *See* *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, ___, 79 L. Ed. 2d 775, 783, 104 S. Ct. 1464 (1984)*; *Oreck Corp. v. Whirlpool Corp., 639 F.2d 75, 78-79 (2d Cir.1980)*, *cert. denied*, *454 U.S. 1083, 102 S. Ct. 639, 70 L. Ed. 2d 618 (1981)*.

HN8[] Conspiracies are, of course, rarely evidenced by explicit agreements, but must usually be proved by "inferences that may fairly be drawn from the behavior of the **[*1437]** alleged conspirators." *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)*. At a minimum, however, "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." *American Tobacco Co. v. United States, 328 U.S. 781, 810, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)*.

A. *Alleged Intraenterprise Conspiracy*

Plaintiff contends that MacLaren Ltd. and MacLaren Inc. schemed to terminate his store as a distributor of the **[**28]** MacLaren Baby Buggy by combining to fix prices, boycott, and allocate markets. The initial question is whether section one proscribes the conspiracy alleged between the parent corporation, MacLaren Ltd., and its wholly owned subsidiary, MacLaren Inc.

In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215, 95 L. Ed. 219, 71 S. Ct. 259 (1951)*, the Supreme Court held that "common *HN9*[] ownership and control does not liberate corporations from the impact of the antitrust laws." However, "[a] single corporate entity of all its agents and employees are normally treated as a single actor for antitrust purposes except where the individuals or subentities are held out as competitors." R. Givens, *Antitrust: An Economic Approach* § 16.03, at 16-11 (1983); *see* *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 28-29, 8 L. Ed. 2d 305, 82 S. Ct. 1130 (1962)*; *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 80-84 (9th Cir. 1969)* (divisions of same corporation cannot conspire), *cert. denied*, *396 U.S. 1062, 24 L. Ed. 2d 755, 90 S. Ct. 752 (1970)*. *See generally* Willis & Pitofsky, *Antitrust Consequence of* **[**29]** *Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20 (1968).

The uncontradicted evidence here demonstrates that MacLaren Inc. and MacLaren Ltd. neither hold themselves out as competitors nor actually compete. MacLaren Inc. was formed solely to act as distributing agent for MacLaren Ltd. in America, as Hambleton, Kurzman, Myles, Jones, and Cross testified. The personnel of the two organizations are closely interrelated. James Myles serves as Chairman of the Board of Directors of both MacLaren Ltd. and MacLaren Inc.; George Hambleton is a member of both Boards and is President of MacLaren Inc.; Maxwell Cross, formerly Marketing Manager of MacLaren Ltd., is presently Vice President of MacLaren Inc. The subsidiary makes no major policy decisions without MacLaren Ltd.'s approval, as evidenced by their communications about whether to deal with plaintiff and their joint decision about which company would become the new distributor. MacLaren Ltd. set the suggested retail price, which MacLaren Inc. automatically adopted. The two corporations do not compete;

rather, their relationship is one of cooperation and integration. *See Brager & Co. v. Leumi Securities Corp., 429 F. Supp. 1341, [**30] 1345 (S.D.N.Y. 1977)* (Weinfeld, J.), *aff'd mem*., *207 U.S. App. D.C. 264, 646 F.2d 599 (2d Cir. 1980)*, *cert. denied*, *451 U.S. 987, 101 S. Ct. 2322, 68 L. Ed. 2d 845 (1981)*; *I. Haas Trucking Corp. v. New York Fruit Auction Corp., 364 F. Supp. 868, 873-74 (S.D.N.Y. 1973)*; *Beckman v. Walter Kidde & Co., 316 F. Supp. 1321, 1325-27 (E.D.N.Y. 1970)*, *aff'd per curiam*, *451 F.2d 593 (2d Cir. 1971)*, *cert. denied*, *408 U.S. 922, 92 S. Ct. 2488, 33 L. Ed. 2d 333 (1971)*. Moreover, MacLaren Inc. was created from its parent, which wholly owns it. *See Brager & Co., 429 F. Supp. at 1345*; R. Givens, § 16.03, at 16-11 to -12 (discussing U.S. Department of Justice, Antitrust Division, *Antitrust Guide for International Operations*, Case A, at 11-14 (1977). Here "the economic realities of their relationship" preclude finding MacLaren Ltd. and MacLaren Inc. distinct economic entities for purposes of the Sherman Act. *Fuchs Sugars & Syrups, Inc. v. Amstar Corp., 602 F.2d 1025, 1031 n.5 (2d Cir. 1979)*, *cert. denied*, *444* ***[*1438]*** *U.S. 917, 62 L. Ed. 2d 172, 100 S. Ct. 232 (1980)*.

A manufacturer electing to market its goods through a distributor is using the latter **[**31]** to supply its goods to consumers more efficiently than the manufacturer could itself. In *General Electric Co. v. Bucyrus-Erie Corp., 563 F. Supp. 970, 976 (S.D.N.Y. 1983)*, the court noted that "if ***HN10***[] no other interpretation of the facts is possible except that a controlled subsidiary, with whom a parent was alleged to have conspired, was created to be and never acted other than as agent for the parent, . . . no valid conspiracy claim is stated because separate entities do not exist to conspire." The record contains no evidence that MacLaren Ltd. and MacLaren Inc. ever operated as other than as a unit. Thus neither the evidence that the personnel of MacLaren Ltd. and MacLaren Inc. conferred about Reborn's discounting policy, the complaints they had received about it, and the close proximity of Reborn to Ben's, nor the evidence that the organizations were unhappy with the situation and discussed ways to deal with it, establish a claim warranting trial of a conspiracy between the companies to engage in the alleged unlawful behavior.

B. *Price-Fixing Allegations*.

Plaintiff maintains that MacLaren Ltd. and MacLaren Inc., (hereinafter referred to jointly as "MacLaren") and Fine and **[**32]** Fine Child (hereinafter referred to jointly as "Fine Child") conspired vertically with various retailers selling the stroller, including Wein and Ben's (hereinafter referred to jointly as "Ben's"), and that the various retailers conspired horizontally to maintain the resale price of the MacLaren stroller. ***HN11***[] Price-fixing conspiracies are unlawful *per se*. *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*.

1. *Vertical Price-Fixing Conspiracy*. To establish its conspiracy claim, plaintiff first points to the close business and personal relationships among the defendants Wein, Fine, and MacLaren, including the frequent meetings and correspondence among them. The Second Circuit has laid down "fairly specific guidelines" in evaluating the probative value of such evidence to support an inference of conspiracy:

> "A ***HN12***[] mere showing of close relations or frequent meetings between the alleged conspirators . . . will not sustain a plaintiff's burden absent evidence which would permit the inference that these close ties led to an illegal agreement." Nor does a manufacturer's mere receipt of complaints from its wholesalers or agents who compete **[**33]** with the plaintiff, or its consultation with such other competing wholesalers, standing alone, support a finding of conspiracy with them. ***HN13***[] Even where a termination follows the receipt of complaints from wholesalers or agents, there is no basis for inferring the existence of concerted action, absent some other evidence of a tacit understanding or agreement with them. Finally, the mere fact that a business reason advanced by a defendant for its cut-off of a customer is undermined does not, by itself, justify the inference that the conduct was therefore the result of a conspiracy. Even if a manufacturer or supplier, acting independently, gave a false or inaccurate reason for its action, whether because of a desire to avoid controversy or some other consideration, this would not violate any legal obligation to the customer, absent proof of a conspiracy or breach of contract.

H.L. Moore Drug Exchange v. Eli Lilly & Co., 662 F.2d 935, 941 (2d Cir. 1981) (citations omitted), *cert. denied*, *459 U.S. 880, 103 S. Ct. 176, 74 L. Ed. 2d 144 (1982)*.

Reborn accords particular significance to the receipt by MacLaren of complaints from Reborn's competitors and to the subsequent termination **[**34]** by Fine Child of the Reborn account. Unquestionably, various retailers selling the stroller complained to MacLaren about Reborn's predatory pricing. But as the Second Circuit has repeatedly held, *see, e.g., id*., and the Supreme Court recently confirmed, *see* *Monsanto, 79 L. Ed. 2d at 785* & n.8, **[*1439]** evidence of complaints, even when followed by termination, cannot alone establish the requisite inference; "something more" is needed. *Id. at 785*. The *Monsanto* Court found this additional quantum of probative evidence in the testimony of a district manager that the company advised price-cutting distributors on at least two occasions that if they did not maintain the suggested retail price they would not receive adequate supplies of a new product and in evidence of coerced compliance by at least one former price-cutter. *Id*. This type of evidence is lacking in the present case. As Justice Powell noted in *Monsanto*, "permitting ***HN14***[] an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct." *Id*. Moreover, retailers are **[**35]** an important source of information for manufacturers and their agents, which the antitrust laws should not operate to foreclose. *Monsanto, 79 L. Ed. 2d at 785*. "In sum, 'to permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of independent business judgment and emasculate the terms of the statute.'" *Id*. (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 n.2 (3rd Cir. 1980)*, *cert. denied*, *451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981)*.

Reborn claims that unity of purpose among defendants is also apparent from the fact that MacLaren Ltd. published and MacLaren Inc. distributed a suggested retail price list and urged the retailers to adhere to these prices. ***HN15***[] Publication of a suggested retail price list, however, and voluntary adherence to it by plaintiff's competitors, is insufficient to support a finding of a vertical price fixing conspiracy. *Fuchs Sugars & Syrups, 602 F.2d at 1030*. ***HN16***[] A manufacturer or dealer may announce the terms under which he will market his product and deal only with those customers **[**36]** who agree to abide by those terms. *Monsanto, 79 L. Ed. 2d at 783-84* (citing *United States v. Colgate Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919))*. On the other hand, a manufacturer or its agent may not "enforce his announced resale prices by active coercion of those who purchase for resale, such as through threats of termination for noncompliance, whether made in combination with others or alone." *Bowen v. New York News, Inc., 522 F.2d 1242, 1254 (2d Cir. 1975)* (citations omitted), *cert. denied*, *425 U.S. 936, 48 L. Ed. 2d 177, 96 S. Ct. 1667 (1976)*. For Reborn to avoid summary judgment on its price-fixing claim it must advance sufficient evidence to raise a genuine dispute as to whether defendants engaged in coercive activity to force adherence to its suggested retail price and plaintiff and other retailers actually adhered to that price. *See* *Albrecht v. Herald Co., 390 U.S. 145, 149-50, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*; *United States v. Parke, Davis & Co., 362 U.S. 29, 43, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*. ***HN17***[] "While evidence of exposition, persuasion, argument, or pressure is alone insufficient to establish coercion, threats of termination, **[**37]** so long as they secure adherence to the fixed price, have been deemed to trespass beyond the boundaries of *Colgate*, thereby triggering a finding of an illegal combination." *Yentsch v. Texaco, Inc., 630 F.2d 46, 53 (2d Cir. 1980)* (citations omitted); *see* *id. at 51-55*.

Plaintiff has failed to raise a genuine dispute as to whether anyone adhered to the suggested price. The depositions of the various store owners reveal that several, including Ben's, Albee's, and Schneider's, sold above the suggested retail price, while at least two, Hatzlacha and Darlings, sold below it. These companies represented approximately half of the MacLaren accounts in New York. Leffler 15; Kurzman 66, 68; Wein 18.

Furthermore, even had most of the MacLaren accounts adhered to the suggested retail price, no significant evidence has been advanced of coercive action on MacLaren's part. Of course, "active coercion" **[*1440]** can take many forms. In *Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 716, 718-19* (S.D.N.Y.), *aff'd*, *417 F.2d 621 (2d Cir. 1969)*, the court found the use of an elaborate surveillance system and threats of "drastic" action enough to establish an illegal coercive **[**38]** atmosphere. The *Yentsch* court "just barely" found sufficient evidence to establish the existence of an illegal combination to maintain resale prices on the basis of written and oral evidence that the manufacturer had instructed his agents to tell the dealers that if volume did not increase they were to be terminated, as well as testimony by the plaintiff that he was told to drop the price or risk replacement. *630 F.2d at 52-53*.

Here, by contrast, Reborn has failed to adduce the minimum amount of evidence which would permit a reasonable jury to find a vertical price-fixing scheme. Kurzman stated that she once received many complaints about a price cutter and asked him to try to stay within a few dollars of the suggested price, because MacLaren was trying to market a new product in America. Kurzman 65. When the owner continued to discount, no one at MacLaren took additional action. The record does contain Wallis' deposition testimony that he was threatened by MacLaren to raise his prices or risk termination. Wallis 240. There is no other suggestion in the record that Kurzman threatened to terminate any account for discounting. Wallis' testimony, of course, relates only to Reborn, **[**39]** and is wholly undercut by the fact that MacLaren continued to supply Wallis' store for well over a year until Fine Child took over despite full knowledge of Reborn's consistent discounting policy. The only inhouse memo relied on by plaintiff is a note from MacLaren Ltd. to MacLaren Inc. in June 1981 which states: "No solution to the Reborn situation." Pltf. Exh. 018. From this evidence one could reasonably infer that MacLaren was displeased with its decision to sell to Reborn, but had not come up with any way to deal with the problem; one could not reasonably infer from this evidence that MacLaren conspired to threaten plaintiff or to terminate him. Finally, Kurzman concedes that at two or three different times she asked Wallis to stay near the suggested price, a policy she followed with all MacLaren accounts. But she and Hambleton firmly deny they ever threatened plaintiff. The evidence proffered by Reborn would demonstrate at most exposition, persuasion, argument, or pressure, which are alone insufficient to establish coercion. *See* *Yentsch, 630 F.2d at 53*.

2. *Horizontal Price-Fixing Conspiracy*. Reborn insists that a horizontal conspiracy to fix prices existed between the **[**40]** various retailers. As noted above, neither complaints nor complaints plus termination constitute evidence of a conspiracy. Plaintiff relies on the fact that some stores which sold the stroller adhered to the suggested retail price. The leading case for the proposition that an agreement can be inferred from commonality of conduct is *Interstate Circuit, Inc. v. United States, 306 U.S. 208, 83 L. Ed. 610, 59 S. Ct. 467 (1939)*. There the Court found an antitrust violation despite the absence of evidence that the various retailers had agreed among themselves to abide by the demands of the manufacturer. *Id. at 225-27*. The Court found it "enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it." *Id. at 226*. Later, however, the Court pointed out that it had "never held that proof of parallel business behavior conclusively establishes agreement" and cautioned that 'conscious parallelism' had not yet read conspiracy out of the Sherman Act entirely." *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 541, 98 L. Ed. 273, 74 S. Ct. 257 (1954)*. The problem of consciously **[**41]** parallel conduct and interdependent decisionmaking has continued to challenge the courts and commentators. *See e.g., First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 286-88, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)*; *Ambook Enterprises v. Time, Inc., 612 F.2d 604, 613-18* **[*1441]** (2d Cir.) (Friendly, J.), *cert. dismissed*, *448 U.S. 914, 101 S. Ct. 35, 65 L. Ed. 2d 1179 (1980)*; *United States v. Phelps Dodge Industries, Inc., 589 F. Supp. 1340*, slip op. at 20-15 (S.D.N.Y. 1984); L. Sullivan, *Handbook of the Law of Antitrust* § 122 (1977). But ***HN18***[] the law is at least clear that "proof of consciously parallel business behavior is circumstantial evidence from which an agreement, tacit or express, can be inferred but that such evidence, without more, is insufficient unless the circumstances under which it occurred make the inference of a rational, independent choice less attractive than that of concerted action." *Ambook, 612 F.2d at 615* (quoting *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 446 (3d Cir. 1977)* (Seitz, C. J.), *cert. denied*, *434 U.S. 1086, 55 L. Ed. 2d 791, 98 S. Ct. 1280 (1978))*.

In this case, the evidence of consciously parallel **[**42]** conduct is weak, as the record indicates that some retailers sold at various prices above and below the suggested level. In any case, independent business considerations justified the conduct of those who adhered: it was their practice to do so when a manufacturer gave a suggested retail price, or they felt the price was reasonable, or the strollers were selling well at the price so they had no desire to raise or lower it. Plaintiff claims that the retailers' discussions of Reborn among themselves provides additional proof of conspiracy. To support this contention plaintiff cites the testimony of Weintraub of Albee's and Wein. The testimony reveals that Weintraub called Wein and said, "I'm being undersold," to which Wein replied, "Me, too, but there is nothing we can do." Wein 89-93; Weintraub 55-58. Weintraub spoke to Wein, however, because their families had been friends for forty years, and in fact both Wein and Weintraub sold above the suggested price.

In sum, in this case the inference from the retailers' actions of a rational independent choice is far more compelling than that of concerted action, making summary judgment appropriate. *See* *Modern Home Institute, 513 F.2d* *at [**43] 109-14*. No probative evidence has been proffered by plaintiff that would permit a finding of a horizontal price-fixing scheme.

C. *Alleged Territorial Division of Markets*.

Plaintiff alleges that MacLaren, Wein, and other retailers vertically conspired to restrict the territory in which Reborn could sell the stroller. Plaintiff claims that Kurzman's and Hambleton's request that he not sell from the Upper East Side store until they talked to Wein, and MacLaren's general unwillingness to sell to any store near Ben's, Pltf. Exh. 82, amounted to an unlawful, vertical territorial restriction, and that this restriction was enforced as part of a conspiracy to terminate Reborn. Plaintiff also alleges a horizontal conspiracy to restrict territories.

1. *Vertical Territorial Restriction*. ***HN19***[] While nonprice restrictions furthering a price-fixing scheme designed to keep a supplier's product out of the hands of a discounter are judged under *per se* analysis, vertical, concerted actions on nonprice restrictions are judged under the rule of reason and violate *section 1* only if the action is anticompetitive in purpose or effect. *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, [**44] 57-59, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*; *Monsanto, 79 L. Ed. 2d at 783 n.6*; *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131* (2d Cir.) (en banc), *cert. denied*, *439 U.S. 946, 58 L. Ed. 2d 338, 99 S. Ct. 340 (1978)*. Because no price-fixing scheme could be proved in this case, the alleged territorial restrictions must be evaluated under the rule of reason.

In *Sylvania*, the defendant manufacturer restricted the store locations from which a retailer could sell his merchandise. The Supreme Court held that before condemning such a scheme it was necessary to examine whether justifiable business reasons existed to support it. One such reason is a manufacturer's desire to encourage **[*1442]** and reward a particular dealer who provides exceptional service and repair, and thus enhances product reputation. Absent territorial allocations, dealers in a given area might be unwilling to provide appropriate levels of service for fear of "free riders." *Sylvania, 433 U.S. at 55*. If profit opportunities are denied dealers in a given territory, they might refuse to incur expenses necessary to permit the manufacturer to compete effectively against its interbrand rivals. The **[**45]** "free rider" problem is highly relevant in the present controversy. Reborn often was unable to repair the strollers it sold, and as a result consumers brought MacLaren strollers purchased at Reborn to Wein for repair. Wein provided excellent repair service and MacLaren sought to maintain its good relationship with Wein so he would continue to do so. MacLaren's request that Wallis not sell from the Upper East Side therefore was motivated by the legitimate business reason of continuing a strong business relationship with a favored account. Under *Sylvania*, the "restriction" sought by MacLaren was lawful.

"The ***HN20***[] agreement necessary to establish a *section 1* violation . . . may be found to exist in a territorial restraint case if the defendant, by his own coercive actions, has put together a system of territorial restraints to which his customers or distributors adhere." *Jacobson & Co. v. Armstrong Cork Co., 433 F. Supp. 1210, 1213 n.17* (S.D.N.Y.) (Weinfeld, J.), *aff'd*, *548 F.2d 438 (2d Cir. 1977)*. However, "if the decision to terminate was solely based on legitimate business reasons such as . . . [plaintiff's] excessive and unjustified complaints, and its deteriorating relationship **[**46]** with [defendant], then [plaintiff's] claim must be dismissed." *Id. at 1214*. Reborn claims its termination was influenced by improper motives, particularly MacLaren's desire to protect Wein against competition from plaintiff in the Upper East Side. To prove this it relies upon the assurances Wein was given by MacLaren personnel, before MacLaren sold to plaintiff, that no other store in the Upper East Side would get the stroller; on Hambleton and Kurzman's request that Wallis hold off selling the stroller from the Upper East Side until they could talk to Wein; on MacLaren's practice of referring requests for strollers from the United States to Ben's; and on memoranda reflecting MacLaren's reluctance to sell to any other store in the Upper East Side.

Approximately two weeks passed from the time MacLaren sent its first shipment to plaintiff until Reborn began to sell from its Upper East Side store. Wallis himself testified that Hambleton told him to go ahead and sell from there. Wallis 215. Defendants took no action against Wallis for his decision, but rather continued to deliver the strollers he ordered. Whatever MacLaren did to aid Ben's, or said to Wein, the fact is that no **[**47]** territorial restriction was implemented by MacLaren when Wallis went ahead and sold from the area of concern. This evidence could not establish any agreement between MacLaren and Ben's. *See* *Jacobson, 433 F. Supp. at 1214*.

The MacLaren defendants contend it was Fine's and not their decision to terminate Reborn. Even assuming, however, that MacLaren was somehow involved in the decision to terminate Reborn, that decision was based upon plaintiff's repeated and vituperative complaints to defendants and the bad relationship to which this led. After the misdelivery incident, followed by Wallis' threats of lawsuits, his taping of phone conversations, his refusal to repair strollers, Reborn's predatory pricing, and his tying up the phone lines at MacLaren Inc. to learn the identity of the new distributor, he and the various defendants had increasingly abrasive discussions. Wallis' behavior, however much he may have believed his position justifiable, itself provided the MacLaren defendants a legitimate business reason for their decision to terminate Reborn as a retail distributor of the stroller.

Fine or Fine Child likewise had legitimate business concerns that would justify a decision **[**48]** to refuse to sell strollers to Reborn. Fine appears to have been particularly **[*1443]** concerned that Reborn was a maternity store. Furthermore, Wallis concedes that he attacked Fine on the phone and threatened to sue him, which gave Fine good reason to refuse to deal with such a customer. A businessman's churlish behavior should not be permitted to become an asset, enabling him to bootstrap himself onto an antitrust claim by having a reasonable businessman's refusal to deal with him be regarded as evidence of an illegal conspiracy.

Finally, MacLaren or Fine could legitimately try to give Wein exclusivity on the Upper East Side by expressing reluctance or even refusing to sell to other stores in that area. ***HN21***[] A manufacturer can establish a system of exclusive distributorships without violating *section 1* of the Sherman Act:

> Such a voluntary choice presumptively establishes . . . that the system is a more efficient method of distributing [the manufacturer's] product. Even if he is irrational or mistaken, the fact that he has created a monopoly or near monopoly for one or more distributors is not "monopolizing" conduct on his part, for it has no exclusionary effects on his **[**49]** actual or potential rivals.

Areeda & Turner, para. 734d, at 262.

2. *Horizontal Territorial Restriction*. ***HN22***[] A horizontal market allocation occurs when competitors on the same level agree only to sell within certain territories. In *United States v. Topco Associates, Inc., 405 U.S. 596, 608, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972)*, the Supreme Court reiterated that these types of arrangements are *per se* unlawful. Except for the lamentations of Weintraub and Wein, however, who on one occasion complained to each other that they were being undersold, the record contains not a shred of evidence that the retailers selling the MacLaren stroller ever had anything to do with one another. This is a frivolous claim.

D. *Alleged Boycott*.

Reborn alleges a series of horizontal and vertical concerted refusals to deal which appear to exhaust the possible combinations of characters. Notwithstanding the Second Circuit's warning that in boycott cases "it is important to distinguish between 'horizontal' . . . and 'vertical' restraints," *Oreck Corp. v. Whirlpool Corp., 579 F.2d at 131*, it is unnecessary here to parse each of the overlapping allegations. In effect, Reborn contends **[**50]** that MacLaren, Fine Child, and various retailers engaged in a complex conspiracy similar to that of the manufacturers, distributors, and retailer alleged in *Klor's, Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207, 212-14, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*, to which the Supreme Court applied a *per se* analysis. *See* *359 U.S. at 212-14*; *Oreck Corp. v. Whirlpool Corp., 579 F.2d at 131*. Reborn cannot avoid summary judgment on these contentions, however, because it has not raised a material issue of fact as to any of the enumerated conspiracies. Summary judgment is also compelled on the vertical conspiracies, which are examined under the rule of reason, for Reborn has failed to adduce evidence which would put at issue the business justifications for defendants' conduct.

As applied to MacLaren plaintiff's claim has no merit, because in fact MacLaren did not refuse to deal with Reborn, but took Reborn on as an account. MacLaren Inc. stopped doing business with Reborn in November 1981, when Fine Child became the new distributor, and at the time MacLaren Inc. stopped dealing with all its other accounts. MacLaren's present decision not to do business with Reborn because they **[**51]** are involved in litigation is a unilateral decision, protected under *Colgate*. Moreover, a desire to avoid burdensome litigation would constitute a legitimate business reason for refusing to deal. *See* *House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867,* 871 (2d Cir. 1962); Zoslaw v. MCA Distributing Corp., 693 F.2d 870, 889-90 (9th Cir. 1982), *cert. denied*, *460 U.S. 1085, 103 S. Ct. 1777, 76 L. Ed. 2d 349 (1983)*.

[*1444] Reborn's horizontal boycott claim is similarly unsupported. In a conventional horizontal boycott, traders at one level seek to protect themselves from competition from others by taking concerted action aimed at depriving the excluded retailer from a trade relationship the retailer needs to compete effectively at that level. *See* Klor's, 359 U.S. at 212-14. No evidence exists of concerted action among the various retailers to protect themselves from Reborn, and there is no indication that they took action to "induce" MacLaren or Fine to stop selling to Reborn. No reasonable jury could possibly infer that a horizontal boycott existed.

Plaintiff also alleges that MacLaren Ltd. conspired with Fine Child to change distributors solely **[**52]** to cut off Reborn, which would amount to a vertical concerted refusal to deal subject to the rule of reason. **HN23**[] A manufacturer may unilaterally decide to terminate one distributor in favor of another for any reason. United States v. Schwinn & Co., 388 U.S. 365, 376, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967), *overruled on other grounds*, Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977). This Circuit in Bowen v. New York News, Inc., 522 F.2d at 1254 stated that "where a manufacturer simply decides on his own to substitute one dealer for another . . . his decision to sell exclusively to a new dealer does not amount to an antitrust 'conspiracy' with the latter." If a manufacturer may cease dealing with one distributor in order to deal with another without implicating the antitrust laws, certainly MacLaren could legally choose to transfer its distribution functions from a subsidiary to a nonaffiliated company so long as it did not act pursuant to some otherwise unlawful plan.

In Calculators Hawaii, Inc. v. Brandt, Inc., 724 F.2d 1332, 1337-38 (9th Cir. 1983), the court reversed a district court judgment in favor of the plaintiff **[**53]** on a section 1 claim. Calculators had alleged a concerted refusal to deal between Brandt, a money-handling machine manufacturer from whom it had previously purchased spare parts, and Hallett, an independent contractor from whom pursuant to a new agreement Brandt instructed owners of its machines to seek maintenance and repair. Calculators contended that their refusal to sell it spare parts cut off its supply of these parts and severely damaged its repair business. The Ninth Circuit observed that the facts "that Brandt and Hallett refused to sell parts to Calculators and that Calculators thereby lost business . . . are simply insufficient standing alone to prove anticompetitive purpose or effect," and held that even Brandt's attempts to keep independent servicemen from obtaining its parts in order to protect Hallett's business did not render the refusal to deal unlawful. *Id*. Likewise here, the decisions of MacLaren and Fine Child not to sell to Reborn cannot alone establish the anticompetitive purpose or effect necessary under a rule of reason analysis. Thus, the failure of Reborn to raise a triable issue of fact as to the existence of a conspiracy between Fine Child and MacLaren **[**54]** renders meritless its contention of vertical boycott.

Although a conspiracy can be proved by circumstantial evidence, the pretrial record is devoid of any kind of evidence that MacLaren changed its distribution system merely to terminate Reborn. Evidence exists that Hambleton, President of MacLaren Inc., was occupied with other matters, that MacLaren Ltd. wanted to expand in the United States stroller market, and that MacLaren Inc. lacked the facilities and personnel to accomplish that expansion. MacLaren Ltd. spent some time searching for a juvenile goods distributors with far-reaching connections in the juvenile goods market and eventually selected Fine Child. In the context of this unrebutted proof, and the fact that MacLaren could unilaterally have terminated Reborn at any time, speculation that this change in MacLaren's distribution system occurred as a result of defendants' desire to terminate Reborn raises no triable issue of fact.

On October 8, 1982, the Managing Director of MacLaren wrote to Fine and stated that, before a final agreement **[*1445]** was signed, he was curious as to Fine's position "vis-a-vis Reborn." Pltf. Exh. 153. Plaintiff relies on this as circumstantial **[**55]** evidence of a conspiracy between MacLaren Ltd. and Fine to boycott Reborn. But **HN24**[] a manufacturer has a right to confer with its distributor on its marketing strategy. Monsanto, 79 L. Ed. 2d at 785. MacLaren's unhappiness about doing business with Reborn was no secret. And the reasons for this unhappiness are uncontroverted: Reborn's close proximity to Ben's, its inability to repair the strollers it sold, and Wallis' rude behavior to MacLaren employees. Given these legitimate concerns, it was reasonable for MacLaren Ltd. to find out Fine's stance on the matter before the distributorship agreement became final. In this factual business context, the letter standing alone does not suffice to raise an issue of fact warranting trial on the claim of a vertical conspiracy between MacLaren Ltd. and Fine to boycott Reborn. No evidence exists that MacLaren made a boycott of Reborn a condition of its arrangement with Fine. The letter indicates only that MacLaren wanted to make Fine aware of and sensitive to the problems Reborn's deficiencies and conduct created. Moreover, the agreement itself tends to refute Reborn's view of the letter's significance, since MacLaren Ltd. retained the right to **[**56]** terminate dealings with any customer, and did not therefore need Fine's agreement in advance to terminate Reborn.

Reborn's allegation that MacLaren Inc. conspired with Fine Child to boycott Reborn is based on inferences drawn from the difficulties MacLaren Inc. had in its dealings with Reborn, and the fact that Kurzman and Hambleton told Fine about their experiences with Reborn. Reborn infers that MacLaren recommended that Fine terminate the account, and that thereafter he refused to sell to Reborn.

MacLaren Inc.'s statements and suggestions to Fine are legally insufficient to establish a conspiracy. ***HN25***[] The antitrust laws permit a terminated distributor to confer with the new one on each of its accounts. The transfer of relevant business information should not be inhibited for fear of spawning antitrust allegations. Section 4(m) of the distributorship agreement gave Fine the authority to decide with whom to deal should MacLaren Ltd. choose not to be involved. Neither the advice of MacLaren's employees nor the influence of past events made Fine's decision any "less unilateral" or "more conspiratorial."

Even if Fine acting independently gave Wallis a false or inaccurate reason for his **[**57]** action, whether because of a desire to avoid controversy or any other reason, he did not violate any legal obligation to the retailer so long as he did not act pursuant to a conspiracy. *H.L. Moore Drug Exchange, 662 F.2d at 941*. Even had Fine had an anticompetitive purpose in mind he would not have violated the Act. ***HN26***[] Because the evidence is uncontroverted that Fine acted without soliciting the aid of any other entity, his motives are irrelevant. *See Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 478 F. Supp. 243, 265 (E.D. Pa. 1979)*, *aff'd*, *637 F.2d 105 (3d Cir. 1980)*, *cert. denied*, *451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981)*; *see also House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867, 870-71 (2d Cir. 1962)*. "To establish the illegality of [an] act under *Section 1*, it is not enough to prove [the defendants'] motivation was that of punishment for discounting or anything else, however reprehensible." *Carbon Steel Products Corp. v. Alan Wood Steel Co., 289 F. Supp. 584, 588 (S.D.N.Y. 1968)* (quoting *Dart Drug Corp. v. Parke, Davis & Co., 120 U.S. App. D.C. 79, 344 F.2d 173, 186 (D.C. Cir. 1965)*; *see GAF Corp. v. Circle Floor Co* ***[**58]*** *., 329 F. Supp. 823, 828 (S.D.N.Y. 1971)*, *aff'd*, *463 F.2d 752 (1972)*, *cert. dismissed*, *413 U.S. 901, 93 S. Ct. 3058, 37 L. Ed. 2d 1045 (1973)*.

E. *Alleged Tying Arrangement*.

Reborn claims that Fine Child engaged in illegal tying arrangements and that these arrangements not only violated *section 1* of the Sherman Act but also *section 3* of the Clayton Act, *15 U.S.C. § 14*, which provides:

> **[*1446]** ***HN27***[] It shall be unlawful for any person engaged in commerce in the course of such commerce to . . . make a sale or contract for sale of goods . . . or fix a price charged therefor . . . on the condition, agreement, or understanding that the . . . purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the . . . seller, where the effect of such . . . sale or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Plaintiff maintains that the tying claim must be sustained against all the other defendants as well because the actions of the Fine defendants were part of an **[**59]** overall scheme to terminate plaintiff, in which all joined. In its complaint, plaintiff specifically charged the MacLaren defendants with tying as well, but that claim has apparently been abandoned, as it is not discussed in Reborn's pretrial order and memoranda.

HN28[] Tying 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." *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5-6, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. The seller's leverage in the tying product market enables it to "deny competitors free access to the market for the tied product." *Id. at 6*. In the instant case, the MacLaren stroller is allegedly the tying product, and all other products sold by Fine Child are allegedly the tied ones. Tying is a *per se* violation of both *section 1* of the Sherman Act and *section 3* of the Clayton Act, so long as forcing is likely. *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, , 80 L. Ed. 2d 2, 15, 104 S. Ct. 1551 (1984)*.

HN29[] A *section 1* tying violation has at least five elements: "first, **[**60]** a tying and a tied product; second, evidence of actual coercion by the seller that in fact forced the buyer to accept the tied product; third, sufficient economic power in the tying product market to coerce purchaser acceptance of the tied product; fourth, anticompetitive effects in the tied market; fifth, involvement of a 'not insubstantial' amount of interstate commerce in the tied product market." *Yentsch, 630 F.2d at 56-57* & n.15 (citations omitted). ***HN30***[] "The elements of a violation of *section 3* are: (1) sales of goods for use, consumption, or resale within the United States; (2) sales conditioned on the purchaser's not dealing in the goods of a competitor; (3) a potential effect of substantial lessening of competition in the market for the tied product." *Reisner v. General Motors Corp., 511 F. Supp. 1167, 1176 (S.D.N.Y. 1981)*, *aff'd*, *671 F.2d 91* (2d Cir.), *cert. denied*, *459 U.S. 858, 103 S. Ct. 130, 74 L. Ed. 2d 112 (1982)*.

While the elements of a violation under the two statutes vary a bit, they aim at the same evil -- decisions to purchase distorted by economic considerations outside the relevant market. *See Reisner, 511 F. Supp. at 1177*. ***HN31***[] "The essential characteristic **[**61]** 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." *Jefferson Parish Hospital, 80 L. Ed. 2d at 13*; *see Northern Pacific Railway, 356 U.S. at 6*. Because this element of forcing is so crucial, "per se condemnation -- condemnation without inquiry into actual market conditions -- is only appropriate if the existence of forcing is probable." *Jefferson Parish Hospital, 80 L. Ed. 2d at 15*.

HN32[] A plaintiff might demonstrate the requisite forcing in two ways. He might "establish that he has been required to purchase something which he does not want to take." *Capital Temporaries Inc. of Hartford v. Olsten Corp., 506 F.2d 658, 662 (2d Cir. 1974)*. Or he might show an "unremitting policy of tie-in," which, "if **[*1447]** accompanied by sufficient market power," might substitute for actual coercion. *Hill v. A-T-O, Inc., 535 F.2d 1349, 1355 (2d Cir. 1976)*; *see Reisner, 511 F. Supp. at 1177 n.21*. Thus in the face of the consistent testimony that Fine Child did not **[**62]** practice tied sales, Reborn must identify evidence either of a persistent policy of tie-in or of actual coercion. In this case, however, only circumstantial evidence exists of a tie-in and no evidence has been presented that stores with whom Fine dealt were required to purchase other Fine Child products if they wished to order the MacLaren stroller.

Reborn relies on the two conversations between Fine and Wallis in which Fine asked Wallis whether Reborn carried any of Fine's other products, Wallis said no, and Fine told Wallis that he would forward a catalogue and price list to Reborn so Wallis would learn its goods and current prices. Two weeks later in a second conversation Wallis said he was only interested in purchasing the stroller, and Fine told Wallis he would not do business with him. Reborn also claims that Fine sold to Stork Time, a maternity shop in Boston, Massachusetts, only because it purchased some of Fine's other products. And plaintiff asserts that most of the retailers of juvenile goods with whom Fine dealt purchased other Fine goods when Fine took over the MacLaren distributorship.

This evidence, taken as a whole and viewed in a light most favorable to Reborn, fails **[**63]** to support a conclusion that Fine's buyers were victims of a tying arrangement. Reborn concedes that Wallis himself told the proprietor of Stork Time to order Fine Child products if he wanted the stroller, so Stork Time's owner asked the Fine Child independent agent with whom it was dealing for other Fine Child goods of his own volition. Pltf. Pretrial Memo at 23. In *Yentsch* a tying arrangement was found where sales representatives of defendant Texaco told leaseholders that "dealers who refused trading stamps 'wouldn't be there when lease time came around again.'" *630 F.2d at 57*. Nothing similar to this was said by Fine or Fine's agent to Stork Time's owner in this case. The owner of Stork Time asked for the "tied" product, other Fine goods, because he was told by Reborn that it was the only way for him to get the stroller. He concluded this, not because he personally knew of a Fine Child "unremitting policy of tie-in" and felt threatened by it, but because Wallis told him that Fine engaged in tying agreements. Stork Time's proprietor never even tried to purchase just the MacLaren stroller, so Wallis' allegation that Fine sold strollers to Stork Time only because it purchased Fine's **[**64]** other juvenile products is conclusory and has no basis in fact.

Fine testified in his deposition that a number of his customers buy only MacLaren strollers from him and may or may not have purchased Fine Child products from other wholesalers. Fine 229. Furthermore, even if many customers did buy other Fine Child juvenile goods, ***HN33***[] "tying arrangements can only be condemned if they restrain competition on the merits by *forcing* purchases that would not otherwise be made." *Jefferson Parish Hospital, 80 L. Ed. 2d at 22* (emphasis added). The record does not indicate that any of Fine's accounts purchasing Fine's other juvenile goods in addition to the MacLaren stroller did not want those goods. In fact, some store owners testified at their deposition that buying Fine's other goods at the same time they purchased the stroller was convenient for them. Leffler 23; Waxman 73. Almost all of the proprietors of Fine's accounts were deposed, but not one spoke of being coerced, in any way, into buying Fine's other goods. Mr. Cziment of Yeedl's in Brooklyn stated that he purchased only the stroller and did not mention anything about being subjected to pressure from Fine to buy other products. **[**65]** Cziment 33.

Given the absence of direct evidence of tying or evidence that many buyers were forced to buy an unwanted tied product, plaintiff must show that it was coerced into purchasing something it did not want. *Capital Temporaries, Inc., 506 F.2d at 662*. Nothing supports plaintiff's claim **[*1448]** that he was required to buy Fine Child products in order to get the MacLaren stroller. Fine's inquiry of Wallis whether he carried any Fine Child goods was at most a sales pitch. Fine did not even send plaintiff the catalogue he said he would send, and as early as October and through November, before Fine spoke to Wallis, Fine had expressed his intention not to sell to Reborn. When Wallis called Fine, threatened to sue, and said he wanted nothing but carriages, Fine had either decided against selling Wallis anything, or had found ample reason for refusing to deal with him further because of his abusive behavior.

HN34[] Absent evidence of forcing, tying arrangements are not unlawful. Plaintiff here has produced no evidence that Fine Child used its economic leverage in the market for MacLaren strollers to force either plaintiff or any other prospective buyer to purchase other Fine Child **[**66]** juvenile goods. Thus, even though other elements necessary to establish a tie-in might have been met here, *see* *Yentsch, 630 F.2d at 57*, absent any evidence of coercion summary judgment must be granted for defendants on the tying claim.

F. *Alleged Rule of Reason Violations*.

HN35[] "In order to prevail in the absence of *per se* liability," and in the face of defendants' evidentiary showing, Reborn must come forward with evidence by which a jury could reasonably conclude that defendants' actions "unreasonably restrained competition." *Jefferson Parish Hospital, 80 L. Ed. 2d at 23*.

> ***HN36***[] Under the rule of reason analysis, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 [53 L. Ed. 2d 568, 97 S. Ct. 2549]* (1977). Among the most important circumstances to be considered are those relating to the competitive characteristics of the relevant market. "Proof that the defendant's activities had an impact upon competition in a relevant market is an absolutely essential element of the rule of **[**67]** reason case." *Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir. 1979)*, *cert. denied*, *447 U.S. 924, 65 L. Ed. 2d 1116, 100 S. Ct. 3016 (1980)*.

Hayden Publishing Co. v. Cox Broadcasting Corp., 730 F.2d 64, 69-70 (2d Cir. 1984) (additional citations omitted), *rev'g* *566 F. Supp. 503 (E.D.N.Y. 1983)*. Moreover, "[a] ***HN37***[] determination as to the boundaries of the relevant product market is essential in order to measure the anti-competitive effect, if any, of defendants' actions." *Id. at 70* (quoting *566 F. Supp. at 511*). Reborn has not alleged the relevant market in its complaint, nor has it produced any evidence in its papers to define this market. In *Hayden* the Second Circuit held that a trial court cannot grant summary judgment to defendants for *section 1* Sherman Act claims reviewed under a rule of reason where a plaintiff fails to produce sufficient evidence of a relevant product market, so long as a genuine issue exists as to the definition of the market. *Id*. The present controversy is distinguishable. Whereas in *Hayden* both parties provided the court with numerous economic and statistical studies as to the relevant product market, *see* *566* ***[**68]*** *F. Supp.*

at 507-08, thus generating a genuine issue of fact as to its nature, here neither party has provided the court with any evidence on this matter. Fine Child states that MacLaren strollers comprise less than 5% of the national stroller market and less than 25% of the metropolitan "high-end" stroller market, Memorandum at 5, but even it has offered no evidence to support this. Summary judgment must therefore be granted defendants on these section 1 claims. In Rios v. Marshall, 530 F. Supp. 351, 357 n.4 (S.D.N.Y. 1981), the court dismissed a section 2 Sherman Act claim for failure to allege what proportion of any relevant market was controlled by the defendants, a necessary element of a section 2 claim. Similarly, plaintiff's failure here either to allege or adduce evidence on what proportion of any relevant **[*1449]** market was restrained, a necessary element under rule of reason analysis, compels this court to dismiss the "rule of reason" claims under section 1 of the Sherman Act and section 1 of the Clayton Act. *See also* Reisner, 511 F. Supp. at 1176 n.19; *cf.* Kaplan v. Burroughs, 611 F.2d at 291 (failure to produce substantive evidence proving relevant market **[**69]** entitles defendant, in rule of reason case, to judgment n.o.v.).

IV. *Claims Not Alleged in the Complaint*.

In its pretrial order and memorandum of law, plaintiff added two claims not included in its complaint of a year earlier -- a claim under section 2 of the Sherman Act, 15 U.S.C. § 2, that defendants monopolized, attempted to monopolize, and conspired to monopolize commerce, and a claim under the Robinson-Patman Act, 15 U.S.C. 13, that defendants engaged in price discrimination. Reborn has not formally moved to amend its complaint to include these claims, but has stated its intention to move at the appropriate time to conform the pleadings to the proof pursuant to Rule 15(a) and (b) of the Federal Rules of Civil Procedure. Plaintiff Letter (Nov. 15, 1983). Defendants have not responded to these claims in their summary judgment papers or pretrial order and have noted their objection to entertaining these claims, for which they contend no factual basis exists in any event. Defendants' Letter (Nov. 15, 1983).

Plaintiff notified the court and parties that it would seek to conform the pleadings to the proof when this case was scheduled for trial. That notice will therefore be **[**70]** treated as a motion to amend the complaint, a form of relief within the trial court's discretion. Oreck Corp. v. Whirlpool Corp., 639 F.2d at 81; Ricciuti v. Voltarc Tubes, Inc., 277 F.2d 809, 814 (2d Cir. 1960). While such a motion should be freely granted when justice requires, Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962), there is no reason to allow the amendment sought in this case.

Lack of diligence is reason enough for this conclusion. *See* Oreck Corp., 639 F.2d at 81; Wheeler v. West India S.S. Co., 205 F.2d 354, 354 (2d Cir. 1953) (per curiam); Kirby v. P.R. Mallory & Co., 489 F.2d 904, 912 (7th Cir. 1973), *cert. denied*, *417 U.S. 911, 41 L. Ed. 2d 215, 94 S. Ct. 2610 (1974)*; Graboi v. Smith, 432 F. Supp. 572, 575-76 (S.D.N.Y. 1977); Weight Watchers of Quebec, Ltd. v. Weight Watchers International, Inc., 398 F. Supp. 1047, 1056 (E.D.N.Y. 1975); J. Moore & J. Lucas, 3 *Moore's Federal Practice* para. 15.08[4], at 15-91 to -94 & n.9. Reborn has had the facts necessary to make the two new allegations proposed throughout this litigation, but has unduly delayed in asserting them.

Alternatively, the amendment is **[**71]** denied because it would add two more meritless causes of action. ***HN38***[] "Although courts usually exercise their discretion in favor of allowing motions under Rule 15, they may also deny such a motion when a party seeks to interpose a claim that lacks merit." *Johnson v. Partrederiet Brovigtank, 202 F. Supp. 859, 867 (S.D.N.Y. 1962)* (Feinberg, J.) (citations omitted); *see* Slavin v. Benson, 493 F. Supp. 32, 33 (S.D.N.Y. 1980). Plaintiff claims that certain documentary evidence establishes that Fine Child and Ben's violated section 2 of the Robinson-Patman Act, 15 U.S.C. § 13, by discriminating in the price it charged for the MacLaren stroller. Plaintiff has produced records showing that Fine Child gave Ben's "B" pricing, which is the price charged if over $2000 of MacLaren merchandise is purchased. Plaintiff Exh. 156(B). In addition, records indicate that Ben's received an additional 5-10% discount from the "B" prices. Plaintiff Exh. 156 E-1. Thus, plaintiff concludes, Fine Child's conduct was unlawful by virtue of the fact that it discriminated in price between different purchasers of the same goods sold in the same time period. Similarly, plaintiff contends that Ben's conduct violates **[**72]** Robinson-Patman, since it is unlawful to induce or receive a discrimination in price.

Plaintiff has no standing to assert these claims. Plaintiff asserts that Fine **[*1450]** "gave Ben's the 'B' pricing which is approximately 5% less than the 'A' pricing it charged its *other customers*", and that Ben's received an additional discount from Fine Child "not offered to *any other purchasers of the MacLaren stroller*." Pltf. Pretrial Memo. at 39-40 (emphasis added). Fine refused to do business with Reborn, however, and did not honor any of Wallis' stroller orders. Therefore, at the time of the alleged price discrimination, Reborn was not competing with Ben's for strollers from Fine Child.

HN39[] Section 4 of the Clayton Act, *15 U.S.C. § 15*, confers standing to raise a claim under *section 2(a)* of the Robinson-Patman Act, *15 U.S.C. § 13(a)*. *Schwimmer v. Sony Corp. of America, 637 F.2d 41, 46 (2d Cir. 1980)*. Notwithstanding the broad language, in order to have standing under section 4, "a plaintiff must allege a causative link to his injury which is 'direct' rather than 'incidental' or which indicates that his business or property was in the 'target area' of the defendant's illegal **[**73]** act." *Litton Systems, Inc. v. American Telephone & Telegraph Co., 700 F.2d 785, 821 (2d Cir. 1983) cert. denied, 464 U.S. 1073, 104 S. Ct. 984, 79 L. Ed. 2d 220 (1984)* (quoting *Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2d Cir. 1970)*, *cert. denied, 401 U.S. 923, 27 L. Ed. 2d 826, 91 S. Ct. 877 (1973)*. ***HN40***[] Plaintiff need not be an actual purchaser, *id*., nor a specifically intended target of the anticompetitive conduct, *Schwimmer, 637 F.2d at 47-48* & n.15. Without expressly approving the "target area" test, the Supreme Court recently advised courts assessing plaintiffs' standing under section 4 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." *Blue Shield of Virginia v. McCready, 457 U.S. 465, 478, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*; *see id. at 476-84*. This inquiry, like that posited by the "target area" test, recognizes that some consequences may **[**74]** flow from anticompetitive conduct which are simply "too remote" to give rise to a right for damages, *id. at 476* (quoting *Illinois Brick Co. v. Illinois, 431 U.S. 720, 728, 52 L. Ed. 2d 707, 97 S. Ct. 2061 n.7 (1977)* -- that "despite the broad wording of § 4 there is a point beyond which the wrongdoer should not be held liable," *id. at 477* (quoting *Illinois Brick, 431 U.S. at 760* (Brennan, J., dissenting)).

In this case, however, Reborn was neither a direct purchaser nor a customer farther down the line of distribution from the alleged price discrimination. As its allegations make clear, Reborn attempts to complain of discriminatory pricing as between other customers of Fine Child at a time when it was not purchasing strollers from this distributor. The wrong of which it complains is this inability to purchase, which while potentially unlawful under other provisions does not fall within the purview of the Robinson-Patman Act. That Fine Child allegedly discriminated between other purchasers of its products does not authorize Reborn to cast its fundamentally different complaint in Robinson-Patman guise. *See L & L Oil Co. v. Murphy Oil Co., 674 F.2d 1113, 1120-21* ***[**75]*** *(5th Cir. 1982)*.

Reborn's proposed *section 2* claims are likewise meritless. ***HN41***[] "The offense of monopoly 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 historic accident," *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*, while "the essential elements of attempted monopolization . . . are (1) a 'dangerous probability of success' in monopolizing a given product market and (2) a specific intent to 'destroy competition or build monopoly,'" *Nifty Foods Corp. v. Great Atlantic & Pacific* ***[*1451]*** *Tea Co., 614 F.2d 832, 841 (2d Cir. 1980)* (citing *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*, and *Lorain Journal Co. v. United States, 342 U.S. 143, 153, 96 L. Ed. 162, 72 S. Ct. 181 (1951))*. Thus, proof of the relevant product market is essential to both these causes of action. *Id. at 840*.

Reborn "bears the burden of proving the boundaries **[**76]** of the relevant market," *id*., yet it has failed even to allege facts which might identify this market. Because the claims would thus be subject to dismissal, *see id. at 840-41*, discretion counsels that Reborn not be permitted to amend its complaint to add them, *see, e.g., Johnson v. Partrederiet Brovigtank, 202 F. Supp. at 867*. Moreover, in the face of substantial evidence in the record of interbrand competition and a multibrand market, Reborn has failed to identify any evidence from which a reasonable jury might find that the defendants achieved or attempted to achieve monopoly power in any relevant market. Thus, summary judgment would also be appropriate.

HN42[] Finally, the elements of the offense of conspiracy to monopolize "are (1) proof of a concerted action deliberately entered into with the specific intent to achieve an unlawful monopoly, and (2) the commission of an overt act in furtherance of the conspiracy." *Paralegal Institute, Inc. v. American Bar Association, 475 F. Supp. 1123, 1132 (E.D.N.Y. 1979)*, *aff'd mem*., *622 F.2d 575 (2d Cir. 1980)*. In the case of defendants' testimony that they did not engage in any such anticompetitive behavior, Reborn has failed **[**77]** to raise a triable issue either as to the existence of a conspiracy or any putative participant's specific intent to monopolize. *See id. at 1132-33*. Since exhaustive discovery has already been had, it would be fruitless at this point to allow amendment to add a claim which would be subject to summary judgment because of the patent unsupportability of Reborn's claim.

V. *Conclusion*.

Summary judgment is granted defendants MacLaren Inc., MacLaren Ltd., Fine, Fine Child, Ben's for Kids, and Wein on all plaintiff's federal claims. **HN43**[] Summary judgment should be granted "if but only if the [district] court is satisfied that a properly instructed jury, giving full weight to plaintiff's evidence, drawing every reasonable inference in its favor, and subjecting defendants' evidence to a critical eye, could not rationally find that plaintiff was entitled to any relief." *Ambook Enterprises v. Time Inc., 612 F.2d 604, 611* (2d Cir.), *cert. dismissed*, *448 U.S. 914, 101 S. Ct. 35, 65 L. Ed. 2d 1179 (1980)*. In the present controversy, no jury finding for the plaintiff would survive the scrutiny of the Second Circuit. *See Schwimmer, 677 F.2d at 956*; *H.L. Moore Drug Exchange,* ***[**78]*** *662 F.2d at 946*; *Fuchs Sugars and Syrups, 602 F.2d at 1033*; *Hill v. A-T-O, Inc., 535 F.2d at 1356*; *see also Oreck Corp. v. Whirlpool Corp., 639 F.2d at 81*. While abstract legal analysis might give one or more of plaintiff's numerous legal claims superficial plausibility, any realistic view of the circumstances underlying this lawsuit should make clear its suitability for dismissal prior to trial. The record reveals that Wallis was an unrelentingly suspicious and difficult person to do business with. He admits to attempting to tape a phone conversation with Fine without telling Fine he was doing so. Wallis 13-14. He had his relatives surreptitiously order catalogues from Fine Child solely to find out whether Fine was discriminating against him. Wallis 262. His testimony includes exaggerated inconsistencies. For example, at one point in his deposition he states that "People from Ben's [came] in ranting and raving . . . threatening customers." Wallis 360. Later on he corrects himself. "Only he (Wein) came in and *may* have knocked over some clothes and *may* have knocked over some chairs." Wallis 367 (emphasis added). Wallis said he kept and filed written notes of all **[**79]** his conversations with defendants. He repeatedly threatened to sue Fine and other defendants if they failed to sell to him. Fine 117, 142; Hambleton 103.

[*1452] The record makes clear that Wallis is attempting to employ the antitrust laws as a weapon against a supplier who has ceased doing business with him in reasonable response to his uncontrolled conduct and shoddy practices. But the antitrust laws are not a shelter for intemperate business people; they provide no protection against the usual consequences of obstreperous behavior. Even were it assumed that the defendants treated Wallis harshly or unfairly, the antitrust laws "were never meant to be a panacea for all wrongs." *Sitkin Smelting & Refining Co. v. FMC Corp., 575 F.2d 440, 448* (3d Cir.), *cert. denied*, *439 U.S. 866, 58 L. Ed. 2d 176, 99 S. Ct. 191 (1978)* (quoting *Parmelee Transportation Co. v. Keeshin, 292 F.2d 794, 804* (7th Cir.), *cert. denied*, *368 U.S. 944, 7 L. Ed. 2d 340, 82 S. Ct. 376 (1961))*. The record reveals a business dispute which has taken on nasty personal dimensions, but it contains virtually no factual support for Reborn's legal contentions. Wallis has attempted to transmute personal **[**80]** animosity into an antitrust suit. But no real antitrust interest is involved here: the strollers continue to be sold to discounters, and the manufacturer is lawfully protecting its longterm interest by favoring a dealer who knows, sells and repairs its strollers well.

VI. *Pendent Jurisdiction*.

Dismissal of plaintiff's federal law claims raises the question whether the state law antitrust and business tort claims should be dismissed without prejudice to their assertion in state court. *See Smith v. Weinstein, 578 F. Supp. 1297, 1304-06* (S.D.N.Y.), *aff'd*, No. 84-7164 (2d Cir. May 29, 1984). **HN44**[] Since diversity is lacking the court has no independent jurisdiction of the state law claims beyond its authority to consider them pendent to substantial federal claims. *See United Mine Workers of America v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*. In this case the court has established that the federal antitrust claims were not substantial, and "the flimsy nature of federal claims may call for dismissal of pendent state claims." *Kavit v. A.L. Stamm & Co., 491 F.2d 1176, 1179 (2d Cir. 1974)* (Friendly, J.). Furthermore, the federal antitrust claims here **[**81]** are being dismissed without the need for a trial. Justice Brennan observed in *Gibbs* that "certainly, **HN45**[] if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." 383 U.S. at 727. The Second Circuit has recently stated, "unless a trial of the operative facts is necessary to resolve claims that the federal court must hear, the federal court has no jurisdiction to take any action with respect to a pendent state law claim." McLearn v. Cowen & Co., 660 F.2d 845, 848 (2d Cir. 1981); *see* Reese Publishing Co. v. Hampton International Communications Inc., 620 F.2d 7, 12-13 (2d Cir. 1980); Federman v. Empire Fund and Marine Insurance Co., 597 F.2d 798, 809 (2d Cir. 1979); *Sciss v. Metal Polishers Union Local 8A*, 562 F. Supp. 293, 295 (S.D.N.Y. 1983). Judge Friendly has advised that **HN46**[] "if it appears that the federal claims . . . could be disposed of on a motion for summary judgment, under Fed. R. Civ. P. 56, the court should refrain from exercising pendent jurisdiction absent exceptional circumstances." Kavit, 491 F.2d at 1180. Here, moreover, the federal and state claims will not entirely overlap, since some state legal issues differ **[**82]** markedly from those presented by the federal claims.

The present controversy presents no special circumstances which might warrant hearing the state law claims. No unfairness has been alleged as likely to result. Nothing before the court would indicate that Reborn will be unable to assert its state law claims in the New York courts. A proper exercise of discretion requires dismissal of plaintiff's state antitrust and business tort claims, as well as of the defamation counterclaim. *See* Smith v. Weinstein, 578 F. Supp. at 1306.

SO ORDERED.

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Jack Walters & Sons Corp. v. Morton Bldg., Inc.

United States Court of Appeals for the Seventh Circuit

March 30, 1984, Argued ; June 22, 1984, Decided

No. 83-2300

Reporter

737 F.2d 698 *; 1984 U.S. App. LEXIS 21188 **; 1984-2 Trade Cas. (CCH) P66,080; 39 Fed. R. Serv. 2d (Callaghan) 504

JACK WALTERS & SONS CORP., Plaintiff-Appellant, v. MORTON BUILDING, INC., Defendant-Appellee

Prior History: **[**1]** Appeal from the United States District Court for the Eastern District of Wisconsin. No. 78 C 329 -- Terence T. Evans, Judge.

Core Terms

dealers, manufacturer, advertising, tie-in, consumers, trademark, exclusive territory, retail price, prices, antitrust, buy, territorial, products, anti trust law, district judge, integrated, retail, advertised price, markets, cases, special master, vertical integration, vertically, franchise, package, maximum price, resale price, fixing, prefabricated, competitors

LexisNexis® Headnotes

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Timing of Appeals

HN1[] **Judicial Officers, Judges**

Trial judges do not have carte blanche to certify partial dispositions for immediate appeal under *Fed. R. Civ. P. 54(b)*. The rule itself makes clear that a district judge may enter an appealable judgment only if it disposes of a "claim for relief" that is "separate" from the claims not disposed of.

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

HN2[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A charge that limiting the territories in which one's dealers can sell violates the Sherman Act *§ 1* is now evaluated under the Rule of Reason. This means among other things that the plaintiff must show that the defendant has market power, as this is a prerequisite to being able to restrain trade unreasonably.

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

HN3[] **Private Actions, Remedies**

A private plaintiff can complain only of an antitrust injury. It is not enough that the plaintiff would not have been injured but for the defendant's alleged violation of the antitrust laws; the injury must be the sort of thing that the antitrust laws are intended to forbid.

Antitrust & Trade Law > Sherman Act > General Overview

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

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

At common law a conspiracy was unlawful if the conspirators used unlawful means to a lawful end or lawful means to an unlawful end.

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Fiduciary Duties

Governments > Courts > Common Law

Governments > Fiduciaries

Torts > Vicarious Liability > Franchisees & Franchisors

HN5[] **Causes of Action, Fiduciary Duties**

The common law of Wisconsin does not make the franchisor a fiduciary of his franchisees.

Civil Procedure > Judicial Officers > Masters > General Overview

Civil Procedure > Judicial Officers > References

HN6[] **Judicial Officers, Masters**

Although the use of special masters to assist federal district judges in complex litigation is not only authorized but indispensable to the effective operation of the federal courts under current workload conditions, its scope is limited by *Fed. R. Civ. P. 53(b)*, as follows: A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

Counsel: John S. Skilton, Foley & Lardner, Milwaukee, Wisconsin, for Plaintiff-Appellant.

Richard T. O'Neill, Michael, Best & Friedrich, Milwaukee, Wisconsin, for Defendant-Appellee.

Judges: Eschbach and Posner, Circuit Judges, and Swygert, Senior Circuit Judge. Swygert, Senior Circuit Judge, concurring in the judgment.

Opinion by: POSNER

Opinion

[*701] POSNER, Circuit Judge.

This antitrust suit under *section 1* of the Sherman Act, *15 U.S.C. § 1*, pits a building-materials dealer, Walters, against a manufacturer of prefabricated farm buildings, Morton. The complaint, filed in 1978, alleges that Morton tied building components to its trademark, assigned its franchised dealers (one of whom was Walters) exclusive sales territories, limited the prices the dealers could charge consumers, and eventually took over the dealership function, terminating Walters in the process. There also is a pendent claim for breach of a duty of fair dealing under Wisconsin law. In 1981, shortly before trial was to begin, Morton moved for summary judgment. The district judge referred **[**2]** the motion to a special master, a member of the Milwaukee bar. After considering for 17 months the voluminous materials that the parties had submitted in connection with the motion, the special master submitted his report, which recommended granting the motion except with respect to the claim regarding exclusive territories. In a brief order the district judge adopted the master's recommendations in their entirety and therefore dismissed all but the exclusive-territories claim, which he retained for trial. He then directed entry of final judgment for Morton on the dismissed claims upon an express determination that there was no just reason for delay, and Walters has appealed under *Rule 54(b) of the Federal Rules of Civil Procedure*.

We consider first, on our own initiative as we must, whether the dismissed and retained claims are separate claims within the meaning of *Rule 54(b)*; if they are not, the judgment of dismissal cannot be appealed as a final judgment and Walters must wait to take its appeal until the exclusive-territories claim is tried. Our recent decisions emphasize that ***HN1***[] trial judges do not have carte blanche to certify partial dispositions for immediate appeal under **[**3]** *Rule 54(b)*. See *A/S Apothekernes Laboratorium v. I.M.C. Chem. Group, Inc., 725 F.2d 1140 (7th Cir. 1984)*; *Minority Police Officers Ass'n v. City of South Bend, 721 F.2d 197 (7th Cir. 1983)*. The rule itself makes clear that a district judge may enter an appealable judgment only if it disposes of a "claim for relief" that is "separate" from the claims not disposed of. But unfortunately the meaning that the draftsmen intended "claim for relief" to bear is not clear, see *Local P-171, Amalgamated Meat Cutters v. Thompson Farms Co., 642 F.2d 1065, 1069-71 (7th Cir. 1981)*; 10 **[*702]** Wright, Miller & Kane, Federal Practice and Procedure § 2657 (2d ed. 1983), and the Supreme Court has not yet attempted a compendious definition. See *Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 100 L. Ed. 1297, 76 S. Ct. 895 (1956)*; *Cold Metal Process Co. v. United Engineering & Foundry Co., 351 U.S. 445, 100 L. Ed. 1311, 76 S. Ct. 904 (1956)*; *Liberty Mutual Ins. Co. v. Wetzel, 424 U.S. 737, 743 n.4, 47 L. Ed. 2d 435, 96 S. Ct. 1202 (1976)*. The recent decisions of this court have experimented with a practical approach based on what we conceive to be the most important purpose **[**4]** behind *Rule 54(b)*'s limitations -- to spare the court of appeals from having to keep relearning the facts of a case on successive appeals. The approach is: if the facts underlying different claims are different, the claims are separate for *Rule 54(b)* purposes. For if there are different facts (and of course different issues) consideration of the appeals piecemeal rather than all at once will not involve a duplication in the efforts required of the judges to prepare for argument in, and to decide, each appeal. The gains from forcing the consolidation of appeals will therefore be small and will be outweighed by the benefits of an immediate appeal in resolving the parties' rights with respect to a part of the controversy between them. By the same token, if there is a great deal of factual overlap between the decided and the retained claims, they are not separate, and appeal must be deferred till the latter are resolved.

Applying this approach to the present case, we find potential but not actual factual overlap between the charges that the district judge dismissed and the single charge, involving exclusive territories, that he retained; therefore we have jurisdiction of the appeal. **[**5]** ***HN2***[] A charge that limiting the territories in which one's dealers can sell violates *section 1* of the Sherman Act is now evaluated under the Rule of Reason. See *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. This means among other things that the plaintiff must show that the defendant has market power, see *Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982)*, as this is a prerequisite to being able to restrain trade unreasonably. The Supreme

Court's most recent tying decision requires the plaintiff to make a similar, maybe identical, showing in order to prove that a tying arrangement is unlawful, even though tying still is referred to as a per se offense. See *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 1559-60, 80 L. Ed. 2d 2 (1984)*. Moreover, where as in the present case the plaintiff tries to show that the whole is greater than the sum of its parts -- that an "aggregation of trade restraints" is unlawful even if the constituent restraints taken one by one are not -- and one of the parts is territorial exclusivity, the issue of unlawful "aggregation" logically **[**6]** requires consideration of the facts concerning territorial exclusivity.

All these are reasons why in the usual case a challenge to a scheme of restricted distribution states only one claim for *Rule 54(b)* purposes. But this case is unusual in that the particular grounds on which the special master and the district judge disposed of the charges that are involved in the appeal do not overlap, factually or legally, the charge of territorial exclusivity that he retained for trial. A clue to this is that the parties' briefs in this court tell us nothing about the exclusive territories -- how large they were, how exclusivity was enforced, how long exclusive territories were in effect, and for what reasons and with what consequences. Although the voluminous record submitted with the appeal contains much on these questions, that is only because the appeal record is the same record that was before the master and the district judge. The parties have made no reference to the parts of the record that relate to exclusive territories. The district judge dismissed the tying charge not because he found that Morton lacked market power, an issue that as we have said would also be highly relevant **[**7]** to the lawfulness of territorial restrictions, but because he found that the tying and **[*703]** the tied products were not separate products and therefore that there could be no tie-in. He dismissed the resale price maintenance and vertical integration allegations (the latter involving Morton's takeover of the retail distribution of its buildings) on evidentiary grounds unrelated to the lawfulness of exclusive territories. And with all of the specific charges other than the territorial charge dismissed, the "aggregation of trade restraints" charge fell of its own weight, like a conspiracy charge when all but one of the alleged participants have been exonerated.

Since, for these reasons, this appeal is unencumbered by any facts bearing on the retained claim, we are entitled to regard that as a separate claim. Its retention by the district court therefore does not deprive us of jurisdiction over the appeal from the dismissal of the rest of the plaintiff's case. This brings us to the merits. We begin with the tie-in charge.

Almost every product can be viewed as a package of component products: a pair of shoes, for example, as a package consisting of a left shoe and a right **[**8]** shoe; a man's three-piece suit as a package consisting of a jacket, vest, and pants; a belt as a package consisting of a buckle and a strap. As shown by the last of these examples, it is possible to describe a product as a package of components even if the components are physically integrated at the point of sale to the consumer. Indeed, much of what is called "manufacturing" is the assembly, i.e., physical integration, of components, often components manufactured by other companies. The manufacturer of an airplane, for example, does not build the whole thing from scratch. Usually he will build just the airframe, consisting of the fuselage, wings, and tail, and he will buy the engine, the wheels, the radar and other electronic equipment and much else besides from other manufacturers and will then assemble the various components to create the finished aircraft. Very few products today are produced like a statue that is made by pouring molten bronze into a cast -- the ultimate single product. But to hold therefore that every composite product is a tie-in, subject to the hostile scrutiny to which ***antitrust law*** still subjects tie-ins, would place industry under a vast antitrust cloud, **[**9]** and has been rejected. In *Johnson v. Nationwide Industries, Inc., 715 F.2d 1233 (7th Cir. 1983)*, for example, we held that a condominium and a contract for the provision of management services to the condominium owner were a single product, so that the owner could not complain, at least under ***antitrust law***, that the developer who had sold him the condominium had forced him as a condition of being allowed to purchase it to agree to buy the developer's management services as well. See also *Foster v. Maryland State Savings & Loan Ass'n, 191 U.S. App. D.C. 226, 590 F.2d 928, 932-33 (D.C. Cir. 1978)*.

The problem is that there is no obvious way of deciding whether a product is a single product or an assemblage of components. The practice has been to classify a product as a single product if there are rather obvious economies of joint provision, as in the left-shoe-right-shoe example. See *Principe v. McDonald's Corp., 631 F.2d 303, 309-11 (4th Cir. 1980)*; Sullivan, Handbook of the Law of Antitrust 449 (1977); Comment, *A New Approach to the Legality of*

Franchising Tie-Ins, 129 U. Pa. L. Rev. 1267, 1293 (1981). Although this approach seems to take what would otherwise **[**10]** be a matter of defense and make its absence a threshold requirement of the offense, it does serve to screen out many silly cases. A different but related approach was taken recently in the *Jefferson Parish* case (decided after argument in our case), where the Supreme Court held that products are separate for tie-in purposes if there are separate markets for each product. See *104 S. Ct. at 1562-63*. The link to the older view is that if there are not separate markets, this is evidence that the economies of joint provision are overwhelming.

The test of *Jefferson Parish* disposes handily of the shoe example, but could be thought to place decisions such as *Johnson* under a cloud, since there are separate markets for condominiums and for real estate management services. Only time will **[*704]** tell how far the "separate markets" approach of *Jefferson Parish* will be pushed. There are separate markets for sugar and for sugarless breakfast cereals, but it would be surprising to find that a sugary cereal was a tie-in (sugar tied to cereal), assuming the seller refused to sell a sugar-free version. The belt example also becomes problematic under the separate-markets approach. **[**11]** Belts are rarely sold without buckles; but surgical operations are even more rarely sold without anesthesia (held in *Jefferson Parish* to have been tied to the hospital's operating rooms). There may be overwhelming economies of joint provision for most customers and yet enough customers with idiosyncratic demands to encourage small markets tailored to their needs to emerge, as has happened with ornamental belt buckles. The separate market for ornamental buckles resembles the separate market for anesthesia, which exists because a patient can contract separately with the surgeon and with the anesthesiologist. We doubt that, even after *Jefferson Parish*, belts are tie-ins of buckles to straps; yet we cannot be sure where the separate-markets test will lead.

Still, we are reasonably confident that under that test as under the older, more intuitive test a building is a single product and not a tie-in of the walls, floors, roof, windows, and so forth; for most of these components are not sold in separate markets, though some are. And as Walters' counsel acknowledged helpfully at argument, it does not matter whether, as with hobby kits of various sorts (and even motorcycles, **[**12]** see *Flaminio v. Honda Motor Co., 733 F.2d 463, 465 (7th Cir. 1984))*, the manufacturer, instead of assembling the components himself at the factory, ships the unassembled components, and the actual assembly is done by the customer or by a dealer (as was the case here, before Morton took over the dealer function). It is enough if the end product is a single product; and a single building is a single product.

All this is more or less common ground among the parties and we have gone over it at such length only to dispel any impression that a tie-in case about prefabricated buildings must be based on a claim that the prefabricated parts were tied to each other. That is not Walters' claim. Its claim is that the Morton name, the Morton trademark, is the tying product and that the building, the kit of prefabricated building components, is the tied product. The difficulty with this argument is that a product and its name are inseparable. It is one thing to say that a manufacturer of copying machines who requires his customers to buy from him the copying paper that is used in the machines is conditioning the sale of the machines on the customer's purchase of a distinct product; it **[**13]** is quite another to say that General Motors lets you use the name Buick on condition that you buy the car to which the name is attached. That is a fantastical description of the transaction, and the cases reject the proposition that a tie-in claim can be based on it. See, e.g., *California Glazed Products, Inc. v. Burns & Russell Co., 708 F.2d 1423, 1430 (9th Cir. 1983)*; *Dart Industries, Inc. v. Plunkett Co., 704 F.2d 496, 500 (10th Cir. 1983)*; *Hamro v. Shell Oil Co., 674 F.2d 784, 788 (9th Cir. 1982)*; *Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1352-54 (9th Cir. 1982)*; *Redd v. Shell Oil Co., 524 F.2d 1054, 1056-57 (10th Cir. 1975)*; *Kugler v. AAMCO Automatic Transmissions, Inc., 460 F.2d 1214 (8th Cir. 1972)*. The only appellate case we can find in which such a claim was accepted is *Warriner Hermetics, Inc. v. Copeland Refrigeration Corp., 463 F.2d 1002, 1015-16 (5th Cir. 1972)*. To accept it would be to impose in the name of antitrust a regime of compulsory licensing of trademarks -- an absurd project. Moreover, since a trademark that denotes a product is rarely licensed apart from the product -- and was not in this case -- the separate-markets **[**14]** test of *Jefferson Parish* is not satisfied.

However, some cases, including several in this circuit, do treat as tying products trademarks that name not a product manufactured by the trademark's owner but a service which he provides to consumers **[*705]** through a system of franchised retail outlets; the tie-in consists of requiring franchisees, as a condition of being allowed to use the trademark, to buy distinct products supplied by the franchisor. See, e.g., *Photovest Corp. v. Fotomat Corp., 606*

F.2d 704, 722 (7th Cir. 1979); Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 834 (7th Cir. 1978); Milsen Co. v. Southland Corp., 454 F.2d 363, 365 (7th Cir. 1971); Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971); Susser v. Carvel Corp., 332 F.2d 505 (2d Cir. 1964), cert. dismissed, 381 U.S. 125, 14 L. Ed. 2d 284, 85 S. Ct. 1364 (1965). The trademark is analytically separable from the tied product, so there is not the same absurdity in treating the trademark as a tying product as there is when the trademark is simply the name of the alleged tied product, as in our example of the Buick name and the Buick automobile. "Chicken Delight," **[**15]** in contrast, was the name of a fast-food franchise operation, not the name of a product; and the franchisor, the owner of the "Chicken Delight" mark, manufactured none of the things (which included mixes, fryers, and packaging supplies) that it required its franchisees to buy from it as a condition of their being allowed to use the name. Siegel v. Chicken Delight, Inc., supra, 448 F.2d at 48 n.4. It was a "case of a franchise system set up not to distribute the trade-marked goods of the franchisor, but . . . to conduct a certain business under a common trade-mark or trade name." Id. at 48 (footnote omitted). The name and the tied products thus were separable in a way that the name Buick and the car sold under that name are not. Or so at least it can be argued; for the *Chicken Delight* line of cases is not universally delectated. See, e.g., Principe v. McDonald's Corp., supra, 631 F.2d at 309; *Baker, The Supreme Court and the Per Se Tying Rule: Cutting the Gordian Knot*, 66 Va. L. Rev. 1235, 1315-17 (1980). And the emphasis in the Supreme Court's recent decision in *Jefferson Parish* on the importance of proving that the owner of the tying product has real market **[**16]** power may doom the franchise trademark cases, as they mostly involve highly competitive retail industries, such as the fast-food business. But we shall not have to get into the broader questions here. All we shall have to decide is whether Morton Building, the name the defendant has given to its prefabricated farm buildings, is more like Chicken Delight or more like Buick -- bearing in mind that since this question was decided on summary judgment we cannot answer it in Morton's favor if there is any material fact in dispute.

Morton manufactures some building parts, such as sheet-metal walls and wooden corner posts, buys others from other manufacturers, and ships the unassembled parts to retail outlets for assembly into finished buildings on the farmer's property. The parts when assembled make a rather austere building, even for a farm utility building, and often the dealer will customize the building by adding things that are not part of Morton's kit. A Morton Building is therefore quite likely to contain some parts not supplied by Morton, just as an automobile might have some accessories that had not been supplied by the manufacturer, such as a dealer-supplied car alarm. But **[**17]** whether few or many farmers embellish their Morton Buildings, the inference that Morton really is engaged in manufacturing buildings is inescapable, and we think this fact defeats any effort to separate its name from the product that it is alleged to be tying to it. Maybe Walters is capable, as it alleges, of building from parts it gets elsewhere a farm building identical to the Morton Building; but it does not follow that it can put Morton's name on it, when Morton wants to manufacture the Morton Building itself. If Morton were just selling blueprints for a building and it told the people it sold them to, "You must buy your bathroom faucets from us if you want to use the blueprints," then it might be possible to separate design and product. But if you happen to be in the business of selling faucets, a dealer cannot force you to let him sell, under your name, faucets he gets elsewhere.

To summarize, we hold that there was no tie-in because there were no separate **[*706]** products (or services) tied together. But we emphasize again that it is not alleged that Morton tied accessories to the building kits that it sold, so we need not decide at what point prefabricated building **[**18]** parts cease to be a single product.

The next question is whether Morton violated the per se rule against resale price maintenance. Several times each year Morton would advertise special deals for its buildings. The advertising was directed to the consuming public and mentioned special prices at which consumers could buy the buildings from dealers such as Walters, listing them by name. Morton gave dealers a discount from the wholesale price to make it easier for the dealers to offer consumers the special retail price that Morton had advertised. It was important to Morton that dealers not charge a higher price than the advertised price, because if they did Morton's advertising would lack credibility -- indeed, would be deceptive and create ill will. So, according to Walters' affidavits, Morton took various steps to see that its dealers sold its buildings at no more than the advertised price. These steps included threatening the dealers with termination if they went above that price, offering if they did to sell directly to the public at the advertised price, and checking up on the dealers to see whether they were charging more. Walters also charges that Morton made it hard for **[**19]** the dealers to comply with its desire that they sell at the advertised price by giving them a smaller discount from the wholesale price than the difference between the regular retail price and the advertised price.

The usual form of resale price maintenance, the form that invited condemnation from the Supreme Court in *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 (1911)*, involves setting a minimum price below which dealers may not sell rather than a maximum price above which they may not sell. It is minimum price fixing that creates the analogy to a dealers' cartel upon which the per se rule against resale price maintenance rests. Although *Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*, extended the rule of *Dr. Miles* to a scheme of maximum resale price maintenance, the continued vitality of *Albrecht* is in doubt after *Continental T.V., Inc. v. GTE Sylvania Inc., supra*, held that assigning dealers exclusive territories is not unlawful per se. The newspaper dealers in *Albrecht* had exclusive territories, and putting a ceiling on their prices was, as Justice Stewart pointed out in his **[**20]** dissenting opinion, a way for the Herald Company to prevent the dealers from exploiting the monopoly power that territorial exclusivity gave them. See *390 U.S. at 169*. But at a time when exclusive territories, at least if imposed through a sale contract (as in *Albrecht*) rather than an agency contract, were illegal per se, as had been held a year before *Albrecht* in *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967)* (the decision overruled by *Sylvania*), it was not a good defense of maximum price fixing that it was ancillary to a system of exclusive territories. Now that assigning exclusive territories to dealers is lawful if reasonable, a manufacturer-imposed price ceiling intended to limit the power that exclusive territories give dealers to raise prices regardless of what other dealers in the manufacturer's product are charging may also be lawful in some cases -- a proposition suggested by Professor Pitofsky in *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 Colum. L. Rev. 1, 16 n. 59 (1978), and supported by the First Circuit's decision in *Eastern Scientific Co. v. Wild Heerbrugg Instruments, **[**21]** Inc., 572 F.2d 883, 885-86 (1st Cir. 1978)*. The defendant in that case had a lawful system of exclusive territories but allowed its dealers to sell outside their territories provided they did not sell below a certain price. This provision was held lawful because it allowed a little more competition than if the territories had been airtight. The justification for maximum prices within exclusive dealer territories is even more straightforward: it forces price within the territories closer to the **[*707]** competitive level. See Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886, 890 n. 20 (1981). It is true that, after *Sylvania* was decided, *Albrecht* was cited approvingly in *Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 347-48, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)* (4-3 decision), but only as supporting the proposition that horizontal price fixing is not saved from condemnation merely because the prices fixed are maximum rather than minimum prices, see *id. at 348* and n.18, a matter of no significance here. Indeed, the footnote can be read as supporting a distinction between horizontal and vertical maximum price fixing.

But we need not explore **[**22]** this maze further. Since the lawfulness of Morton's territorial exclusivity has not been adjudicated, it is premature to conclude that maximum price fixing would be a lawful incident to it. We mention the point to avoid creating the impression that we consider maximum price fixing always and everywhere unlawful (unless horizontal, in which event it is indeed illegal per se, as held in *Maricopa, 457 U.S. at 348*). That seems to us an open question after *Sylvania*. But even if we assume that maximum price fixing would be unlawful in this case, as it might well be if Morton's exclusive territories were unlawful (an issue not before us on this appeal), we must still determine whether the conduct attested to in Walters' affidavits is price fixing. The special master thought that Morton's efforts to compel its dealers to comply with the advertised price, and the dealers' responses, did not create an agreement to adhere to that price; and without agreement there can be no violation of *section 1* of the Sherman Act. The picture painted by Walters' affidavits is one not of agreement but of Morton's unsuccessful efforts to force Walters to agree. However, Supreme Court pronouncements **[**23]** which appear still to be authoritative despite the considerable changes in the Court's interpretation of the antitrust laws in recent years indicate that when a seller goes beyond announcing a policy of refusing to deal with price cutters (or in this case price gougers) and of cutting off those dealers who do not comply with the announced policy, it has, for *section 1* purposes, conspired with any dealer who complies with the policy. See, e.g., *United States v. Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*. Here some dealers did comply; and Walters' affidavits if true indicate that Morton went beyond simply announcing its policy and terminating noncompliers, and used persuasion and policing to obtain that compliance, as in *Yentsch v. Texaco, Inc., 630 F.2d 46, 49-55 (2d Cir. 1980)*. See also *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 1471-73, 79 L. Ed. 2d 775 (1984)*.

But there is a more fundamental ground, alluded to by the special master, which requires that we uphold the dismissal of this part of the complaint. Walters concedes as it must that it is perfectly lawful for a manufacturer to advertise his product to **[**24]** the ultimate consumer, whether or not he sells directly to the consumer, and to mention in that advertising the retail price of the product -- the only price the consumer is interested in. The law of products liability has come to recognize what economists and businessmen have long known -- that manufacturers are in a direct economic relationship with the ultimate consumers of their products even if they are not in privity with them. See, e.g., *Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 412-16, 161 A.2d 69, 99-101 (1960)*. This insight cannot be limited to tort law. The demand for a manufacturer's product depends significantly on the retail price; the lower that price is (other things being equal), the more his product will be demanded by consumers and therefore by the dealers who are his immediate purchasers. Hence the manufacturer has a vital interest in the retail price. Maybe that interest is not great enough to allow him to place a cap on the retail price but Walters concedes that it is great enough to allow the manufacturer to advertise a retail price.

[*708] This concession is very damaging to Walters. If it is lawful to advertise a retail price, it **[**25]** should be lawful to take at least the minimum steps necessary to make that advertising beneficial. It would be pretty embarrassing for a manufacturer who had advertised a special retail price to be bombarded by complaints from consumers that dealers were refusing to sell to them at that price. Such refusals would make the advertising misleading and might even expose the manufacturer to legal sanctions under the Federal Trade Commission Act or counterpart state regulations. So if retail price advertising by manufacturers is to be feasible the manufacturer must be allowed to take reasonable measures to make sure the advertised price is not exceeded. These measures include trying to persuade dealers to adhere to the advertised price and checking around to make sure they are adhering. These are the respects in which Morton is alleged to have gone beyond the simple announcement of policy and refusal to deal with noncompliers that would be permissible even if it were trying to get its dealers to adhere to its suggested retail prices across the board. See *Monsanto Co. v. Spray-Rite Service Corp., supra, 104 S. Ct. at 1469*. They are the minimum steps that Morton had to take if its **[**26]** advertised price was to have any value at all, and they are therefore lawful. Cf. *Bruce Drug, Inc. v. Hollister, Inc., 688 F.2d 853, 859-60 (1st Cir. 1982)*.

It is true that dicta in *Butera v. Sun Oil Co., 496 F.2d 434, 437 (1st Cir. 1974)*, based on *Pearl Brewing Co. v. Anheuser-Busch, Inc., 339 F. Supp. 945 (S.D. Tex. 1972)*, suggest that for a supplier to condition a cut in the wholesale price to his dealers on their agreeing to pass it on to the consumer by lowering their prices, which is a little like what is alleged here, is a form of price fixing. But the more recent decisions hold to the contrary. See *Lewis Service Center, Inc. v. Mack Trucks, Inc., 714 F.2d 842, 846 (8th Cir. 1983)*; *AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc., 705 F.2d 1203, 1206 (10th Cir. 1982)*. And in none of these cases did the manufacturer have the additional argument that Morton has here: Morton had to pressure its dealers to lower price in order to maintain the credibility of its price advertising -- a form, by the way, of constitutionally protected speech. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 48 L. Ed. 2d 346, 96* ***[**27]*** *S. Ct. 1817 (1976)*.

All this is not to say that simply by advertising retail prices a manufacturer gets the right to fix retail prices. If Morton had tried to fix its dealers' prices at times when it was not advertising special deals at specific prices, its efforts would not be privileged just because at other times it did advertise retail prices. Nor could Morton require its dealers to comply with minimum prices. And therefore it could not forbid them to sell at less than the advertised prices. See *Lehrman v. Gulf Oil Corp., 464 F.2d 26, 39-40 (5th Cir. 1972)*. But it did not do any of these things.

Even if what Morton did was price fixing, Walters could not challenge it. ***HN3***[] A private plaintiff can complain only of an antitrust injury. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. It is not enough that the plaintiff would not have been injured but for the defendant's alleged violation of the antitrust laws; the injury must be the sort of thing that the antitrust laws are intended to forbid. The plaintiff in *Brunswick* was complaining that the defendant's acquisition of a rival would enable the rival to become **[**28]** a more efficient company, and therefore a more effective competitor of the plaintiff. The Supreme Court held that the plaintiff could not complain about the injury. It would have been different if the complaint was that the acquisition would lead to the rival's engaging in predatory pricing or some other method of competition with the plaintiff that the antitrust laws are intended to prevent.

There is nothing esoteric about the *Brunswick* rule. It is the application to ***antitrust law*** of venerable principles of tort **[*709]** causation illustrated by *Gorris v. Scott*, 9 L.R. Ex.-125 (1874). The plaintiff's animals, which were being transported on the deck of the defendant's ship, were washed overboard in a storm. They would have been saved if the deck had been penned, as required by statute. But since the purpose of the statute was to prevent contagion, not drowning, the defendant was not liable. Similarly, although the plaintiff in *Brunswick* would not have been hurt if there had been no acquisition, the acquisition did not hurt it in the way that the framers of the antitrust laws had in mind. In the present case, even if Morton did violate the prohibition against **[**29]** fixing its dealers' prices, the only harm to Walters came from the fact that competing dealers (or Morton itself) would lower their prices to consumers if Walters did not. There is no suggestion that the lower prices would have been below cost; they would have been lawful prices. This case thus is stronger for the defendant than *Gorris*. The loss of the animals was a pure social cost, while the loss to Walters from lawful price competition was a gain to consumers. Walters will not be heard to complain about having to meet lawful price competition, which ***antitrust law*** seeks to encourage, merely because the competition may have been enabled by an antitrust violation. See *MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1161 (7th Cir. 1983)*; Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467, 491 (1980).

The remaining antitrust claim that the district court dismissed is that the tie-in, resale price maintenance, and exclusive-territories allegations, taken together, make out an independent violation of *section 1* of the Sherman Act, because they establish a scheme to destroy Morton's independent **[**30]** dealers in order that Morton could take over the retail sale of its buildings, as eventually it did. Our conclusion that there was no tie-in and no resale price maintenance may seem to eliminate all possibility that there was an unlawful scheme of greater compass than the territorial exclusivity, which is not before us on this appeal. But it is possible to recast Walters' argument as follows. Even if there was no tie-in in a technical sense and no resale price maintenance in the sense in which it is a per se violation of *section 1*, still when one combines what Morton is alleged to have done (such as forbidding its dealers to obtain, from other manufacturers, any Morton Building components that Morton supplies, and squeezing the dealers by forcing them to sell buildings at the low prices that Morton advertised and to swallow part of the discount) with its alleged motive in doing so of driving the dealers out of business, an unreasonable restraint of trade can be inferred. And it meets the threshold requirement of *section 1* that there be a contract, combination, or conspiracy, since Morton managed to draw some of its (doomed) dealers into its scheme to eliminate recalcitrants such **[**31]** as Walters.

It does not add much, though, to call the scheme an "aggregation of trade restraints." The term goes back to *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598, 95 L. Ed. 1199, 71 S. Ct. 971 (1951)*, and as used there, and later in *United States v. Sealy, Inc., 388 U.S. 350, 354, 357, 18 L. Ed. 2d 1238, 87 S. Ct. 1847 (1967)*, just meant that whether a restriction was illegal per se might depend on what other restrictions the defendant had imposed. A later decision in the interminable Sealy litigation, *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., supra, 585 F.2d at 827-28*, used a similar approach to conclude that a number of separate provisions in the Sealy licensing agreement, each innocuous in itself, had been combined in such a way as to perpetuate the division of markets that the Supreme Court had held was a per se violation of *section 1*. All that Walters is asking us to do here is to decide whether its challenge to Morton's system of marketing raises a triable issue under the Rule of Reason.

It is helpful to recall that ***HN4***[] at common law a conspiracy was unlawful if the conspirators used unlawful means to a **[*710]** lawful end or lawful means **[**32]** to an unlawful end. *United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 293 (6th Cir. 1898)*, modified and aff'd, *175 U.S. 211, 44 L. Ed. 136, 20 S. Ct. 96 (1899)*. This is a pretty encompassing definition, and if Walters cannot bring itself within either branch it is unlikely to have a cause of action under *section 1*. The means, we have seen, were not unlawful, unless the exclusive territories are unlawful; but if they are, Walters can get all the relief it seeks in the trial of the retained claim in the district court. Predatory pricing, alleged in *Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1345 (3d Cir. 1975)*, on which Walter relies as a case where the goal of the alleged conspiracy was vertical integration into retail distribution, is not alleged here.

The end that Walters alleges is that Morton wanted to take over the retail function; in the terminology of industrial organization, it wanted to integrate forward. But vertical integration is not an unlawful or even a suspect category under the antitrust laws: "Firms constantly face 'make-or-buy' decisions -- that is, decisions whether to purchase a good or service in the market or to produce it internally **[**33]** -- and ordinarily the decision, whichever way it goes, raises no antitrust question." *University Life Ins. Co. of America v. Unimarc Ltd., 699 F.2d 846, 852 (7th Cir. 1983)*. Morton manufactures some of the building components that it includes in the kits that it sells. It is therefore vertically integrated, because it could buy those components on the market instead. There is nothing abnormal about this. If Morton employs its own typists it is vertically integrated, because it could farm out its typing work to independent contractors. When a corporation that has been using a law firm to handle a particular type of litigation hires a lawyer to do the litigation in-house, it is vertically integrating into litigation services. When a law firm that has been buying a billing service from a computer time-sharing firm buys its own computer to perform the service, it is vertically integrating into computer services. Vertical integration is a universal feature of economic life and it would be absurd to make it a suspect category under the antitrust laws just because it may hurt suppliers of the service that has been brought within the firm.

A common type of vertical integration is **[**34]** for a manufacturer to take over the distribution of his product. Some manufacturers use wholesalers; others, for example the U.S. automobile manufacturers, do their own wholesaling and thus are vertically integrated into wholesale distribution. Some firms, IBM for example, sell their products directly to the public, rather than through independent retail outlets, and thus are vertically integrated into retail distribution. It was not improper for Morton to want to deal directly with the consuming public rather than indirectly through dealers such as Walters. Of course if it set about to do this in an unlawful fashion it would not be immune from liability just because it had an unexceptionable end in view. But that is only because, as we have noted, a conspiracy to attain a lawful end by unlawful means is actionable.

We just said that vertical integration is not an improper objective. But this puts the matter too tepidly; vertical integration usually is procompetitive. If there are cost savings from bringing into the firm a function formerly performed outside it, the firm will be made a more effective competitor. Moreover, the option of vertical integration places competitive **[**35]** pressure on the firm's suppliers and buyers, who know that if they charge too much for their services the firm may decide to perform them itself. It thus increases competition in the markets for those services. Morton claims that the spiraling costs of building materials forced it to cast about for methods of economizing on its operations, and one method it hit on was to do its own retailing. This is a common motivation for vertical integration. True, some economists believe that monopolistic firms might integrate vertically in order to deny supplies or outlets to competitors, or to make it more costly for new firms to enter the **[*711]** market (because they would have to enter at more than one level of production or distribution), or to facilitate price fixing with their competitors. See 3 Areeda & Turner, ***Antitrust Law*** paras. 725-26 (1978). But nothing of this kind is suggested here. Walters does allege that Morton has a big name in the prefabricated farm buildings market, but there is no indication that this is a meaningful economic market that might be worth monopolizing, or that Morton's purpose in integrating into retail distribution was to make life harder for *its* **[**36]** competitors. Its object was to make more money by reducing the cost of retail distribution, not by coercing or excluding (or for that matter colluding with) its own competitors, whoever they may be, or discouraging potential competitors. Indeed Walters' tie-in claim is premised on the ready availability, from other manufacturers, of the building parts that Morton sells in kits from which Morton Buildings are put together. This shows that Morton has no monopoly.

The final substantive question is whether the district court was correct to dismiss Walters' claim that Morton breached its duty under Wisconsin law to deal fairly with a party with which it had a contractual relationship. The dismissal was on the merits; and if it were not for the fact that Walters and Morton are of diverse citizenship and that the amount in controversy between them exceeds $10,000, there would be a question whether retention of this state-law claim after all the federal claims except the challenge to Morton's use of exclusive territories were dismissed before trial was a proper exercise of pendent jurisdiction; for the relationship between the pendent claim and the only retained federal claim is somewhat **[**37]** distant.

Walters does not charge Morton with a breach of contract, in part because Walters has been unable to produce a copy of any written contract though it claims there was one. The charge sounds in tort. But we share the special master's perplexity as to what tort is being charged. In Wisconsin as in many other states it is tortious for an insurance company to refuse to pay an insured his claim if the company has no colorable basis for its refusal. See, e.g., *Kranzush v. Badger State Mutual Casualty Co., 103 Wis. 2d 56, 61-62, 307 N.W.2d 256, 259-60 (1981)*; *Anderson v. Continental Ins. Co., 85 Wis. 2d 675, 687, 271 N.W.2d 368, 374 (1978)*. But the tort requires a contractual claim so incontestable that the refusal to honor it must have been in bad faith; here, if Walters has any contractual claim at all, it is so tenuous that Walters is not asserting it. Also the tort has not been extended, in Wisconsin anyway, beyond the insurance setting, where the disparity in resources between insurer and insured has seemed to make the bad-faith breaking of contracts especially reprehensible. Indeed, even in that setting the tort has been defined narrowly, as we pointed out recently **[**38]** in *A.W. Huss Co. v. Continental Casualty Co., 735 F.2d 246, 249-54 (7th Cir. 1984)*.

Fiduciaries have a duty of fair dealing, of course; and in *Estate of Chayka, 47 Wis. 2d 102, 176 N.W.2d 561 (1970)*, this duty was extended to spouses executing a joint will -- a special relationship resembling a fiduciary one. But it is a big step from this to reading into every commercial relationship a duty of fair dealing not cabined by contractual provisions, express or implied. Statutes in many states, including Wisconsin, give dealers and franchisees special protections against termination. See *Wis. Stat. § 135.03*. But Walters does not rely on any statute; it relies on a common law tort concept that is not yet the law in Wisconsin. ***HN5***[] The common law of Wisconsin does not make the franchisor a fiduciary of his franchisees. *Murphy v. White Hen Pantry Co., 691 F.2d 350, 355 (7th Cir. 1982)*.

This completes our discussion of the matters presented in the appeal, but before ending we want to make an observation about the procedure employed by the district court in this case. ***HN6***[] Although the use of special masters to assist federal district judges in complex litigation is not only authorized **[**39]** but indispensable to the effective operation of the federal courts under **[*712]** current workload conditions, its scope is limited by *Fed. R. Civ. P. 53(b)*, as follows: "A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it." The reference in this case was proper only if required by "some exceptional condition," since it was not made to assist a jury and did not call for an accounting or a damage calculation; and we doubt that this demanding condition was met. Cf. *Bennerson v. Joseph, 583 F.2d 633, 642 (3d Cir. 1978)*. In this more than in any other circuit we must be alert to the danger of overusing special masters, for it was overuse by one of our district judges that led the Supreme Court to issue a writ of mandamus in *La Buy v. Howes Leather Co., 352 U.S. 249, 1 L. Ed. 2d 290, 77 S. Ct. 309 (1957)*. Judge La Buy "stated he did not know when he could try the case 'if **[**40]** it is going to take this long.' He asked if the parties could agree 'to have a Master hear' it. The parties ignored this query and the next day [Judge La Buy] entered the orders of reference sua sponte. The orders declared that the court was 'confronted with an extremely congested calendar' and that 'exception [sic] conditions exist for this reason' requiring the references. The cases were referred to the master 'to take evidence and to report the same to this Court, together with his findings of fact and conclusions of law.' . . . All parties objected to the references. . . ." *Id. at 253-54* (footnote omitted).

In this case the district judge, also on his own initiative and also because he did not have time for a long trial, and hoping that the special master's report would (as it did) enable the number of issues to be reduced for trial, referred summary judgment proceedings to a special master who prepared a report that the judge then adopted without independent analysis. Since the judge did not refer the case to the special master for trial, and only one of the parties (Walters) objected, the delegation of judicial power was less extreme than in *La Buy*. But that **[**41]** does not mean it was in conformity with *Rule 53(b)*. Although the materials submitted in connection with the motion for summary judgment ran to several thousand pages, this unfortunately is not unusual in antitrust and other complex litigation; yet it would be contrary to *Rule 53(b)*, as it has been understood and interpreted against a background of concern with the cost and delay created by using masters, to refer summary judgment motions in antitrust cases routinely to masters. See 9 Wright & Miller, Federal Practice and Procedure § 2605 (1971); cf. *MCI Communications Corp. v. American Tel. & Tel. Co., supra, 708 F.2d at 1169 n.125*.

But unless the delegation of judicial power to the master in this case exceeded the bounds of Article III of the Constitution, it is not reversible error, because Walters has not asked us to reverse the district court's judgment on the ground that the reference to the master violated *Rule 53(b)*. See, e.g., *Hayes v. Foodmaker, Inc., 634 F.2d 802, 803 (5th Cir. 1981)* (per curiam); 9 Wright & Miller, *supra*, § 2606. The objection was made in the district court but has been abandoned on appeal, so we would not revive it unless we thought **[**42]** the reference was beyond the district court's subject-matter jurisdiction. The district judge delegated a reporting and recommending power rather than the power of decision; it was he, not the master, who entered judgment. True, the master's function was to evaluate a long documentary record and determine whether it presented genuine issues of material fact; the opinion he wrote was indistinguishable in form from a judicial opinion; and the district judge approved that opinion rather than write his own. Walters therefore has a valid gripe about being hustled off to an adjudicative process conducted -- and at rather too leisurely a pace -- by a private practitioner. If Walters had preserved its objection on appeal we might well reverse, **[*713]** and we would have to do so whether it had or not if we thought the procedure was so improper as to be beyond the powers granted federal judges by the Constitution, statutes, and rules -- which means, practically speaking, so egregious as to warrant reversal even though the issue was not preserved on appeal. We do not think the procedure was quite that egregious, and we naturally are reluctant to prolong the length and increase the expense **[**43]** of this proceeding (already six years old) by vacating the reference on our own initiative. But we trust that in the future the use of special masters in antitrust and other complex litigation will be conducted with greater sensitivity to the problems of excessive delegation of judicial power that such use can create and to the precise language of *Rule 53(b)*, which as we have pointed out requires in a case such as this a showing of "some exceptional condition" justifying the reference to a master.

AFFIRMED.

Concur by: SWYGERT

Concur

SWYGERT, Senior Circuit Judge, concurring in the judgment.

Walters raises four issues on appeal: (1) whether Morton's trademark was illegally tied to the sale of its building material packages; (2) whether Morton forced Walters to maintain illegally fixed retail prices on periodically advertised specials; (3) whether Walters states a claim under *section 1* of the Sherman Act for Morton's alleged predatory scheme to destroy its independent dealers; and (4) whether Morton owed Walters a duty of good faith. I agree with the majority that the district court's disposition of these four issues should be affirmed, although I will address only the first two.

[44]** In regard to the tie-in claim, the record can admit of only one conclusion: there was no tie-in because there were not two separate products, *see Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 507, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)*. Under any of the analyses adopted by the courts, the Morton trademark did not constitute a product separate from the Morton building material package. *See, e.g., Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 1562-63, 80 L. Ed. 2d 2 (1984)* (separate products exist where there are separate markets for each product); *Principe v. McDonald's Corp., 631 F.2d 303, 309 (4th Cir. 1980)*, *cert. denied*, *451 U.S. 970, 68 L. Ed. 2d 349, 101 S. Ct. 2047 (1981)* (franchise package constitutes single product where the "aggregation is an essential ingredient of the franchised system's formula for success"); *Siegel v. Chicken Delight, Inc., 448 F.2d 43, 48-49 (9th Cir. 1971)*, *cert. denied*, *405 U.S. 955, 31 L. Ed. 2d 232, 92 S. Ct. 1172 (1972)* (trademark used under "business format system" or "rent a name" franchise constitutes separate product from articles used in production of system **[**45]** but trademark used under a "distribution format system" is integrated with the product or products that it represents).

Walters' retail price maintenance claim is hardly worth discussion. Morton legally could advertise its products for direct sales to consumers at any price it wished. Walters admitted that he was faced with the choice of meeting the price advertised by Morton or making no sales. Thus, any actions by Morton to enforce sales at the advertised price were unnecessary and could not have caused Walters a compensable antitrust injury. *See* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487-89, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*.

Unfortunately, I cannot concur in much of the discussion contained in the majority opinion, not because that discussion may not state correct principles of law, but because I believe it is dicta -- dicta that might tend to influence and prejudice decisions in cases yet unborn but which may come to this court for review. It could be argued that the discussion of matters other than those actually raised by this appeal has a certain peripheral relevance, but such relevance, if it exists at all, is unnecessary for an understanding **[**46]** and treatment of this case. It is axiomatic, of course, that we **[*714]** should confine our discussion to the legal principles applicable to the case at hand. Shadows cast beyond the facts of a particular case tend to confuse the trial judges and haunt our own appellate court -- inhibiting our freedom to decide future cases according to what we perceive to be the applicable law at that time.

Dunn v. Phoenix Newspapers, Inc.

United States Court of Appeals for the Ninth Circuit

November 18, 1983, Argued and Submitted ; June 26, 1984, Decided

No. 83-2024

Reporter

735 F.2d 1184 *; 1984 U.S. App. LEXIS 21102 **; 1984-2 Trade Cas. (CCH) P66,012; 1984-2 Trade Cas. (CCH) P66,079; Fed. Sec. L. Rep. (CCH) P66,012; 10 Media L. Rep. 2263

GARY J. DUNN, individually and as guardian of STEVEN DUNN, a minor child; and G. MICHAEL DUNN, Plaintiffs-Appellants, v. PHOENIX NEWSPAPERS, INC., Defendant-Appellee

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

Honorable Carl A. Muecke, District Judge, Presiding.

Disposition: Affirmed.

Core Terms

carriers, newspapers, subscription, prices, district court, subscribers, rates, retail, practices, plans, resale price, home-delivery, subscription price, per se violation, antitrust, customers, producer, distributors, conspiracy, papers

LexisNexis® Headnotes

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

HN1[] **Standards of Review, Clearly Erroneous Review**

Findings of fact must be upheld unless they are clearly erroneous. *Fed. R. Civ. P. 52(a)*.

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

HN2[] **Standards of Review, De Novo Review**

Whether the defendants' practices as found violate the Sherman Act *15 U.S.C.S. §1* is a question of law, not fact, and is subject to de novo review.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

Section 1 of the Sherman Act forbids every contract, combination, or conspiracy, in restraint of trade or commerce among the several States. *15 U.S.C. S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

Resale price maintenance is illegal only if implemented by contract, combination, or conspiracy.

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

HN5[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Price-fixing brought about by contract, combination, or conspiracy is unquestionably per se illegal. But a producer is free to fix and publish a retail price for his product and solicit business at that price.

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

HN6[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under the rule of reason, the plaintiffs must show either that the purpose of the defendants' direct dealings with subscribers was to restrain trade or that it actually injured competition.

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

HN7[] **Standards of Review, Clearly Erroneous Review**

A reviewing court must give due regard to the trial court's judgment of the credibility of the witnesses. *Fed. R. Civ. P. 52(a)*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN8[] **Public Enforcement, State Civil Actions**

Arizona ***antitrust law*** expressly incorporates federal court interpretations of federal ***antitrust law***. *Ariz. Rev. Stat. Ann. § 44-1412*.

Counsel: Kenneth R. Reed, Esq., Michael Wischkaemper, Esq., Kenneth D. Nyman, Esq., Phoenix, Arizona, for Appellant/Petitioner.

Richard A. Segal, Esq., Gust, Rosenfeld, Divelbess & Henderson, Phoenix, Arizona, for Appellee/Respondent.

Judges: Duniway, Timbers, * and Skopil, Circuit Judges.

Opinion by: DUNIWAY

Opinion

[*1185] DUNIWAY, Circuit Judge:

This is an antitrust suit brought by newspaper home-delivery carriers against the publisher of two newspapers. The carriers complained that the newspapers violated the Sherman Act, *15 U.S.C. § 1*, and parallel state law, *Ariz. Rev. Stat. Ann. § 44-1402*, by directly signing up home subscribers and engaging in other conduct setting the **[*1186]** price that home subscribers paid to the carriers. The district court rejected the carriers' *per se* violation analysis and, after bench trial, filed detailed findings of fact, and decided for the newspapers under the "rule of **[**2]** reason." The carriers appeal, and we affirm.

I. FACTS.

Plaintiffs Gary J. Dunn, his minor son Steven Dunn, and G. Michael Dunn were carriers for the *Arizona Republic* and the *Phoenix Gazette*, daily newspapers published by defendant Phoenix Newspapers, Inc. The carriers were independent contractors, not employees of the newspapers. The newspapers did not grant the carriers monopolies or exclusive geographical sales rights. The newspapers set the prices at which they sold papers to the carriers.

The newspapers engaged in various practices that, the carriers say, tended to set the price that home-delivery subscribers would pay the carriers: (1) The newspapers published "suggested retail subscription prices" for home-delivery, as well as newsstand "face" prices, in each copy of the papers. (2) When the newspapers changed the published home-delivery subscription rates, they notified subscribers by prominent notices in the papers. (3) When the newspapers switched from carriers to motor route distributors, they directly notified subscribers of rate increases by form letter. (4) At various times, the newspapers used subscription-boosting practices such as door-to-door, telephone, **[**3]** and direct mail solicitation; newspaper advertisements quoting home delivery subscription rates; and promotional subscription discounts ("Eight-for-Four" and "Eight-for-Eight" plans). The carriers were contractually obligated to deliver the papers to such new subscribers. (Exh. 1, para. 9.) (5) The newspapers offered direct plans ("Easy Pay Plan" and "Debit Transfer Plan") under which home-delivery subscribers paid directly to the newspapers at the suggested subscription rates, and the newspapers credited the carriers' accounts on a weekly basis. The carriers were not contractually obligated to participate in these plans. (*See* Exh. 1, para. 8.) (6) The newspapers offered the carriers prepared billing invoices at the published home-delivery subscription rates.

The contractual agreements between the newspapers and carriers did not cover subscription prices, and the newspapers told both the carriers and subscribers that published subscription rates were "suggested retail prices" and that carriers were free to charge whatever prices they wanted. There was no evidence that the carriers ever tried to deviate from the suggested retail subscription price. Consequently, there was **[**4]** no evidence as to what the newspapers' actual response to a price increase by a carrier would have been.

II. STANDARDS OF REVIEW.

The parties disagree as to the appropriate standard of review. ***HN1***[] Findings of fact must be upheld unless they are clearly erroneous. *Fed. R. Civ. P. 52(a)*. ***HN2***[] Whether the newspapers' practices as found violate the Sherman Act is a question of law, not fact, and is subject to *de novo* review. *See* *United States v. General Motors Corp., 384 U.S. 127, 141 n.16, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)*. The carriers are wrong in saying that all issues on appeal are issues of law subject to *de novo* review. The newspapers are wrong in saying that all issues on appeal are issues of fact subject to the "unless clearly erroneous" rule.

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* The Honorable William H. Timbers, Senior United States Circuit Judge for the Second Circuit, sitting by designation.

III. PER SE VIOLATION.

A. *Agreements between Newspapers and Subscribers*.

HN3[] Section 1 of the Sherman Act forbids "every contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. A manufacturer that suggests resale prices and unilaterally refuses to deal with distributors that do not comply does not violate the statute. *Monsanto Co. v. Spray-Rite* **[**5]** *Service Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984)*; *United States v. Colgate &* **[*1187]** *Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*; *Filco v. Amana Refrigeration, Inc., 709 F.2d 1257, 1261* (9 Cir., 1983); *General Cinema Corp. v. Buena Vista Distribution Co., 681 F.2d 594, 597* (9 Cir., 1982). **HN4**[] Resale price maintenance is illegal only if implemented by contract, combination, or conspiracy. *Albrecht v. Herald Co., 390 U.S. 145, 149, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*; *United States v. Parke, Davis & Co., 362 U.S. 29, 43-44, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*; *United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 721-23, 88 L. Ed. 1024, 64 S. Ct. 805 (1944)*; *F.T.C. v. Beech-Nut Packing Co., 257 U.S. 441, 451-53, 66 L. Ed. 307, 42 S. Ct. 150 (1922)*; *Dr. Miles Medical Co. v. Park & Sons Co., 220 U.S. 373, 408, 55 L. Ed. 502, 31 S. Ct. 376 (1911)*.

The carriers do not contend that agreements between the newspapers and themselves, or between the newspapers and other carriers, fixed resale prices. They do argue that the direct payment plans and other agreements between the newspapers and certain subscribers **[**6]** fixed the carriers' resale prices, and that this was *per se* illegal. We reject this argument for two reasons. First, the district court found that the carriers failed to show that agreements between the newspapers and subscribers fixed the prices received by the carriers. Second, even if such agreements set subscription prices, they would not be illegal *per se*.

1. *No price-fixing agreements*.

The district court found that the direct payment plans did not fix the carriers' prices and that carriers could charge higher or lower rates under these plans. The carriers argue that they were contractually bound to honor "direct payment" and other subscription agreements. This is not what the carrier agreements say. (Exhs. 1-3, para. 8.) This is not what the district court found. (Findings & Conclusions para. 46; *cf.* para. 43.) Carriers were obligated to service *new* subscribers (Exhs. 1-3, para. 9.) Although the carriers might have blushed to explain to their customers why they charged more than the suggested subscription prices, the record does not contradict the district court's finding that the carriers could have charged prices other than the suggested retail **[**7]** subscription prices.

The carriers target the newspapers' subscription promotion plans, but the district court found that these plans, while they did fix prices, were of limited duration, were offered on a sporadic basis, and were not shown to involve the plaintiff carriers or any of their subscribers. The carriers did not show that they ever tried to charge, but were prevented from charging, higher prices under the direct payment or other subscription plans.

Therefore, the district court found that there were no express agreements to fix prices that would support application of the *per se* rules of illegality. The district court further found that there was no implied agreement or combination because the newspapers stayed within permitted bounds of unilateral suggestion and persuasion in setting subscription rates. *See* *Colgate, 250 U.S. at 305-06*; *Hanson v. Shell Oil Co., 541 F.2d 1352, 1355-57* (9 Cir., 1976); *Gray v. Shell Oil Co., 469 F.2d 742, 748* (9 Cir., 1972). The findings are not clearly erroneous.

2. *No per se violation*.

HN5[] Price-fixing brought about by contract, combination, or conspiracy is unquestionably *per se* illegal. *Arizona v. Maricopa* **[**8]** *Medical Society, 457 U.S. 332, 347, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*. But a producer is free to fix and publish a retail price for his product and solicit business at that price. The carriers argue that when the newspapers sign up subscribers for home delivery at specified prices, this is a combination in restraint of trade under the Sherman Act. Clearly, without more, it is not; and it is not *per se* illegal.

The myriad cases that have held resale price maintenance schemes to be *per se* violations have typically involved significantly different fact patterns, such as (1) a **[*1188]** combination between the newspaper and a rival carrier, *e.g.*, *Albrecht v. Herald Co., 390 U.S. at 150*; or (2) a combination between the newspaper and the plaintiff carrier, *e.g.*, *Noble v. McClatchy Newspapers, 533 F.2d 1081, 1089* (9 Cir., 1975); *Blankenship v. Hearst Corp., 519 F.2d 418, 427-28* (9 Cir., 1975); *see* *Albrecht, 390 U.S. at 150 n.6*; or (3) a combination between the newspaper and a rival newspaper, *e.g.*, *Citizen Publishing Co. v. United States, 394 U.S. 131, 135, 22 L. Ed. 2d 148, 89 S. Ct. 927 (1969)*.

The carriers rely on the second paragraph of the **[**9]** Supreme Court's footnote in *Albrecht, 390 U.S. at 150 n.6*:

> Petitioner's amended complaint did allege a combination between respondent and petitioner's customers. Because of our disposition of this case it is unnecessary to pass on this claim. It was not, however, a frivolous contention. See *Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441 [66 L. Ed. 307, 42 S. Ct. 150]* (1922); *Girardi v. Gates Rubber Co. Sales Div., Inc., 325 F.2d 196 (C.A. 9th Cir. 1963)*; *Graham v. Triangle Publications, Inc., 233 F. Supp. 825 (D.C.E.D. Pa. 1964)*, aff'd *per curiam*, *344 F.2d 775 (C.A. 3d Cir. 1965)*.

In *Albrecht*, there was a combination between a newspaper, a subscription solicitation firm, and a replacement carrier against an independent carrier who charged more than the suggested retail price. *390 U.S. at 147, 150*. The footnote is thus dictum, as is clear from its language. The Court did not say that such a combination is a *per se* violation, but only that the claim was something better than "frivolous."

The cases cited in the *Albrecht* footnote are not helpful. *Beech-Nut* held that resale price maintenance by a food producer, **[**10]** implemented in the course of its dealings with jobbers, wholesalers, and retailers, was an unfair method of competition under § 5 of the Federal Trade Commission Act, *15 U.S.C. § 45*. *Beech-Nut* did not involve dealings between the producer and retail customers. *See* *257 U.S. at 447-48*. The only references to "customers" pertain to wholesale buyers. *See* *257 U.S. at 444, 455*.

Girardi involved an alleged conspiracy and agreement between a belt and pulley producer and its distributors, which at trial was confined to a conspiracy between the producer and a rival distributor. *325 F.2d at 198*. Neither the holding nor dictum addresses dealings between the producer and retail customers.

In *Graham*, the Third Circuit affirmed the denial of a preliminary injunction without expressing any opinion on the merits. *344 F.2d 775, 776*.

B. *Coercion by the Newspapers*.

The district court held that the carriers failed to show a "level of coercion sufficient to deprive plaintiffs of their free choice in the context of all the facts of this case." (Findings & Conclusions paras. 39, 95-99.) *See In re Coordinated Pretrial Proceedings in* *Petroleum Products Antitrust Litigation* ***[**11]*** *, 691 F.2d 1335, 1343* (9 Cir., 1982); *General Cinema, 681 F.2d at 597*; *Knutson v. Daily Review, Inc., 548 F.2d 795 at 806 (9th Cir.1976)*; *Hanson, 541 F.2d at 1357*; *Gray, 469 F.2d at 748*. The carriers say that they need not show coercion because express agreements between the newspapers and subscribers set the price received by the carriers. The argument is predicated on the finding of an agreement establishing a *per se* violation, which the district court properly rejected.

The carriers also say that they proved coercion under the standard of *Parke, Davis, 362 U.S. at 44-45*. But in *Parke, Davis* the manufacturer combined with wholesalers to induce price maintenance by retailers. Here the district court did not find that the newspapers coerced carriers who attempted to raise subscription rates. Gary Dunn testified that newspaper employee Dyer said that Dunn would be "off the route" if he raised prices. But the district court **[*1189]** rejected this testimony as "entirely self-serving." (Findings & Conclusions para. 68.) There was contrary testimony by newspaper area sales manager Carity, which the trial court chose to believe, that the newspaper routinely **[**12]** told carriers that they could set their own prices. We give due regard to the trial court's judgment of the credibility of the witness. *Fed. R. Civ. P. 52(a)*.

Our decision in *Chelson v. Oregonian Publishing Co., 715 F.2d 1368* (9 Cir., 1983), is of no help to the carriers. There, we held that a claim that a newspaper threatened to terminate carriers if they agreed to carry another publisher's advertising circulars could amount to a valid antitrust claim and reversed a summary judgment for the newspaper. No such claim is asserted here, and this case has been tried on the merits and findings have been made against the claims of the carriers.

C. *Application of the Rule of Reason Analysis*.

The carriers do not try to show that the newspapers intended their subscription practices to restrain trade or injure competition but rather that, if the practices are not illegal *per se* as resale price maintenance, they are presumptively unreasonable because they "operate directly on price." The carriers quote *United States v. Trenton Potteries Co., 273 U.S. 392, 397-98, 71 L. Ed. 700, 47 S. Ct. 377 (1927)*. But *Trenton Potteries* involved fixing prices by means of agreements **[**13]** between 23 manufacturers and distributors, which was illegal *per se*. The district court correctly found that there were no such agreements here.

HN6[] Under the rule of reason, the carriers must show either that the purpose of the newspapers' direct dealings with subscribers was to restrain trade or that it actually injured competition. *Calculators Hawaii, Inc. v. Brandt, Inc., 724 F.2d 1332, 1337-38* (9 Cir., 1983); *Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, 449* (9 Cir., 1979). They have not done this. The district court properly considered under the rule of reason standard: (1) whether the newspapers had a legitimate economic interest in using subscription practices to increase their circulations, (2) whether subscribers benefitted from restrained subscription costs, and (3) whether the carriers would have provided any additional services to subscribers if they had charged higher prices.

1. *The finding that subscription solicitation practices did not affect the carriers*.

The carriers argue that this finding was clear error because, as a result of the newspapers' subscription practices, the carriers received only the published home-delivery subscription **[**14]** rates, although they wanted to charge more. But the district court found that the carriers were not adversely affected by the newspapers' practices, because the carriers never tried to charge anything other than the suggested rates. Under the rule of reason, the carriers had the burden of proving that they were affected.

2. *The finding that the carriers never attempted to increase prices*.

First, the carriers argue that there was uncontroverted testimony by Gary Dunn that the carriers had repeatedly attempted to increase their prices but had been prevented from doing so. Not so. The district court gave greater credence to contrary testimony by newspaper area sales manager Carity. (*See* Findings & Conclusions paras. 52-54.) ***HN7***[] A reviewing court must give due regard to the trial court's judgment of the credibility of the witnesses. *Fed. R. Civ. P. 52(a)*.

Second, the carriers argue that the newspapers expressly admitted in para. 33 of their Proposed Findings of Fact that the carriers had attempted to charge more than the suggested subscription rates. This misconstrues the quoted passage, which referred to Dunn's own testimony regarding his inquiry to his newspaper supervisor **[**15]** about raising prices, and did not concede that Dunn actually attempted to charge his customers **[*1190]** more than the suggested subscription price.

Third, the carriers argue that there is a legal presumption that home-delivery carriers would increase their prices if they were free to do so, citing *Knutson, 548 F.2d at 812*, as establishing this presumption. But *Knutson* involved an express agreement between carriers to adhere to current subscription rates. Under such circumstances, the carriers could not prove what they would have done in the absence of such agreements, and we recognized a rebuttable presumption that dealers would set prices at the level that maximized profits. Here no agreements required the carriers to adhere to the suggested subscription rates, and thus the *Knutson* rationale does not apply. The district court did not err in requiring that the carriers prove damages.

Without such a presumption, the carriers showed no damages. They did not try to raise prices. The newspapers did not fire any of them for trying to raise prices: Gary Dunn voluntarily quit because the route took too much time and he had problems with delinquent subscription payments; **[**16]** Michael Dunn voluntarily quit; Steven Dunn was fired by the *Arizona Republic* for unrelated reasons, but continues to deliver the *Phoenix Gazette*. None of them suffered injury apart from alleged lost profits. These lost profits were speculative because any increases in price would have caused decreases in circulation, as the carriers stipulated. The net effect on revenues depends on the price elasticity of demand, regarding which there were no findings. (The newspapers' circulation director Martz testified that an increase in subscription rates to the face price of the newspapers might cause a 20 to 25% decrease in circulation.) Thus, the carriers failed to prove damages.

IV. OTHER ERRORS OF LAW.

A. *Claim for Injunctive Relief*.

The carriers claim that under the district court's findings, Steven Dunn (who is still delivering papers) was entitled to a permanent injunction barring the newspapers from continuing to violate the antitrust laws by imposing their resale price maintenance program on their independent carriers. Because the district court properly found that there were no such violations, it did not err in denying injunctive relief.

B. *Pendant State* **[**17]** *Law Claim*.

The district court treated the federal and state antitrust claims as presenting substantially identical issues of fact and law. ***HN8***[] Arizona ***antitrust law*** expressly incorporates federal court interpretations of federal ***antitrust law***. *Ariz. Rev. Stat. Ann. § 44-1412*. Without separating the two claims, the district court entered judgment in favor of the newspapers on both. We find no error.

C. *Attorneys Fees Award*.

The carriers argue that the district court's order improperly awarded attorneys fees to the defendant newspapers. The attorneys fees are like the snakes in Ireland. The judgment does not provide for them.

Affirmed.

Gemini Supply Corp. v. Zeitlin

United States District Court for the Eastern District of New York

June 26, 1984

CV No. 84-0524

Reporter

590 F. Supp. 153 *; 1984 U.S. Dist. LEXIS 15544 **; 1984-2 Trade Cas. (CCH) P66,118

GEMINI SUPPLY CORPORATION, Plaintiff, v. BERNARD ZEITLIN, EDMER SANITARY SUPPLY COMPANY, INC., EDWARD ZEITLIN, GLENN ROGERS and JEROME GOLDBERG, Defendants; EDMER SANITARY SUPPLY COMPANY, INC., Third-Party Plaintiff, v. WILLIAM ZAGER and GEORGE FLANAGAN, Third-Party Defendants

Core Terms

prices, predatory, customers, Robinson-Patman Act, solicit, sanitary, preliminary injunction, discounts, seller's, merits, costs, acquisition costs, discriminatory, confidential, irreparable, third-party, injunctive, ranging, selling, sales

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

To prevail on a motion for a preliminary injunction, the moving party must first show the possibility of irreparable injury and then show either (1) probable success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

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

HN2[] **Robinson-Patman Act, Claims**

To prevail on a Robinson-Patman Act claim, plaintiff must demonstrate that defendant has discriminated in the prices it has charged in contemporaneous sales of commodities of like grade and quality between two or more different customers; that at least one of these sales crossed a state line; and that the price discrimination has had or may in the future have the requisite negative effect on competition. The injury to competition can occur either at the "primary line", i.e., between competing sellers, one of whom is discriminating in price, or at the "secondary line", i.e., between two firms at the buyer level, one of whom receives discriminatory prices from a seller. This case is to be judged by the injury to competition at the primary line.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

Antitrust & Trade Law > ... > Price Discrimination > Defenses > Meeting Competition Defense

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

HN3[] **Robinson-Patman Act, Claims**

The competitive injury requirement of the Robinson-Patman Act may be met by a showing of either injury to competition at the seller's level or the existence of the seller's predatory intent from which injury to competition may be inferred. There may not be any serious argument that competition in the sanitary supply industry is threatened by the actions of seller.

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

HN4[] **Antitrust & Trade Law, Robinson-Patman Act**

While the court must look for direct evidence of predatory intent, evidence of predatory pricing, from which predatory intent may be inferred, is a crucial part of plaintiff's proof.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Law of the Case

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

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

HN5[] **Estoppel, Collateral Estoppel**

The courts are hesitant to upset the determination of a state court on a question of state law, absent a showing of substantially different evidence at a subsequent trial, new controlling authority, or the prior decision was clearly erroneous and would result in injustice.

Counsel: **[**1]** Edward Rubin, Esq., Shapiro, Spiegel, Garfunkel, Rubin & Driggin, New York, New York, for Plaintiff.

Norman Roy Grutman, Esq., Grutman Miller Greenspoon Hendler & Levin, New York, New York, for Defendant.

Judges: Platt, Judge.

Opinion by: PLATT

Opinion

[*154] MEMORANDUM AND ORDER

This case is before the Court on the parties' cross-motions for preliminary injunctive relief. Plaintiff Gemini Supply Corporation ("Gemini") seeks to enjoin defendants Edmer Sanitary Supply Company, Inc. ("Edmer"), and Messrs. Bernard Zeitlin, Edward Zeitlin, Glenn Rogers and Jerome Goldberg [1] from violating the Robinson-Patman Act, *15 U.S.C. § 13 et seq. (1982)*. Third-party plaintiff Edmer seeks to enjoin third-party defendants Messrs. William Zager and George Flanagan, [2] as well as Gemini, from soliciting Edmer's customers or using or disclosing certain information which the third-party defendants acquired while employees of Edmer, and which Edmer alleges is confidential. On February 14, 1984, defendants' counsel consented to the entry of a temporary restraining order ("TRO") forbidding defendants from violating the Robinson-Patman Act, and a hearing was held to consider both motions on twelve dates **[**2]** between February 21, 1984 and April 4, 1984. For the reasons that follow, both motions for injunctive relief are denied, and the TRO is dissolved.

I

Edmer was founded in 1959 by Mr. Bernard Zeitlin. (Tr. p. 731-32). It distributes janitorial and sanitary supplies to businesses and institutions in the New York Metropolitan area. While little or no evidence was presented at the hearing concerning either the size of Edmer, the definition or size of a relevant market, or Edmer's share of that market, it is apparent from the record that the sanitary supply industry is highly competitive, has relatively low barriers to entry and that Edmer is only one of many companies competing in that market. (Tr. p. 753-58).

Messrs. Zager and Flanagan began working for Edmer as salesmen in 1976. (Defendant's **[**3]** **[*155]** exhibit P, Tr. pp. 210, 1447). Each signed, as a condition of their employment, an agreement in the nature of a restrictive covenant, which provided, *inter alia*, that they would not, for a period of three years after they left Edmer's employ, solicit orders for goods in any city or town they had visited as a salesman for Edmer or from any person who had been a customer of Edmer. They also agreed not to disclose any confidential information they received while with Edmer. (Defendant's exhibits A and Y). During the period between 1976 and October, 1983, Messrs. Zager and Flanagan became two of Edmer's leading salesmen (Tr. p. 878), and each serviced approximately 200 accounts. (Tr. pp. 236, 1456).

During the late part of the summer of 1982 Messrs. Zager and Flanagan, who were growing increasingly dissatisfied with their prospects at Edmer, began considering leaving Edmer and forming their own sanitary supply company. (Tr. p. 212). Over the next fourteen months each of the third-party defendants took certain steps,

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[1] A sixth defendant, Mr. Jay Schwartz, was released as a party by the plaintiff on the first day of the hearing held to consider the cross-motions.

[2] Messrs. Zager and Flanagan are the founders and sole shareholders of Gemini.

allegedly on their own time, towards achieving this goal, such as forming Gemini, finding and leasing office space, and assembling a list of potential customers **[**4]** through the purchase of mailing lists from various commercial sources in New York City. (Tr. pp. 213-16). However, Messrs. Zager and Flanagan did not solicit any business on Gemini's behalf from anyone until after October 17, 1983. (Tr. pp. 214-15).

During the week of October 17, 1983, Messrs. Zager and Flanagan resigned from Edmer and began soliciting business for Gemini. Some of the businesses and institutions they solicited were accounts they had serviced while at Edmer, and some were not. There was no credible evidence presented at the hearing that either Mr. Zager or Mr. Flanagan removed written customer information from Edmer at the time of their departure. There *was* considerable evidence that the information Gemini used to solicit prospective customers was either readily available through public sources, e.g., the yellow pages or else was information which Messrs. Zager and Flanagan remembered from their work at Edmer. (Tr. pp. 218-19).

On or about October 21, 1983, Edmer sought a preliminary injunction in New York State Supreme Court, Nassau County, restraining Messrs. Flanagan and Zager and Gemini from soliciting Edmer's customers or disclosing any information about **[**5]** Edmer's business, such as the names of Edmer's customers. (Tr. p. 903). In support of their motion, Edmer submitted a list of the Edmer accounts serviced by Messrs. Zager and Flanagan to the Court. Mr. Justice Stanley Harwood appended this list to his Memorandum of November 30, 1983 denying the motion for preliminary injunctive relief. Edmer never requested that such list be sealed and it is, and has been for some time, a public record.

In late December, 1983, Messrs. Zager and Flanagan became aware that certain businesses that had been serviced by them while they were with Edmer and which were now purchasing sanitary supplies from Gemini, were being offered what Messrs. Zager and Flanagan felt were drastic price discounts by Edmer. Based on their experience with Edmer, which to their knowledge had rarely offered discounts before, Messrs. Zager and Flanagan felt that these price concessions could have only one purpose -- i.e., to drive Gemini out of business. This suit followed.

In their answer to Gemini's complaint, defendants added a counterclaim and third-party action seeking the relief Edmer had failed to get from the Supreme Court, Nassau County. Evidence on both claims for **[**6]** relief was presented at the hearing.

II

A

In order ***HN1***[] to prevail on a motion for a preliminary injunction, the moving party must first show the possibility of irreparable injury and then show "either (1) probable success on the merits *or* (2) sufficiently serious questions going to the merits to **[*156]** make them a fair ground for litigation *and* a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Caulfield v. Board of Ed., 583 F.2d 605, 610 (2d Cir. 1978)*. We will examine each motion in turn.

B

Plaintiff's motion papers allege that it will suffer irreparable injury if Edmer is allowed to continue its practice of offering selective deep discounts to their mutual customers. While the evidence adduced at the hearing showed that approximately eighty percent (80%) of Gemini's present customers have previously done business with Edmer (Tr. p. 276) only a fraction of these customers were offered discounts (Tr. p. 229) and only some of those offered discounts stopped purchasing from Gemini. Moreover, the hearing testimony revealed that there are tens of thousands of potential customers for Gemini in the New York Metropolitan area. **[**7]** Given the extent of Gemini's market which has not been subjected to allegedly illegal price discrimination by Edmer, we cannot agree that Gemini will suffer irreparable injury if an injunction is not issued. While Gemini can probably ill afford to lose any customers at this early stage in its corporate life, its financial frailty is common to any start-up business and is not the result of Edmer's alleged illegal conduct.

Gemini has also failed to demonstrate that it would probably succeed on the merits, or that there are serious questions going to the merits *and* a balance of hardships tipping towards Gemini.

HN2[] To prevail on its Robinson-Patman Act claim, Gemini must demonstrate that Edmer has discriminated in the prices it has charged in contemporaneous sales of commodities of like grade and quality between two or more different customers; that at least one of these sales crossed a state line; and that the price discrimination has had or may in the future have the requisite negative effect on competition. Hansen, *Robinson-Patman Law: A Review and Analysis*, *51 Fordham L.Rev. 1113, 1125-34 (1983)*. The injury to competition can occur either at the "primary line", i.e., between **[**8]** competing sellers, one of whom is discriminating in price, or at the "secondary line", i.e., between two firms at the buyer level, one of whom receives discriminatory prices from a seller. This case is to be judged by the injury to competition at the primary line.

The first two elements of Gemini's proof are not in serious dispute. Edmer has clearly made recent sales of like commodities at different prices. (*Compare* plaintiff's exhibit 15A *with* plaintiff's exhibit 6). It is equally clear and, in fact, defense counsel stipulated that at least one of the sales producing a price discrimination crossed a state line. (Tr. p. 559). Our inquiry, then, is into Gemini's ability to show a primary-line competitive injury.

HN3[] The competitive injury requirement of the Robinson-Patman Act may be met by a showing of either injury to competition at the seller's level or the existence of the seller's predatory intent from which injury to competition may be inferred. ABA Antitrust Section, ***Antitrust Law*** *Developments* 231 (2d Ed. 1984). There may not be any serious argument that competition in the sanitary supply industry is threatened by the actions of Edmer. The testimony of a competitor, **[**9]** Bruce Janbey, clearly indicated that there are scores of firms selling to tens of thousands of potential customers. (Tr. pp. 756-57). Edmer's actions do not indicate an attempt to gain monopoly power in a market, nor is there any evidence that such an attempt could reasonably be expected to succeed. *O. Hommel Co. v. Ferro Corp., 659 F.2d 340, 347 (3d Cir. 1981)*, *cert. denied*, *455 U.S. 1017, 72 L. Ed. 2d 134, 102 S. Ct. 1711 (1982)*.

Gemini must therefore demonstrate that Edmer's actions were predatory to prevail on its motion for a preliminary injunction. The Supreme Court in *Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 18 L. Ed. 2d 406, 87 S. Ct. 1326 (1967)*, appeared to take a broad view of what conduct may be admissible to prove predatory **[*157]** intent, which in turn may imply an injury to competition. *Id. at 702*. However, since 1975, the year of publication of Areeda and Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Har. L.Rev. 697 (1975), courts have increasingly performed an economic analysis of price discrimination's effect on competition, focusing primarily on whether the discriminatory prices were **[**10]** set above or below the seller's cost to determine whether predatory intent has been proved. As Professors Areeda and Turner note, prices which are at or above a seller's cost are pro-competitive since they may be met by any equally efficient competitor and provide consumers with the lowest price consistent with efficient allocation of resources. *Id*. at 711. Prices below cost, on the other hand, may only be explained as "the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition." 2 P. Areeda & D. Turner, ***Antitrust Law*** para. 711b at 151 (1978). See *Northeastern Tel. Co. v. American Tel. & Tel. Co., 651 F.2d 76, 86 (2d Cir. 1981)*, *cert. denied*, *455 U.S. 943, 71 L. Ed. 2d 654, 102 S. Ct. 1438 (1982)*. Professors Areeda and Turner argue that since the Robinson-Patman Act forbids price discriminations only "where the effect may be substantially to lessen competition", only discriminatory prices which are below cost should violate the Robinson-Patman Act, since only these prices are predatory and anti-competitive. Discriminatory prices above cost **[**11]** should, on the other hand, be *per se* lawful. Areeda & Turner, *Predatory Pricing, supra*, at 733; see 3 P. Areeda & D. Turner, ***Antitrust Law***, *supra*, para. 720c at 190.

While courts have not yet adopted this "*per se* lawful" rule for above-cost discriminatory prices, they have increasingly focused on evidence of below-cost pricing when evaluating primary-line competitive injury in Robinson-Patman Act cases. Hansen, *Robinson-Patman Law: A Review and Analysis*, *51 Fordham L.Rev. 1114, 1139-40 (1983)*. I ABA Antitrust Sec., *The Robinson-Patman Act: Policy and Law* (ABA Monograph No. 4) 81-90 (1980). See *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc., 668 F.2d 1014 (9th Cir. 1981)*, cert. denied, *459 U.S. 825, 103 S. Ct. 58, 74 L. Ed. 2d 61, 103 S. Ct. 57 (1982)*; *O. Hommel Co. v. Ferro Corp., 659 F.2d 340 (3d Cir. 1981)*, *cert. denied*, *455 U.S. 1017, 72 L. Ed. 2d 134, 102 S. Ct. 1711 (1982)*; *Janich Bros. v. American*

Distilling Co., 570 F.2d 848 (9th Cir. 1977), *cert. denied*, *439 U.S. 829, 58 L. Ed. 2d 122, 99 S. Ct. 103 (1978)*; Pacific Eng'r Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied*, *434 U.S.* ***[**12]*** *879, 98 S. Ct. 234, 54 L. Ed. 2d 160 (1977)*; International Air Indus., Inc. v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975), *cert. denied*, *424 U.S. 943, 47 L. Ed. 2d 349, 96 S. Ct. 1411 (1976)*. **HN4**[] Thus while we must look for direct evidence of predatory intent, Double H Plastics, Inc. v. Sonoco Products Co., 732 F.2d 351 (3d Cir. 1984), evidence of predatory pricing, from which predatory intent may be inferred, is a crucial part of plaintiff's proof.

In this case, the direct evidence of predatory intent consists of the admitted enmity between the principals of Edmer and the principals of Gemini (Tr. pp. 220, 709, 901, 933-35). There was also some evidence that Mr. Bernard Zeitlin had made disparaging remarks to Gemini's suppliers (Tr. 1013). There was not, however, evidence of the type of predatory intent proscribed by the antitrust laws, that is, the intention to sacrifice "present revenues with the hope of obtaining monopoly profits". Double H Plastics, Inc. v. Sonoco Products Co., 732 F.2d 351, 354 (3d Cir. 1984); O. Hommel Co. v. Ferro Corp., 659 F.2d at 348; Areeda & Turner, *Predatory Pricing*, 88 Harv. L.Rev. at 698. While Edmer was obviously displeased **[**13]** by Gemini's attempt to solicit Edmer's client base, often with lower prices than Edmer had charged, there was ample evidence that Edmer accepted competition from the dozens of other sanitary supply firms in the region as a way of life. (Tr. p. 1062). There was no evidence that Edmer had a monopoly position **[*158]** in the relevant market, that it was trying to establish one, or that by forcing Gemini out of the market it could recoup the profits lost on the discounted sales by a later price increase. Rather this appeared to be a situation where Edmer realized "the realities of its own market place", i.e., that a new competitor, with special access to its customers, was now in its market which, "standing alone, cannot support an inference of predatory intent." Double H Plastics, supra, 732 F.2d 351, 355.

Nor did Gemini successfully demonstrate Edmer's below-cost pricing. However, before turning to the issue of proving predatory intent through predatory pricing, we must define what we mean by a seller's "cost". Professors Areeda and Turner argue that it is a seller's marginal cost, that is, the cost of each additional increment of production, that should be the basis for analyzing **[**14]** predatory prices: prices above marginal cost are presumptively non-predatory, prices below are presumptively predatory. *Predatory Pricing, supra*, at 732-33. Recognizing that marginal costs are difficult to compute from traditional accounting date, Professors Areeda and Turner propose an alternative measure of a firm's costs, which is the average variable cost, that is, the sum of charges such as the acquisition costs, selling expenses and other costs that fluctuate with the quantity of goods sold. Id., at 716-17. This alternate measure of a firm's cost was adopted by the Second Circuit as a standard to judge allegedly predatory prices in *Northeastern Tel. Co. v. American Tel. & Tel. Co., supra*. While *Northeastern Tel. Co*. involved a claim of predatory pricing under § 2 of the Sherman Act, 15 U.S.C. § 2 (1982), and not the Robinson-Patman Act, courts and commentators agree that the analysis is the same in both situations. See Areeda and Turner, *Predatory Pricing*, 88 Harv. L.Rev. at 727; Pacific Eng'r Prod. Co. v. Kerr-McGee Corp., 551 F.2d at 798.

Using average variable cost as our guide, then, we conclude that Gemini has not shown that Edmer's discounted **[**15]** prices were below this level, and thus has failed to show a likelihood of success on the merits on their Robinson-Patman Act claim.

With one exception, no evidence whatsoever was even submitted with regards to Edmer's acquisition costs on any of the items whose discounts are in dispute. One item, cases of Windex, was shown to have been purchased at $ 11.06 a case (Ex. R), and sold at prices ranging from $ 18.75 to $ 31.20 a case (Exs. 1c, E). [3] Moreover, if we assume that the items for which no acquisition cost evidence was introduced were originally marked up 100% over acquisition cost (Tr. p. 852) then items such as Kleen-glo concentrate cost $2.30 per gallon, and were sold at prices ranging from $3.22 to $4.60 per gallon. (Exs. 4, E); Super Wax Stripper cost $2.55 per gallon and sold at prices

[3] It is questionable whether any of the parties gave proper consideration to what comprises Edmer's "average variable cost" on any of its products in question here. When asked what Edmer's "cost" was on a case of Windex and whether Edmer made a "profit" on a sale at $16 per case and whether such sale was below "your cost," Mr. Bernard Zeitlin replied $11.05 a case and "yes" and "no" to the respective questions (Tr. pp. 1207-08). Left unspecified was a statement of what other "costs" may have been involved besides "acquisition cost."

ranging from $3.57 to $5.10 per gallon (Exs. 6, E); Premium floor finish cost $3.90 per gallon and sold at prices ranging from $5.46 to $7.80 a gallon (Exs. 4, E). Cotton mop heads cost $24.25 per dozen, and sold at prices ranging from $33.95 to $48.50 per dozen (Exs. 3, E).

[16]** Even when we add a selling commission of between 10 and 15 % to each item (Tr. p. 369), the court-estimated acquisition costs plus selling costs do not in any case exceed the prices at which these goods were offered to various members of the buying public. [4] Absent a showing that Edmer was selling sanitary supplies below its average variable costs, Gemini may not prevail on **[*159]** its motion for a preliminary injunction on a theory of predatory pricing. *Northeastern Tel. Co. v. American Tel. & Tel. Co*., 651 F.2d at 91. See also, *California Computer Products, Inc. v. IBM Corp., 613 F.2d 727, 743 (9th Cir. 1979)*.

Since we find that the evidence of personal enmity between the principals of Edmer and Gemini is not sufficient to demonstrate predatory **[**17]** intent for Robinson-Patman Act purposes, and that Gemini has failed to show any instance of Edmer's pricing below its average variable costs, we hold that Gemini has not shown a probability of success on the merits, nor sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping in its favor, *Caulfield v. Board of Ed., supra*, and thus its motion for a preliminary injunction is denied.

C

Edmer alleges that it will be irreparably harmed if Messrs. Zager and Flanagan, along with Gemini are not enjoined from soliciting Edmer's customers or using or disclosing certain information which Edmer considers proprietary and confidential.

As a preliminary matter, we note that Edmer asserts that we have jurisdiction over its claims under *28 U.S.C. § 1337 (1982)* and the doctrine of pendent jurisdiction. While we are not totally convinced that Edmer's counterclaim arises out of a "common nucleus of operative fact" with Gemini's claim, *United Mine Workers v. Gibbs, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*, our decision below obviates any detailed discussion of this point.

Despite Edmer's arguments about irreparable **[**18]** injury, we find that it would be fully compensable in money damages if Gemini's solicitation of approximately 80 of Edmer's over 2000 customers is ultimately proved wrongful, and furthermore, that Edmer has not demonstrated that its customer list, which it appended to a Nassau County Supreme Court pleading thereby making the same a public record, is either confidential or proprietary. Thus Edmer has not satisfied the first requirement for the issuance of a preliminary injunction.

However, a more fundamental shortcoming exists in Edmer's counterclaim. As noted above, one of the first actions Edmer took when it discovered that Messrs. Zager and Flanagan had formed Gemini was to seek a preliminary injunction, seeking the same relief on the same grounds asserted here, in the New York State Supreme Court, Nassau County. That motion was denied on November 30, 1983, and that decision thereby became the law of the case in this proceeding. See J. Moore, J. Lucas & T. Currier, *1 b Moore's Federal Practice*, 155 (2d Ed. 1983). Although the doctrine of law of the case is not as rigid as the related doctrines of res judicata or collateral estoppel, see J. Moore, J. Lucas & T. Currier, *1* **[**19]** *b Moore's Federal Practice*, 118 (2d Ed. ***HN5***[] 1983), we are hesitant to upset the determination of a State court on a question of State law, absent a showing of "substantially different evidence at a subsequent trial, new controlling authority, or the prior decision was clearly erroneous and would result in injustice." *Handi Investment Co. v. Mobil Oil Co., 653 F.2d 391 (9th Cir. 1981)*.

Edmer failed to make any such showing at the hearing before this Court. On the contrary, the proof showed that (a) to the extent that Messrs. Zager and Flanagan removed information from Edmer it was via information they retained in their heads after seven (7) years of work; (b) the types of customers in question are matters of common

[4] While we have used the 100% mark-up to approximate Edmer's acquisition cost for each item, there would be nothing to prevent either Edmer or Gemini from showing a different acquisition cost, "average variable cost," etc., at a trial, if any, in this case.

knowledge in the highly competitive sanitary supply industry, and a customer list could be recreated out of public documents such as the yellow pages; (c) Edmer submitted a "confidential" customer list as part of a pleading filed in the Nassau County Supreme Court proceeding, and never sought to have that list sealed or otherwise protected from public inspection; and (d) when asked the hypothetical question about what he would do in similar circumstances, one of Edmer's **[**20]** competitors revealingly replied "nothing -- that's business" (Tr. p. 820). Edmer has also failed to **[*160]** indicate any new controlling authority which might justify our disturbing the Nassau County Supreme Court's decision.

Edmer argued at the hearing that they were represented by other counsel in the State Court proceeding and that they failed to submit certain evidence to the State Supreme Court which they submitted to the undersigned. However, "it is not enough . . . that defendants could now make a more persuasive argument. . . . The law of the case will be disregarded only when the court has 'a clear conviction of error.'" *Fogel v. Chestnutt, 668 F.2d 100 (2d Cir. 1981)*, *cert. denied*, *459 U.S. 828, 103 S. Ct. 65, 74 L. Ed. 2d 66 (1982)*, quoting *Zdanok v. Glidden, 327 F.2d 944, 953 (2d Cir. 1964)*, citing, in turn, *Johnson v. Cadillac Motor Car Co., 261 F. 878, 886 (2d Cir. 1919)*. We do not have such a conviction, and consequently Edmer's motion for a preliminary injunction must be, and the same hereby is, denied.

D

For all of the above reasons the parties' cross-motions for preliminary injunctive **[**21]** relief must be, and hereby are, denied.

SO ORDERED.

End of Document

Laker Airways, Ltd. v. Pan American World Airways

United States District Court for the District of Columbia

June 26, 1984

Civil Action Nos. 82-3362, 83-0416, 83-2791

Reporter

103 F.R.D. 22 *; 1984 U.S. Dist. LEXIS 15513 **

LAKER AIRWAYS LIMITED, Plaintiff, v. PAN AMERICAN WORLD AIRWAYS, et al., Defendants; LAKER AIRWAYS LIMITED, Plaintiff, v. SABENA, BELGIAN WORLD AIRWAYS, et al., Defendants; LAKER AIRWAYS LIMITED, Plaintiff, v. UNION DE TRANSPORTS AERIENS, et al., Defendants

Core Terms

fares, advice, lawsuit, disqualification, proceedings, disqualified, antitrust, matters, parties, airline, confidences, participated, memorandum, Disciplinary Rule, allegations, confidential information, negotiations, defendants', carriers, charter, disqualification motion, government service, Confidentiality, representations, conspiracy, traffic, substantial relation, similarities, rulemaking, tariffs

Counsel: **[**1]** Robert M. Beckman, Beckman & Farmer, N.W., Washington, District of Columbia, Carl W. Schwarz, Metzger, Shadyac & Schwarz, Washington, District of Columbia, for plaintiff.

Pan American World Airways, Fred D. Turnage, Cleary, Gottlieb, Steen & Hamilton, N.W., Washington, District of Columbia.

British Caledonian Airways, Leonard N. Bebchick, N.W., Washington, District of Columbia, Douglas E. Rosenthal, Sutherland, Asbill & Brennan, N.W., Washington, District of Columbia.

McDonnell Douglas Corporation, McDonnell Douglas Finance Corporation, James J. Murphy, Bryan, Cave, McPheeters & McRoberts, N.W., Washington, District of Columbia.

Trans World Airlines, George T. Manning, Chadbourne, Parke, Whiteside & Wolff, N.W., Washington, District of Columbia.

Lufthansa German Airlines, Swissair, Swiss Air Transport Company Limited, Lloyd Cutler, Wilmer, Cutler & Pickering, N.W., Washington, District of Columbia, Laurence A. Short, Short, Klein & Karas, N.W., Washington, District of Columbia.

British Airways Board, Sidney S. Rosdeitcher, Paul, Weiss, Rifkind, Wharton & Garrison, N.W., Washington, District of Columbia.

International Air Transport Association, Bert Rein, P.C., N.W., Washington, **[**2]** District of Columbia.

Societe Anonyme Belge D'Exploitation de la Navigation Aerienne (Sabena), Peter J. Nickels, Covington & Burling, N.W., Washington, District of Columbia.

KLM Royal Dutch Airlines, Robert V. von Mehren, R. C. Ferrara, Debevoise & Plimpton, N.W., Washington, District of Columbia, Thomas Whalen, Condon & Forsyth, N.W., Washington, District of Columbia.

Union de Transports Aeriens, Sanford C. Miller, Haight, Gardner, Poor & Havens, N.W., Washington, District of Columbia.

Scandinavian Airlines System, Robert R. Gray, Hale Russell & Gray, N.W., Washington, District of Columbia.

Amicus Curiae, Stephen J. Pollak, Shea and Gardner, N.W., Washington, District of Columbia, for defendants.

Judges: Greene

Opinion by: GREENE

Opinion

[*26] Greene, District Judge.

This is a motion to disqualify plaintiff's counsel. Several of the defendants [1] have cited various incidents in the past career of Donald A. Farmer, Esq. which they claim give rise to his disqualification from his current representation of Laker. [2] **[**4]** There is no question that Farmer, both during his government service and in private practice, **[*27]** has specialized in the areas of law involved in the instant lawsuit. **[**3]** He has also encountered or had contact with the parties to this lawsuit, both in a regulatory capacity and as a private attorney. One way to look at the issues raised by the motion would be to assume that with this kind of experience and specialization, there must be something in Farmer's career to disqualify him now. But when his relationships are examined in detail, it becomes apparent that defendants' charges do not require disqualification. [3]

I

Before discussing the specific facts, it is appropriate to relate some of the applicable policy considerations.

It is true, of course, that where there are conflicts of interest, the particular attorney or attorneys must be ordered disqualified. Conflicts of interest by attorneys give rise to many substantive evils *(e.g.,* unfair advantage in litigation, neglect of duties to the client) and they tend to diminish the bar's image in the mind of the public. But the mere claim of a conflict is not enough; there must be proof. Moreover, the Court must make its decision [4] **[**5]** in the interest of justice to all concerned, [5] and it must balance the need to ensure proper conduct on the part of lawyers appearing before it against the harm to other social interests which may ensue if disqualification is improvidently granted. [6] There are several such competing interests in this case.

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[1] British Airways Board (British Airways), British Caledonia Airways Ltd., Deutsche Lufthansa Akt. (Lufthansa), Swissair, Swiss Transport Company (Swissair), Pan American World Airways, Inc. (Pan Am), and Trans World Airlines, Inc. (TWA).

[2] Defendants claim that consequently all other members of Beckman & Farmer, the law firm in which Farmer is a partner, must also be disqualified, as well as the law firm of Metzger, Shadyac & Schwarz, co-counsel for Laker in this case. Because of the Court's disposition of the motion to disqualify with regard to Farmer, it need not address the issue of the disqualification of other members of Farmer's firm and of co-counsel.

[3] Opposition papers have been filed by Robert E. Jordan III and others of the law firm of Steptoe & Johnson, specially retained by plaintiff's counsel for this proceeding.

[4] The decision whether to disqualify counsel grows out of the Court's responsibility to supervise the members of its bar, and it is viewed to be discretionary. *Groper v. Taff, 230 U.S. App. D.C. 358, 717 F.2d 1415 (D.C. Cir. 1983)*; *Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975)*; *City of Cleveland v. Cleveland Electric Illuminating Co., 440 F. Supp. 193, 195-96 (N.D. Ohio 1977)*.

[5] *J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1360 (2d Cir. 1975)* (Gurfein, J., concurring); see also *Woods v. Covington County Bank, 537 F.2d 804, 812 (5th Cir. 1976)*; *International Electronics v. Flanzer, 527 F.2d 1288, 1293 (2d Cir. 1975)*.

[6] See, *e.g., Woods v. Covington County Bank, supra 537 F.2d at 810*; *Williamsburg Wax Museum v. Historic Figures, Inc., 501 F. Supp. 326, 332 n.19 (D.D.C. 1980)*, *aff'd in part and vacated in part on other grounds sub nom.* *National Souvenir Center, Inc. v. Historic Figures, Inc., 234 U.S. App. D.C. 222, 728 F.2d 503 (D.C. Cir. 1984)*; *Black v. Missouri, 492 F. Supp. 848, 874 (W.D. Mo. 1980)*; *City of Cleveland v. Cleveland Electric Illuminating Co., supra, 440 F. Supp. at 195-96*.

First. A litigant has a right to freely chosen, competent counsel. [7] The protection of that right is particularly important in this case, where the attorneys sought to be disqualified have a unique and probably irreplaceable value to their client. Robert Beckman, one of the attorneys whose disqualification defendants seek (see note 2 **[**6]** *supra),* has served as Laker's counsel on all aviation matters in this country and most aviation matters worldwide for over ten years. Moreover, the subject matter of this lawsuit is quite specialized, and without Farmer and Beckman plaintiff would be dealt a significant, perhaps irreparable, setback. See also, note 80 *infra.* [8]

Second. Related to the interest in allowing plaintiff to proceed through its own counsel is the public interest in a speedy resolution of this lawsuit. See *Black v. Missouri, supra, 492 F. Supp. at 873-74*. The complaint alleges an international conspiracy among a number of foreign and domestic airlines in violation of the United States antitrust laws, and that conspiracy is claimed to have resulted **[**7]** ultimately in plaintiff's financial collapse. The case may have important consequences both for the many American consumers of the services of transatlantic carriers and for Laker's creditors. Despite the public interest in the expeditious resolution of this lawsuit, the action has already been characterized **[*28]** by extraordinary delay due to defendants' litigation tactics. See, *e.g.,* notes 78 and 79. Were the motion to disqualify to be granted, the resulting additional delay might well be crippling. In fact, defendants have requested that all work product prepared by counsel to date be withheld from substitute counsel, and that steps be taken to insulate disqualified counsel from any new counsel.

Third. The Court may appropriately consider an attorney's right freely to practice his profession. *Woods v. Covington County Bank, supra, 537 F.2d at 812*. The judicial system benefits from attorneys who have a specialized expertise, for such attorneys bring to the process both experience and a special insight into those problems which are encountered within the areas of their expertise. Yet questions concerning conflict of interest are likely to arise more frequently **[**8]** when an attorney has a specialized practice, especially in an area as narrow as that in which Farmer has practiced, since the same parties and similar issues of law will frequently be encountered in subsequent lawsuits. A court must be careful not to penalize attorneys who chose such specialties, and it therefore should not order disqualification without carefully examining whether a genuine conflict exists.

Fourth. When the motion is based upon an attorney's government service--as this motion is in primary part--a court must also be wary not to take action which will discourage other attorneys from entering government employ. As Judge Kaufman admonished in his seminal article, *The Former Government Attorney and the Canon of Professional Ethics,* 70 Harv. L. Rev. 657, 668 (1957):

> If the Government service will tend to sterilize an attorney in too large an area of law for too long a time, or will prevent him from engaging in the practice of a technical specialty which he had devoted years in acquiring, and if that sterilization will spread to the firm with which he becomes associated, the sacrifice of entering government service will be too great for most men to make.

[9]** See also, Cutler, *New Rule Goes Too Far,* 63 A.B.A.J. 725 (1977).

Fifth. Disqualification motions "have become increasingly popular 'tools of the litigation process, being used . . . . for purely strategic purposes. '" *Rice v. Baron, 456 F. Supp. 1361, 1368 (S.D.N.Y. 1978)*, quoting *Allegaert v. Perot, 565 F.2d 246, 251 (2d Cir. 1977)*. Accord *Williamsburg Wax Museum v. Historic Figures, Inc., supra, 501 F. Supp. at 331*. See also Part VI *infra.* Accordingly, courts have in recent years become more and more skeptical of motions to disqualify counsel, and they now approach them with cautious scrutiny. [9]

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[7] *Woods v. Covington County Bank, supra, 537 F.2d at 810*; *W.T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976)*.

[8] Cf. *Williamsburg Wax Museum v. Historic Figures, Inc., supra, 501 F. Supp. at 332 n. 19*; *Black v. Missouri, supra, 492 F. Supp. at 873-74*.

[9] See, *e.g.,* ***Koller v. Richardson-Merrell, Inc., 237 U.S. App. D.C. 333, 737 F.2d 1038 (D.C. Cir. 1984)***; *Board of Education v. Nyquist, 590 F.2d 1241 (2d Cir. 1979)*.

In its determination of the specific issues discussed below, the Court has considered these various policies in juxtaposition to the need to disqualify counsel who has a true conflict of interest.

II

Defendant's primary **[**10]** challenge is based on Farmer's prior government service, and in this regard they rely on Canon 9 of the D.C. Code of Professional Responsibility [10] which states that "[a] lawyer should avoid even the appearance of professional impropriety," and upon the Code's Disciplinary Rule 9-101(B) (hereinafter generally referred to as the Disciplinary Rule) which implements Canon 9 and provides that:

> A lawyer shall not at any time accept private employment in connection with any matter in which he or she participated personally and substantially as a public officer or employee, which includes acting on the merits of a matter in a judicial capacity.

[*29] In support of their disqualification claim, defendants provide a laundry list of governmental proceedings in which Farmer was claimed to have been involved and which are said to be connected with this litigation. However, under the Rule, as a former attorney with the government, **[**11]** Farmer would have engaged in improper conduct only by accepting private employment (1) in the same "matter" (2) in which he "participated personally and substantially" while in government service. [11]

The question therefore is not, as defendants would have it throughout their briefs, whether there is some relationship or connection between this litigation and a subject under Farmer's jurisdiction while he was serving the government. [12] Rather, the pertinent questions are, first, whether Farmer's government activity was the same "matter" as the alleged conspiracy to destroy Laker, and second, whether he participated "personally and substantially" in that matter while serving as a public employee.

[12]** The case law illustrates this point. Most cases concerning the Rule involved *ongoing litigation* where a former government attorney who participated in the litigation in that capacity later represented one of the parties in a private capacity, [13] and the remaining cases were often *parallel case proceedings,* where a private civil action was instituted charging allegations which were virtually identical to a criminal or agency proceeding brought by the government against the same defendant. [14] As will be seen *infra,* the instant case is entirely different. [15]

[13]** Moreover, it is not enough to rummage through Farmer's past career to find incidents which may be said to have some relationship to the present suit. Among the principal evils the Rule was designed to prevent are the practice of "switching sides" (leaving government employ and representing another party in the same matter) and the use by government attorneys of their public position to develop suits which they may later bring in a private

[10] The Canon was adopted by this Court in Local Rule 4-3(IV)(b).

[11] The Rule was recently amended in *Revolving Door, 445 A.2d 615, 617 (D.C. App. 1982)* with respect to other subjects.

[12] Defendants' Reply Memorandum at 5.

[13] See, *e.g. Kessenich v. Commodity Futures Trading Comm., 221 U.S. App. D.C. 314, 684 F.2d 88 (D.C. Cir. 1982)*; *United States v. Miller, 624 F.2d 1198 (3d Cir. 1980)*; *Hull v. Celanese Corp., supra.*

[14] See, *e.g., General Motors Corp. v. City of New York, 501 F.2d 639 (2d Cir. 1974)*; *Telos, Inc. v. Hawaiian Tel. Co., 397 F. Supp. 1314 (D. Hawaii 1975)*; *Allied Realty of St. Paul, Inc. v. Exchange Nat'l Bank, 283 F. Supp. 464 (D. Minn. 1968)*, *aff'd, 408 F.2d 1099 (8th Cir. 1969)*.

[15] The regulations of the Office of Government Ethics (5 C.F.R. § 737.9(g) provide a pertinent example of conduct not leading to disqualification:

> *Example 4:* A Senior Justice Department lawyer participated in an antitrust case against Q Company, which is represented by Y law firm. Immediately after leaving the Department, she goes to work with Y law firm, and assists at a trial representing Q Company in a different antitrust case, not involving the allegations in the Government case. Such assitance would not be barred because it does not occur in connection with the same particular matter.

capacity. [16] As has aptly been noted, the fear is of "the great potential for lucrative returns in following into private practice the course already charted with government resources." General Motors Corp. v. City of New York, 501 F.2d 639, 650 (2d Cir. 1974). The Rule also aims at such abuses of a government position as the concentration on potentially profitable cases with a view towards subsequent private gain. See Allied Realty v. Exchange National Bank, 283 F. Supp. 464, 469 (D. Minn. 1968).

[14]** Unless the past government matter is essentially like the private litigation conducted in the present, these concerns are largely absent. Thus, disqualification is not mandated merely because it might be observed in retrospect that certain past **[*30]** governmental matters may have some factual connection to the allegations of a present complaint. Yet, as seen below, a simple connection, at best, is all that defendants are able to establish.

III

Defendants first rely on several facets of Farmer's career in the Antitrust Division of the Department of Justice from October 1, 1969 to September 30, 1977.

A. *1974 Grand Jury Investigation*

First. During his tenure in the Public Counsel Section of the Antitrust Division, Farmer in 1973 conducted an investigation into alleged price-fixing among the North Atlantic carriers. Defendants claim that there is a similarity between the basic claim made by Farmer in a memorandum to support the grand jury investigation and one of the allegations made by Laker in its complaint in this case. However, there is no such similarity. In fact, the two matters are entirely separate and distinct.

The Laker complaint concerns an alleged conspiracy **[**15]** among several transatlantic airlines to eliminate its Skytrain service. Laker alleges that this service posed a threat to defendants' maintenance of high prices by airline agreement through the International Air Transport Association (IATA). [17] According to Laker, this conspiracy first took the form of a series of predatory schemes to offer more attractive, high-cost services at prices below the costs of these services. When these schemes were not completely successful, the airline defendants allegedly pressured Laker's lenders (also named as defendants) to deny Laker necessary financing, and to mislead Laker into believing the financing would be provided in order to prevent it from seeking other sources of finance.

The focus of the 1973 grand jury investigation, on the other hand, was a single meeting reported in the press as having taken **[**16]** place in Geneva, Switzerland after an IATA traffic conference. The conference, and the meeting which followed, took place in December 1972, *four years before Laker's Skytrain service even came into existence.* In his memorandum seeking authority to conduct the grand jury probe, Farmer expressed his belief that the IATA members fixed North Atlantic fares outside the CAB-approved IATA rate machinery at the Geneva meeting after the IATA conference had failed to reach agreement on such fares. The memorandum does refer to the fact that "efforts to prevent further erosion of market share to charter services are clearly an important consideration behind scheduled North Atlantic air fare proposals," [18] but it indicates no concern whatever that the prices proposed at this informal Geneva meeting were predatory or designed to eliminate competition. The investigation involved simply the possibility of an agreement among the airlines to fix prices outside the approved machinery of IATA traffic conferences.

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[16] Kessenich v. Commodity Futures Trading Comm'n, supra, 684 F.2d at 97; Woods v. Covington County Bank, supra, 537 F.2d at 814; Telos, Inc. v. Hawaiian Tel. Co., supra, 397 F. Supp. at 1316-17; see also 5 C.F.R. 737.5(b)(1) (comparable federal regulation).

[17] Since 1946, the fares for scheduled air transportation on North Atlantic airline routes have been set primarily by government-approved agreements among members of IATA.

[18] Defendants quote this language out of context in an effort to link the grand jury investigation to Laker's complaint. But that reference is incidential to the complaint's focus upon the alleged scheme to destroy Laker's Skytrain service. The complaint *does not* allege a predatory scheme to destroy charters before Skytrain came into existence.

[17]** This is not only Farmer's own view of the matter. In addition to his testimony, there are before the Court an affidavit by Elliott Seiden (the attorney who replaced Farmer in December 1974 as lead counsel for the Justice Department in the grand jury proceeding) and a letter from Seiden to Farmer, both of which explicitly state that the 1973-74 grand jury proceedings are entirely unrelated to the Laker complaint. [19]

[18]** **[*31]** The defendants, by contrast, offer nothing but speculation based upon the generally expansive and unpredictable nature of grand juries, and upon similar discovery requests made in the grand jury investigation and in the instant lawsuit. One purpose of discovery, however, is to find new avenues of discovering further information, and requests are frequently drawn in broad and general terms and encompass much material which may turn out to be entirely irrelevant. A court would not be justified in finding that matters are related, much less essentially the same, so as to disqualify counsel, on the basis of demand for discovery. [20]

Second. Defendants also claim that Farmer should be disqualified because he had access to confidential information, some of it provided during the grand jury **[**19]** proceedings. [21] According to the defendants, Pan American and TWA provided a large number of documents containing trade secret information, IATA materials, and attorney-client communications in response to grand jury subpoenas, and they cite several decisions which indicate that it was one of the concerns underlying the Disciplinary Rule that unfair advantage could accrue to a private client whose attorney had access to confidential information while in government service. [22] **[**20]** There is no authority for the proposition, however, that an attorney should be disqualified under the Rule upon the basis of the receipt of confidential information when the matter in which he participated was not substantially related to the present litigation. [23] To the contrary, disqualification on these grounds was denied in a number of cases when the matters were not identical or substantially related. [24]

Defendants have made no attempt to establish that the documents submitted in 1974 are in any way material to this lawsuit, [25] **[**21]** or even that Farmer had actual knowledge of the contents of those documents or was familiar enough with them to be able to use them to the prejudice of defendants in a lawsuit ten years later. [26]

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[19] Seiden's testimony is particularly credible since he is still employed at the Department of Justice and has no interest in this lawsuit. Defendants' suggestion that Seiden's affidavit is not based upon personal knowledge is simply incorrect. Seiden has testified that

> based upon my familiarity with [the grand jury] proceedings, and from having read the complaint in *Laker v. Pan American, et al.,* it is my opinion that the subject of the grand jury investigation is entirely unrelated to the subject matters described in the *Laker* complaint.

Seiden affidavit at para. 5.

[20] Discovery need not be limited to documents or testimony which would be relevant as evidence, but they may include papers and testimony which may be expected to lead to such evidence. ***Fed. R. Civ. P. 26(b)(1)***.

[21] Defendants make this claim also with regard to a number of other events and proceedings.

[22] See, *e.g., Woods v. Covington County Bank, supra, 537 F.2d at 816*; *Allied Realty v. Exchange National Bank, supra, 283 F. Supp. at 467*.

[23] The cases in which the concern about access to confidential information is discussed and disqualification was granted generally involve former prosecutors representing a private client in a civil matter relating to or arising out of the criminal prosecution in which he had substantial responsibility. See *Allied Realty v. Exchange National Bank, supra; Hilo Metals Co. v. Learner Co., 258 F. Supp. 23 (D. Hawaii 1966)*.

[24] See *Flego v. Philips, Appel & Walden, Inc., 514 F. Supp. 1178 (D.N.J. 1981)*; *International Union, UAW v. National Caucus of Labor Committees, 466 F. Supp. 564 (S.D.N.Y.)*, *aff'd*, ***607 F.2d 996 (2d Cir. 1979)***.

[25] Defendants repeat over and over that confidential information was supplied to the grand jury (Reply Memorandum at 13 note 9); they do not focus on the relationship of that material to this lawsuit.

[26] Cf. *Control Data Corp. v. International Business Corp., 318 F. Supp. 145 (D. Minn. 1970)*.

Like the case law, policy considerations do not support the disqualification of a government attorney merely because during his government service he had access to information about a corporation which subsequently turned out to become an opponent in a private lawsuit. If the law were otherwise, the limiting language of the Disciplinary Rule could be bypassed altogether by the simple claim that an attorney may have viewed confidential information while employed by the government, and government lawyers would face perpetual **[*32]** disqualification in their subsequent practices. [27]

[22]** B. *Laker Skytrain Service Permits*

In December of 1974, Farmer became a Special Assistant to the Assistant Attorney General, Antitrust Division. In this capacity, he was involved in the preparation of the Department of Justice recommendation to the President in connection with his review of the Civil Aeronautics Board decision on Laker's Skytrain application in 1975, [28] and defendants advocate his disqualification for that reason. That claim is likewise without merit.

The Court finds that the Laker Skytrain permit proceedings are not the same "matter" as the instant lawsuit. [29] To be sure, the CAB grant of permission to Laker to operate the Skytrain service is a necessary factual predicate for this lawsuit since without that permission the service would not have existed. Beyond that, however, the CAB matter has absolutely nothing to do with this lawsuit: it was not a proceeding with **[**23]** either the same allegations [30] or the same legal issues as this lawsuit. [31] **[**24]** Thus, there was no switching of side and there can be no concern that Farmer could have, somehow, participated in the approval of Laker's application with a view towards bringing this antitrust suit in a private capacity. [32]

C. *The 1977 IATA Fare Proceedings*

Prior to Farmer's departure from the Department of Justice in October 1977, several carriers filed tariffs with the CAB proposing reduced fares on the London-New York route. These fares, commonly referred to as the 1977 IATA fare package, were later incorporated into an agreement among the members of IATA. The CAB heard oral argument from the interested parties on the proposal on September 7, 1977, and it issued a proposed order on September 16, essentially approving some of the fares and disapproving others. Pursuant to section 801 of the

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[27] Disqualification would be appropriate if the moving party were able to demonstrate with some degree of persuasiveness that the material was indeed confidential and could not have been obtained by other means; that it is material to and has significance in the private litigation; and that under the circumstances the former government attorney would be able to use such information to the prejudice the moving party.

[28] The President never acted on the CAB decision. Three years later, the CAB approved Laker's Skytrain application.

[29] Moreover, Farmer has testified that he has no recollection that he was at all involved in the review of the 1977 CAB decision. This is not overcome by defendants' claim that he must have been involved because he normally participated in such reviews.

[30] Defendants attempt to link the two matters by observing that the Laker complaint alleges that "the airline defendants resisted Laker's efforts" to obtain government authority to operate its Skytrain service. Complaint para. 17 However, there is no indication that when the CAB approved Laker's application it was concerned with or investigated such resistence, or that if it did, Farmer had any awareness of it. And defendants do not suggest otherwise.

[31] Indeed, the decision to grant a permit does not involve "allegations" or "legal issues" so much as policy considerations. There is considerable doubt therefore whether a policy decision such as this may even be considered a "matter" within the terms of the Disciplinary Rule. See Part IV *infra.*

[32] Defendants complain that Farmer has insight into the reasons generally for CAB and Presidential action or inaction that is unavailable to them. This is too insubstantial a concern. If a court were disqualify counsel whenever he may have gained special insight into governmental deliberations, disqualification of former government attorneys, or indeed former law clerks of judges, would become mandatory and routine.

Federal Aviation Act, 49 U.S.C. § 1461, the Board then submitted its suspension and investigation **[**25]** order to the President for his review. [33]

Defendants claim that Farmer "appears to have been involved" in the proceedings relating to the 1977 IATA fare package. **[*33]** More specifically, they suggest it was his "normal practice" to participate in the Antitrust Division's recommendations in connection with the subsequent Presidential review of the CAB's decision, [34] and they attempt to establish his presence at two meetings held on September 14 and 23, 1977, respectively--the first between representatives of British Airways and Antitrust Division officials, the second between representatives of various agencies and officials at the White House.

[26]** However, there simply is no credible evidence that Farmer participated in any of these proceedings. In support of their assertions, defendants provide only the affidavit of William C. Clarke, one of the British Airways representatives at the September 14 meeting, who states that it is his recollection that he first met Farmer at that meeting. The affidavit also candidly concedes, however, that "none of the other participants with whom I have spoken say that they can recall whether Mr. Farmer was present"; that his own recollection of the meeting is "somewhat hazy after five years"; that he has no recollection of anything said or done by Farmer at the meeting; and that it is "possible that I could be mistaken about Mr. Farmer's participation." Clarke affidavit at para. 20. Defendants also offer speculation revolving around the fact that there is a notation on Farmer's calendar on September 23, 1977, of the meeting at 11:00 a.m.

Defendants' "evidence" does not come close to establishing Farmer's involvement in the Presidential review of the CAB order, [35] particularly since much more credible evidence suggests the precise opposite. Farmer has stated that he has no recollection **[**27]** of attending either meeting or otherwise participating in the IATA fare package proceedings on behalf of the Department of Justice during September 1977. That denial is supported by objective facts.

Farmer was planning his move to the CAB's Bureau of International Aviation (BIA) at the time, and his primary activities were assisting CAB Chairman Kahn in preparing his testimony for hearings **[**28]** related to the Bermuda 2 agreement and working on airline deregulation legislation for the Department of Justice. [36] As concerns more specifically the September 14 meeting, none of the participants who were contacted (with the equivocal exception of Clarke) recall attendance by Farmer, and, most significantly, a Department of Justice public file memorandum does not identify Farmer as being in attendance. [37] With regard to the September 23 meeting, it apparently took place at the White House. Security clearance records for the White House and the Old Executive Office Building reveal that Farmer was not admitted to either of those buildings on that day.

The Court concludes that Farmer did not participate in the 1977 IATA fare package proceedings. [38]

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[33] In a letter written September 26, 1977 to Chairman Kahn, the President rejected the CAB's proposed order as inconsistent with the Administration's foreign economic policy. He stated that he would consider suspension of these fares in the future should the CAB obtain evidence that they were predatory.

[34] Farmer did not participate in the presentation of the Antitrust Division's position before the CAB. He was away from Washington on vacation from July 29 to August 28, during which time the Department of Justice's pleadings were filed with the CAB. Abbott B. Linsky, Jr., represented the Department at the September 7 oral argument.

[35] Even if the proof were stronger, it is doubtful that Farmer's participation in the 1977 IATA fare package proceedings and decisions could be characterized as substantial enough to meet the requirements of the Disciplinary Rule. "Participation" is defined to include "the rendering of advice," D.C. Code of Professional Responsibility, Definitions (1983) but that does not mean that whenever an individual has been involved in the rendering of advice his participation violates the Disciplinary Rule. The advice, like any participation, must have been sufficiently substantial to raise the types of concerns underlying the Rule.

[36] Farmer affidavit at para. 15; Clarke affidavit exh. 15 ("Jordan memo") at 7-8.

[37] Jordan memorandum at 9, App. D; Clarke affidavit at para. 20; Farmer affidavit at paras. 16-19.

[38] Accordingly, it need not be decided whether these proceedings constitute the same matter as this lawsuit, or whether for the purposes of the Disciplinary Rule, they may at all be considered as a "matter."

[29]** IV

Defendants next discuss the various regulatory and policy-making activities **[*34]** of the CAB during Farmer's tenure there, and they assume that, as Director of BIA, Farmer must have been directly involved. However, even if that premise is correct, [39] disqualification does not follow. It is well established that rule-making and policy-making activities do not constitute a "matter" within the meaning of the Disciplinary Rule for the purposes of disqualifying counsel from a subsequent private lawsuit, [40] and they do not become so unless the activity is narrow in scope and is confined to specified issues and identifiable parties such that it may be properly characterized as "quasi-judicial" in nature.

[30]** The District of Columbia has specifically defined "matter" to include:

> any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or *other particular matter involving a specific party or parties.*

Revolving Door, supra, 445 A.2d at 618 (emphasis added). [41]

The language indicates that the Disciplinary Rule is limited to government actions focusing upon particular, distinct, and identifiable sets of facts with reasonably measurable implications and consequences involving specific parties. As one commentator has noted,

> the word 'particular ' was inserted in the definition of 'matter ' in order to emphasize that the restriction applies to a specific case or matter and not to a general area of activity. [42]

[31]** Contrasted with such distinct situations are rulemaking activities and other actions of broad application, such as supervision of a program of compliance or the formulation of general policies, standards, or objectives. The regulations implementing the Ethics in Government Act (5 C.F.R. § 737.5(c)) make this point very clearly:

> [A particular matter involving a specific party or parties] typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transctions between identifiable parties. Rulemaking, legislation, the formulation of general policy, standards, or objectives, or other action of general application is not such a matter.

In short, a government attorney may participate in legislative or other policy-making activity without precluding his subsequent representation of private parties affected by such rules or policies. [43]

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[39] The issue of Farmer's personal and substantial participation in the activities cited by defendants is discussed *infra.*

[40] To be sure, the Disciplinary Rule would bar counsel from representing a private party in a regulatory or rule-making proceeding when he previously participated as a government attorney *in the same proceeding.* Such a practice of "switching sides" is the primary target of the Rule. See note 13 *supra.* Contrary to defendants' assertion, allegations that defendants engaged in predatory pricing do not constitute an attack on the rate-making proceedings held at the CAB during Farmer's tenure there such that he may be said to have "switched sides." Laker is not litigating CAB approval of defendants' fares or its policies concerning deregulation.

[41] This language is identical to the definition of matter in the comparable provision of the Ethics in Government Act, *18 U.S.C. § 207*.

[42] B. Manning, *Federal Conflict of Interest Law* 55 (1964), quoting H.R. Rep. No. 748, 87th Cong., 1st Sess. 20 (1961) (regarding the identical definition in federal ethics statute).

[43] See 5 C.F.R. § 737.5(c):

> [A] former Government employee may represent another person in connection with a particular matter involving a specific party even if rules or policies which he or she had a role in establishing are involved in the proceeding.

[32]** Defendants' objections regarding the consequences of Farmer's activities at the CAB are therefore in the main entirely beside the point. They complain about Farmer's involvement in the implementation of a new deregulatory policy of fostering international fare competition on the North Atlantic routes; his advocacy of views with respect to policies which may become issues in this lawsuit; his involvement with issues that, it is claimed, he **[*35]** should have recognized would have effects upon particular parties; and his participation in the establishment of the framework within which the defendants were granted authority to engage in price competition on the routes at issue in this lawsuit.

These are not the sorts of specific problems the Disciplinary Rule was designed to prevent. If advocating views, fostering a policy, or establishing a framework for competition were sufficient to disqualify counsel, every government attorney holding a position of authority in an executive department or an administrative agency would be disqualified from the practice of law in his field for a very long time. Farmer in particular would be precluded from participating in any litigation involving **[**33]** airline regulation, rates, or antitrust questions. [44] That is not, that cannot be, the law. The Disciplinary Rule accordingly does not include such activities unless, as indicated above, they have become narrowed to specific issues and parties.

The Court will now examine the specific CAB activities in controversy in light of these principles. [45]

[34]** A. *Scheduled Fare Proceedings*

In late 1977, the CAB issued a number of orders suspending foreign airline tariffs until such time as the European destination countries entered into *ad hoc* agreements which would permit suspension in the event the fares proved to be predatory with respect to charter services. As various countries entered into such agreements with the United States the CAB thereafter vacated its suspension orders. [46]

In the spring of 1978, several airlines filed individual tariffs with the CAB for the 1978 peak summer season. [47] Various charter tour operators filed objections to these fares, arguing that the airlines were seeking to extend low winter season fares into the peak season, that the fares would be destructive of their North Atlantic charter business, and that at the very least they should not be extended into countries that had not entered into agreements **[**35]** with the United States. [48] In response to these complaints, the CAB's Bureau of Pricing and Domestic Aviation (BPDA) prepared and sent to the Board a memorandum recommending that the complaints be summarily dismissed and the summer fares be permitted to become effective. Farmer signed the memorandum as "coordinated" with the BIA following its preparation. [49]

Further tariff revisions were filed late summer 1978 proposing fare revisions for the winter 1978/79 season. [50] With the exception of a complaint filed against TWA's tariff by a consumer group, no complaints were filed against these

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[44] These principles also illustrate the irrelevance of Farmer's CAB activities to this lawsuit. The establishment of a framework which granted defendants the freedom to engage in price competition is not the same matter as the alleged abuse of that freedom in the form of an antitrust conspiracy to establish anti-competitive pricing in order to eliminate a particular competitor.

[45] Defendants' suggestion that the CAB activities should not be examined separately but as one single "matter"--the regulation of low fares being charged by scheduled carriers--is clearly inappropriate in light of the principle that a matter be "particular." See note 42 *supra.* As indicated below, the defendants' broad brush effort obscures rather than illuminates the issues on this motion.

[46] The CAB reversed its policy on the necessity of entering into these *ad hoc* agreements in an order issued May 2, 1978.

[47] These tariffs generally proposed upward seasonal adjustments from the new low fares from the 1977/78 winter season.

[48] Laker was not among those complaining.

[49] The CAB ultimately adopted the BDPA's recommended order. *Transatlantic passenger fares,* Nos. 31232, *etc.,* C.A.B. Order 78-5-3 (May 2, 1978).

[50] The proposals again generally involved fare increases.

tariffs. The BDPA prepared two memoranda recommending suspension of the proposed increases with respect **[**36]** to one of the normal fares but approving the others. Farmer signed the first memorandum as coordinated with BIA, indicating next to his signature **[*36]** that he did so before reviewing the matter to meet the CAB's internal deadline. The second memorandum was signed for Farmer by his deputy. [51]

During this period, the CAB also concluded a rulemaking proceeding entitled *North Atlantic Fares Investigation* to establish long-term ratemaking guidelines for evaluating fare levels and structures. That proceeding resulted in a Board determination that it was no longer desirable to establish regulatory standards by which to judge international rates in view of its new policy of relying on competition to regulate airline prices. **[**37]** *North Atlantic Fares Investigation,* No. 27918, C.A.B. Order 78-5-157 (May 25, 1978).

Defendants complain about Farmer's participation in these various activities, but the complaints are not well taken because all these proceedings clearly constituted rulemaking. [52] A review of the various memoranda and orders reveals that all the decisions rendered were based upon general policy considerations, and that none of the proceedings could in any sense be characterized as "adjudicative," or even, with one exception, "investigative." [53] These fare proceedings therefore cannot be used as a basis for disqualifying Farmer.

Finally, defendants claim that confidential **[**38]** information was provided to the CAB and thus to Farmer in connection with the *North Atlantic Fares Investigation.* However, Farmer had no access to that information, since the CAB issued an order insulating such data from all staff members except those in the Bureau of Fares and Rates. [54] Farmer was never a member of that Bureau.

B. *Data Collection, Deregulation, and International Negotiation*

First. Soon after the President's letter of September 26, 1977 to Chairman Kahn, the CAB instituted a procedure for obtaining and compiling data from American and foreign air carriers relating to the low fares offered on transatlantic scheduled routes. This information was supplied to the CAB's Bureau of Accounts and Statistics of which Farmer was not a member. An August 11, 1978 memorandum prepared by that Bureau proposed the issuance of an order to continue the collection of data, and it noted that the data "permit **[**39]** more comprehensive analyses of market trends in transatlantic discount traffic" and were necessary "to keep abreast of the impact these low fares are having on charter traffic in North Atlantic Markets."

The routine submission of data pursuant to CAB direction to assist the agency to monitor traffic and to assess the impact of its regulatory decisions is clearly not sufficiently specific to be a "matter" within the terms of the Disciplinary Rule.

As for defendants' claim that because of their proprietary nature, these statistics were submitted to the CAB in confidence, as noted above there is no authority for the proposition that counsel may be disqualified simply because he had access to confidential matters while employed by the government. See note 27 *supra.* In any event, defendants do not claim that Farmer actually examined this data, and Farmer has stated that he has no recollection of seeing it. [55]

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[51] The CAB again adopted the BDPA's proposed orders. *Transatlantic fare increases,* No. 33276, C.A.B. Order 78-9-38 (August 23, 1978); *Transatlantic fare increases,* No. 33622, C.A.B. Order 78-10-61 (October 5, 1978).

[52] Moreover, as noted, Farmer was so little involved that he signed one BPDA memorandum before reviewing the matter, and another was signed for him by his deputy.

[53] The *North Atlantic Fares Investigation* is the obvious exception. That proceeding, however, was clearly a broad rulemaking proceeding and not a "matter" under the Disciplinary Rule.

[54] *North Atlantic Fares Investigation,* No. 27918, C.A.B. Order 77-10-100 (October 25, 1977).

[55] There is also a question as to whether the data is still confidential. Beckman was apparently able to acquire this same information through a Freedom of Information Act request. Thus, if it was related to the issues of this lawsuit, it would be discoverable in any event.

[40]** Second. During this same period, the CAB also instituted a series of proceedings **[*37]** designed to liberalize CAB rules governing charter carriers, so as to permit them to compete with the reduced fares offered by scheduled carriers. Again, as rulemaking proceedings concerned primarily with policy considerations, they were not "matters" under the Disciplinary Rule for the purpose of disqualifying counsel. Furthermore, the proceedings governing charter carriers do not appear even to be related to the instant action, which alleges an antitrust conspiracy to eliminate Laker's scheduled Skytrain services.

Third. Defendants cite a number of international discussions and negotiations in which Farmer was a participant while Director of the BIA. For example, he was a delegate to negotiations between the United States and Great Britain with respect to four annexes to a previously-negotiated agreement known as "Bermuda 2," which established a general framework for the operation of air services between the two countries. Farmer also participated in bilateral negotiations between the United States and the Federal Republic of Germany, which also resulted in an agreement providing a **[**41]** framework for determining fares and rates as well as charter rules, and he was a delegate to tripartite discussions between the United States, Canada, and the European Civil Aviation Conference. [56]

Such broad, policy-oriented activities as international discussions and negotiations clearly do not amount to "matters" under the Disciplinary Rule. To the extent that these negotiations resulted in agreements, they were plainly legislative in nature, similar to treaties or executive agreements. Although during the course of negotiations items of a more specific nature may have been discussed, [57] **[**42]** such discussions were entirely collateral to the main purpose of the negotiations. [58]

V

Defendants also move for Farmer's disqualification on the basis of his activities in private practice.

Following his employment at the CAB, Farmer joined the law firm of Galland, Kharasch, Calkins & Short. He was a member of that firm from April 1979 until August 1981, when he left to join Robert Beckman to form the firm of Beckman & Farmer. In August of 1980, Swissair asked the Galland firm to render antitrust advice with respect to Swissair's activities in certain IATA committees, and in connection with this employment Farmer was given access **[**43]** to confidential correspondence between IATA and another defendant concerning the scope of the antitrust immunity for IATA activities. [59] The Galland firm was also retained by a committee of IATA in October 1980 to render advice similar to that provided to Swissair, on essentially the same issues. On November 21, 1980, Farmer and other members of the Galland firm met with that committee to provide advice on the questions raised. Following the meeting, IATA requested that the Galland firm provide a memorandum reducing the oral advice to writing.

[*38] Defendants seek to disqualify Farmer on the basis of the attorney-client relationship he and his previous law firm had with Swissair and IATA, pursuant to Canon 4 of the D.C. Code of Professional Responsibility and on DR 4-

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[56] The report of the chairman of the United States delegation to that conference reveals that the meetings took the form of a discussion session and an exchange of views rather than negotiations.

[57] The incidental reference to an agreement by the United States that its "aeronautical authorities shall promptly consider [an application for renewal of Laker's permit] in accordance with Article 3 of the 1977 Air Services Agreement," does not change the thrust of the negotiations or the Court's conclusion. That subject was incidental to the proceedings and not significant to the instant lawsuit.

[58] Defendants once again claim that Farmer had access to confidential information, basing that assertion upon vague statements in two affidavits to the effect that "TWA proprietary information" was given to U.S. officials during the Bermuda II and U.S.-West Germany negotiations. Affidavit of Thomas K. Taylor at para. 4; affidavit of Kenneth L. Briggs at para. 6. Mere exposure to proprietary information is a far cry from the concerns and language of the Disciplinary Rule and the case law, particularly where the evidence is entirely indeterminate.

[59] The representation culminated in a telex from the Galland firm to Swissair dated September 1980.

101(B) (hereinafter referred to as the Confidentiality Rule) which deals with a lawyer's duty to preserve the confidences and secrets of **[**44]** a client.

To enforce the duty of confidentiality in successive representations, this Circuit, like others, has adopted the "substantial relationship" test first enunciated in *T.C. Theatre Corp. v. Warner Brothers Pictures, Inc., 113 F. Supp. 265 (S.D.N.Y. 1953)*, as the standard for disqualification. *Williamsburg Wax Museum v. Historic Figures, Inc., 234 U.S. App. D.C. 222, 728 F.2d 503, 517 (D.C. Cir. 1984)*. Under this test, the former client has the burden of showing that the pending suit is substantially related to the matters in which the attorney previously represented him. *Williamsburg Wax Museum v. Historic Figures, Inc., supra, 501 F. Supp. at 328*; *T.C. Theatre Corp. v. Warner Brothers Pictures, Inc., supra, 113 F. Supp. at 268*. [60] See also, *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, 646 F.2d 1020, 1028 (5th Cir. 1981)*; *Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980)*.

[45]** The theory underlying the substantial relationship test is as follows. A court could not properly inquire into the nature and extent of the confidences actually provided to the moving party's former attorney, because such an inquiry would reveal the very confidences sought to be protected. [61] **[**46]** For that reason, the Court will instead assume that, if a substantial relationship was established, confidences were disclosed that would have a bearing on the present representation. *T.C. Theatre Corp. v. Warner Brothers, Inc., supra, 113 F. Supp. at 268*. In addition, when the subject matters of the two representations are substantially related, it is assumed that a genuine threat exists that the confidences revealed to former counsel will be used for the benefit of the present adversary despite the attorney's good faith efforts to avoid such use. [62] These standards are, of course, substantially more favorable to the defendants than would be a requirement of actual proof of the exchange of confidences.

It is a question of fact whether there is a substantial relationship between present litigation and a previous matter or cause of action. *Williamsburg Wax Museum v. Historic Figures, Inc., supra, 501 F. Supp. at 328*. The focus of the inquiry is on the precise nature of the relationship between the present and former representations. *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, supra, 646 F.2d at 1029*. In light of the serious nature and consequences of such relationships, the Court has a duty to examine them with precision and care, and this Court has done just that.

To that end, the Court examined the record submitted *in camera* with regard to this matter in light of this standard, and it has considered the several affidavits submitted by both parties, the confidential correspondence involved in the Swissair representation, the instructions presented to the Galland firm in the IATA representation, and the written **[**47]** materials in both representations which comprise the advice furnished to Swissair and IATA.

It should be observed initially that the previous matters consisted not of litigation but of advice within a particular factual **[*39]** context and with regard to specific concerns. [63] Thus, the prior representations may be considered substantially related to the present litigation only if the facts occasioning the need for advice have a substantial bearing on this suit. These facts have no such bearing.

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[60] This Court has stated that it will grant disqualification "only upon a showing that the relationship between issues in the prior and present cases is 'patently clear ' . . . . [and] when the issues involved have been 'identical ' or 'essentially the same. '" *Williamsburg Wax Museum v. Historic Figures, Inc., supra, 501 F. Supp. at 329*, quoting *Government of India v. Cook Industries, Inc., 569 F.2d 737, 739-40 (2d Cir. 1978)*; accord *City of Cleveland v. Cleveland Electric Illuminating Co., supra, 440 F. Supp. at 208-09*.

[61] *Emle Industries, Inc. v. Patentex, 478 F.2d 562, 571 (2d Cir. 1973)*; *T.C. Theatre Corp. v. Warner Brothers, Inc., supra, 113 F. Supp. at 269*.

[62] See *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, 646 F.2d 1020, 1028 (5th Cir. 1981)*; *Emle Industries, Inc. v. Patentex, supra, 478 F.2d at 570-71*.

[63] This case is therefore unlike cases such as *Chugach Electric Association v. United States District Court, 370 F.2d 441 (9th Cir. 1966)*, where the attorney appearing for counsel for plaintiff in an antitrust action had been general counsel for defendant.

The event which caused first Swissair, then IATA, to seek legal advice, was the proposal of the CAB to remove antitrust immunity for IATA Traffic Conference agreements and the reactions of some of the airlines to that proposal. [64] That proposal and the reactions **[**48]** thereto are of no significance whatever to the allegations of Laker's complaint or to the issues which it raises. These events are not even alluded to in the factual portion of Laker's complaint, and there is no reason why they should have been. Nor may the events be said to be implicitly contained by, or have any impact upon, [65] the allegations of the complaint: the CAB regulatory proposal simply has no relevance to the alleged illegal conspiracy to destroy Laker. [66]

[49]** The nature of the Swissair and IATA concerns which prompted them to request advice of the Galland firm further illustrates the essential dissimilarity between the previous consultations and the present litigation. Swissair and IATA sought merely general clarification of the antitrust immunity available to IATA carriers with respect to the normal functioning of various IATA committees. Plaintiff's affidavits, the nature of the advice requested, and the advice itself all reveal that the advice was being sought to assist the clients in understanding the requirements of the antitrust laws as applied to IATA committee activities in order to fully comply with them. [67] The advice sought and given did not relate to any particular factual activities or transactions involving IATA or any of its members. In fact, the written request for advice specifically excluded all antitrust implications of the IATA Traffic Conference ratemaking activities.

[50]** The advice requested and rendered thus bears no relationship to this case, involving as it does specific allegations of conscious and deliberate illegal activity. There is not the slightest suggestion that at the time they requested advice from the Galland firm any members of IATA were even contemplating any sort of illegal activity, or that they sought legal advice which might extricate them if they acted unlawfully. The clients' concern was simply how best to conduct business in order to comply with the law. Their general request for what amounted to straight-forward, textbook advice cannot be considered to be substantially related to this lawsuit. [68]

[51]** Defendants' papers are brimming with claims of apparent similarities between this **[*40]** lawsuit and the earlier requests for advice which they claim create a substantial relationship. This inventory of similarities, however, may be reduced essentially to two points of contact.

The first is that both representations share a common area of law. This, of course, does not make two matters related. The second is that both matters involve IATA, its organization, operation, and activities. [69] But these areas of resemblances are both general and superficial; specific similarities between this lawsuit and Farmer's advice are entirely absent. [70] Absent such similarities, Farmer, or any other attorney who at any time furnished IATA with legal

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[64] Because of the confidential nature of the materials submitted to the Court, it must necessarily speak in generalities.

[65] This is particularly true in light of the fact that the CAB never implemented its proposal.

[66] This analysis is not changed merely because it is through IATA Traffic Conferences that the IATA may agree upon rates, subject to CAB approval. It may of course be possible to imagine circumstances in which the events in question could have some factual connection to this case, but that would be true of any event of the past ten years involving the CAB, IATA, or any of the defendants. Disqualifications are not based upon such speculation. In any event, scrutiny of the documents involved in the prior representations makes clear that there are no factual connections to this lawsuit.

[67] Defendants can do no better in this respect than to claim that Farmer rendered advice "concerning the scope of . . . . the antitrust immunity of [various carriers] provided pursuant to the Federal Aviation Act." Reply Memorandum at 6.

[68] Furthermore, it is important not to lose sight of the fact that one of the purposes of the "substantial relationship" standard is to protect the former client against the use to his detriment of confidential information provided to his former attorney. The correspondence and written instructions requesting advice do not contain, and the advice rendered does not reflect, any confidences with any bearing upon this case.

[69] IATA is not named as a defendant in this lawsuit, and the complaint does not allege that IATA itself played a role in the defendants' conspiracy.

[70] Cf. *Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra, 646 F.2d at 1030-31*; *Moyroud v. Itek Corp., 528 F. Supp. 707, 708 (S.D. Fla. 1981)*; *Jackson v. J.C. Penney Co., 521 F. Supp. 1032, 1035 (N.D. Ga. 1981)*.

counsel, could never again participate in a matter involving IATA. The proscriptions of the Confidentiality Rule are not that draconian.

[52]** Moreover, the concern of the Confidentiality Rule and the case law is the protection of what the client tells his attorney, not what the attorney tells the client (except, of course, to the extent the attorney's advice incorporates client confidences). The fact that this case may involve points of law contained in the Galland firm's recitation of ***antitrust law*** to Swissair and IATA is therefore irrelevant. As defendants themselves put it, the substantial relationship standard involves the relationship between the two representations, not the relationship between the two sets of legal advice, [71] *i.e.,* the fact that similar legal advice may have been given to different clients.

The Court therefore finds as a fact, based upon its review of the pertinent documents, that there is no substantial relationship between the Galland firm matters and this lawsuit. [72]

[53]** Defendants also argue that, even if these matters are not substantially related, Farmer should still be disqualified because he was privy to confidential information concerning IATA. Farmer has sworn that he was privy to no confidential information with respect to IATA activities and that he received no confidential information relevant to this proceeding. [73] His showing is not overcome by the kind of information adduced by defendants.

Defendants have made no effort to demonstrate that confidences were disclosed to Farmer which relate to this lawsuit; instead, they are content merely to state a conclusion to that effect. If defendants are correct in their approach, a party moving for disqualification may avoid the burden imposed upon it under the case law simply by asserting, without elaboration, that confidences had been imparted under the prior attorney-client relationship. Because it is improper for a Court to inquire into the confidences actually **[**54]** provided, [74] the clients would in effect hold veto power over their former attorneys' ability ever to represent an opponent in another matter. **[*41]** That is not the law. [75]

In short, there is no reason to presume or to find on this record that Farmer engaged in unethical behavior, [76] or that his representation of plaintiff in this case would be inconsistent with his prior representation of Swissair and IATA. [77]

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[71] Defendants' Reply at 34 n.35.

[72] None of these conclusions is altered by defendants' frequent references to discovery requests for information concerning IATA meetings and activities. As indicated above, arguments based upon the scope of discovery are not necessarily persuasive grounds upon which to establish that two matters are substantially related.

Moreover, defendants' discussions of discovery requests are broad and unspecific. On one occasion, the Court is referred to "some" 400 pages of deposition testimony, and it is apparently expected either to accept blindly defendants' characterization of that testimony or to read through one thousand pages of deposition testimony in search of the unidentified 400 pages. In any event, the Court finds that, even accepting defendants' characterizations of plaintiff's discovery, a substantial relationship has not been established.

[73] Farmer *in camera* affidavit at paras. 3, 4, 7, 10.

[74] See note 61 *supra.*

[75] It is not the courts' duty to disqualify an attorney whenever a mere possibility exists that one of the canons of professional ethics could be violated. To the contrary; the Court presumes that, as an officer of the Court, each attorney may be depended upon to meet his professional and ethical obligations.

[76] Cf. *Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 609 (8th Cir. 1977)*.

[77] Defendants argue that the need for Farmer's disqualification under Canon 4 is reinforced by the concern underlying Canon 9, which seeks to protect against the appearance of impropriety. The case law is clear, however, that an attorney may not be disqualified under Canon 9 unless there is a reasonable possibility that some specifically identifiable impropriety actually occurred. *Woods v. Covington County Bank, supra, 537 F.2d at 810*; see also *Board of Education v. Nyquist, supra, 590 F.2d at*

[55]** VI

It is, finally, appropriate to consider this motion in the context in which it has been filed. As noted above, courts have become increasingly aware that some motions for disqualification are motivated not by a fine sense of ethics and a well-developed desire to remove from litigation practitioners whose ethics are less acute, but, bluntly, by a desire to achieve a tactical advantage. Some of the defendants in this suit have engaged in other maneuvers to avoid or delay a decision on the merits, ranging all the way from their litigation in Great Britain, [78] to their determined resistance to legitimate discovery. [79]

[56]** In connection with this motion, defendants have evidently scoured the government files for references to Farmer's name and for activities for which he may have ever had some responsibility. On the basis of these efforts, they then provided the Court with a roll of activities which allegedly bar him, and all associated counsel, from representing plaintiff in this case. This broad, wide-ranging and scattershot effort is undoubtedly designed to persuade the Court that where there is this much smoke there must be some fire. Yet, when the various claims are analyzed in detail, it becomes clear that there is no fire--there is only smoke.

Defendants frequently mischaracterize and misrepresent the nature and essence of Farmer's activities in both government and private practice; they often rely upon sheer supposition concerning the extent of Farmer's participation in government activities; and they ignore or distort the nature of this suit--all to achieve the goal of eliminating Laker's counsel from this action. See slip op. at 4-6 *supra.* In addition, there is every reason to believe that similar efforts would be directed against any new counsel Laker might retain, should it be able **[**57]** to find attorneys with the necessary experience and expertise who are not already retained by the twelve powerful and wealthy corporations which are defendants here. [80] This case, in brief, is a textbook **[*42]** example of the kind of misuse of the disqualification standards for tactical litigation advantage of which courts have become increasingly aware and wary.

None of this should be taken to mean that if Farmer's participation in this litigation did, indeed, violate the canons of professional ethics, the **[**58]** Court would allow him to remain. But for the reasons stated, that participation presents no such violations.

The Court is both justified and required to regard defendants' arguments through a practical lens, and to assess them in light of those practicalities. Its responsibility with respect to the supervision of its bar is not limited to the disqualification of attorneys for violations of the Code of Professional Responsibility; it also includes the rejection of efforts to abuse the Code through motions to disqualify which lack substantive merit and represent means to harass the opposing party.

The motion to disqualify counsel will be denied.

1247. As the Court has found that there is no reason to believe that an impropriety has or will occur, it will not disqualify Farmer under Canon 9, whether considered in conjunction with Canon 4 or as an alternative grounds for disqualification.

[78] See *Laker Airways Ltd. v. Pan American World Airways, 559 F. Supp. 1124 (D.D.C. 1983)*, *aff'd,* *235 U.S. App. D.C. 207, 731 F.2d 909 (D.C. Cir. 1984)*.

[79] See, *e.g.,* a separate Opinion issued simultaneously herewith, which describes Lufthansa's performance with respect to discovery of whatever type and for whatever purpose, sometimes by enlisting the support of the foreign governments which own or control them, sometimes by almost childish objections *(e.g.,* the refusal to make corporation officials located in New York available for deposition in Washington on the ground that they cannot be spared at any time from their duties for the duration of the one-hour trip).

[80] In their supplementary papers defendants reveal that they are actively investigating ("through Freedom of Information Act requests and other means") the prior government activities of a recent member of the firm of Beckman & Farmer who has begun working on this case. Defendants complain that they "have been unable to obtain sufficient information to present in appropriate detail their concerns about the potential ethical problems" they claim are raised by that attorney's representation of Laker.

Southern Pac. Communications Co. v. American Tel. & Tel. Co.

United States Court of Appeals for the District of Columbia Circuit

March 20, 1984, Argued ; June 26, 1984

No. 83-1102

Reporter

740 F.2d 980 *; 1984 U.S. App. LEXIS 21115 **; 238 U.S. App. D.C. 309; 1984-2 Trade Cas. (CCH) P66,077

SOUTHERN PACIFIC COMMUNICATIONS CO., ET AL., Appellant v. AMERICAN TELEPHONE AND TELEGRAPH CO., ET AL.

Prior History: [1]** Appeal from the United States District Court for the District of Columbia (Civil Action No. 78-0545).

Core Terms

pricing, interconnection, monopoly power, views, district judge, public interest, anti trust law, specialized, predatory, memorandum opinion, common carrier, carriers, costs, argues, copied, clearly erroneous, total cost, charges, facilities, bias, present case, private line, cases, fact finding, microwave, antitrust, witnesses, tariffs, trial judge, intercity

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

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

See *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Clayton Act > General Overview

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

See *15 U.S.C.S. § 15(a)*.

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

HN3[] **Standards of Review, Clearly Erroneous Review**

The United States Court of Appeals for the District of Columbia Circuit must affirm the lower court's judgment provided that the lower court's conclusions are based on correct legal standards and the lower court's findings of fact are not clearly erroneous.

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > General Overview

Civil Procedure > Judicial Officers > Judges > General Overview

HN4[] **Inability to Proceed, Disqualification & Recusal**

The mere fact that a judge holds views on law or policy relevant to the decision of a case does not disqualify him from hearing the case.

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > Federal Judges

Legal Ethics > Judicial Conduct

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > General Overview

HN5[] **Disqualification & Recusal, Federal Judges**

Judicial disqualification in the federal courts is governed by two sections of the Judicial Code, *28 U.S.C.S. §§ 144*, *455*.

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > Federal Judges

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > General Overview

HN6[] **Disqualification & Recusal, Federal Judges**

See *28 U.S.C.S. § 144*.

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > Federal Judges

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > General Overview

HN7[] **Disqualification & Recusal, Federal Judges**

See *28 U.S.C.S. § 455*.

Civil Procedure > ... > Disqualification & Recusal > Grounds for Disqualification & Recusal > Personal Bias

Civil Procedure > Judicial Officers > Judges > General Overview

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > General Overview

HN8[] **Grounds for Disqualification & Recusal, Personal Bias**

A determination that a judge is not disqualified for bias necessarily includes a determination that the right to a fair trial is not violated by the judge's presiding over the case.

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > General Overview

Civil Procedure > Judicial Officers > Judges > General Overview

HN9[] **Inability to Proceed, Disqualification & Recusal**

The test for judicial bias may be stated in terms of whether the judge's mind is "irrevocably closed" on the issues as they arise in the context of the specific case.

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > General Overview

Civil Procedure > Judicial Officers > Judges > General Overview

HN10[] **Inability to Proceed, Disqualification & Recusal**

A judge is not disqualified merely because he personally disagrees with the policy underlying a law that he is bound to apply in a case.

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

HN11[] **Standards of Review, Clearly Erroneous Review**

In the absence of clear evidence to the contrary, an appellate court must presume that the lower court judge adopted the findings of fact and conclusions of law after full consideration.

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > General Overview

Civil Procedure > Judicial Officers > Judges > General Overview

HN12[] **Inability to Proceed, Disqualification & Recusal**

The lower court judge's extensive copying of the proposed findings of fact and conclusions of law prepared by counsel for one of the parties is an abandonment of the duty and the trust that has been placed in the judge.

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > General Overview

HN13[] **Inability to Proceed, Disqualification & Recusal**

Statistical one-sidedness of a trial court's evidentiary, factual, and legal rulings cannot be used to support an inference of judicial bias.

Civil Procedure > ... > Inability to Proceed > Disqualification & Recusal > General Overview

Civil Procedure > Judicial Officers > Judges > General Overview

HN14[] **Inability to Proceed, Disqualification & Recusal**

There is a strong presumption against disqualifying a judge solely on the basis of his views about law or policy.

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

Civil Procedure > Judicial Officers > Judges > General Overview

HN15[] **Standards of Review, Clearly Erroneous Review**

The reviewing court is bound by the rule that findings of fact in actions tried without a jury shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

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

HN16[] **Standards of Review, Substantial Evidence**

It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data.

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

HN17[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Exclusionary conduct may be defined as conduct, other than competition on the merits or restraints reasonably necessary to competition on the merits, that reasonably appear capable of making a significant contribution to creating or maintaining monopoly power. The issue is whether the defendant's conduct is reasonable in light of its business needs, or whether it unreasonably excludes competition.

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

HN18[] **Regulated Industries, Energy & Utilities**

Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.

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

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

HN19[] **Monopolies & Monopolization, Actual Monopolization**

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 historic accident. Monopoly power is the power to control prices or exclude competition.

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

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

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

HN20[] **Regulated Practices, Market Definition**

In cases involving unregulated industries, courts frequently approach the problem of measuring market power by defining the relevant product and geographic market and computing the defendant's market share. Monopoly power is then ordinarily inferred from a predominant share of the market. Reliance on statistical market share is a questionable approach in cases involving regulated industries, however. A predominant market share may merely be the result of regulation, and regulatory control may preclude the exercise of monopoly power. Therefore, in such cases market share should be at most a point of departure in determining whether monopoly power exists. Ultimately, a court should focus directly upon the ability of the regulated firm to control prices or exclude competition.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN21[] **Antitrust & Trade Law, Sherman Act**

Any market condition that makes entry more costly or time-consuming and thus reduces the effectiveness of potential competition as a constraint on the pricing behavior of the dominant firm should be considered a barrier to entry, regardless of who is responsible for the existence of that condition. Thus, the costs and delays of the regulatory process clearly constitute barriers to entry.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN22[] **Antitrust & Trade Law, Sherman Act**

The need for large capital outlays and lengthy construction programs in order to enter the market, and the need to overcome brand preference established by the defendant's having been first in the market or having made extensive image advertising expenditures constitute barriers to entry.

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

HN23[] **Actual Monopolization, Anticompetitive & Predatory Practices**

To identify predatory pricing, some courts follow the Areeda-Turner test, which establishes conclusive presumptions that prices are either lawful or predatory depending solely on the relationship between those prices and certain measures of the firm's costs. Other courts follow the Ninth Circuit's test, which states that to establish predatory pricing, a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power. The United States Court of Appeals for the District of Columbia Circuit finds it unnecessary to decide which rule it should adopt for identifying predatory pricing.

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

HN24[] **Regulated Industries, Energy & Utilities**

Absolute equality of access to essential facilities is not mandated by the antitrust laws.

Antitrust & Trade Law > Regulated Industries > Communications

HN25[] **Regulated Industries, Communications**

Access to essential facilities is to be afforded to competitors upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies. Essential facilities must be shared on "fair terms," and the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the communication company's ability to serve its customers adequately.

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

HN26[] **Regulated Industries, Energy & Utilities**

See *47 U.S.C.S. § 201(a)*.

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

HN27[] **Regulated Industries, Energy & Utilities**

An ideal instruction for the regulatory justification defense would very briefly explain, for example, that a carrier has an obligation under the Communications Act to interconnect, but may deny interconnections if it determines that the public interest is to the contrary; and that if the carrier at the time had a reasonable basis in regulatory policy to conclude, and in good faith concluded, that denial of interconnections is required by concrete, articulable concerns for the public interest, then there is no liability under the antitrust laws.

Counsel: Frederick P. Furth, with whom Thomas R. Fahrner, Daniel S. Mason, Charles P. Wolff, Michael P. Lehmann, Craig C. Corbitt, Stephen Ailes, Richard A. Whiting, Richard Diamond and James H. Pipkin were on the brief, for Appellant. Edmund W. Burke also entered an appearance for Appellant.

George L. Saunders, Jr., with whom Michael S. Yauch, C. John Buresh, Stewart A. Block, Howard J. Trienens and Raymond Brenner were on the brief, for Appellees. Julie D. Nelson also entered an appearance for Appellees.

Judges: Wald and Edwards, Circuit Judges, and Swygert, * Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit. Opinion for the Court filed by Circuit Judge Edwards.

Opinion by: EDWARDS

Opinion

[*983] EDWARDS, Circuit Judge:

This appeal arises out of a private antitrust action brought by Southern Pacific Communications Company and Transportation Microwave Corporation (collectively "SPCC") against the American Telephone and Telegraph Company and the local Bell operating telephone companies **[**2]** (collectively "AT & T"), alleging that AT & T monopolized the market for intercity business telecommunications services in the United States in violation of *section 2* of the Sherman Act. [1] **[**3]** Following a lengthy trial, the District Court entered judgment for the defendants and dismissed the case. [2] The plaintiffs appeal from this judgment.

Figuratively speaking, this case is an appellate judge's nightmare. It not only presents an enormous record and poses some extremely difficult and controversial issues of great public importance, but also is lamentably tainted with charges of judicial bias. The central issue at trial was whether AT & T had wrongfully used monopoly power to exclude competition. Yet, in his Memorandum Opinion, the District Judge strongly expressed his personal policy view that an AT & T monopoly, and not competition, is in the public interest in the telecommunications industry. Moreover, in drafting his extremely lengthy Memorandum Opinion, the trial judge simply copied -- word-for-word (including even typographical errors) -- most of AT & T's proposed findings of fact and conclusions of law. Virtually every assessment of the credibility of witnesses, finding of fact and conclusion of law is in favor of AT & T. Finally, almost as if to ensure a preferred result, **[**4]** the trial court's judgment is supported by layer upon layer of alternative **[*984]** holdings on the issues of implied antitrust immunity, monopoly power, unlawful maintenance of monopoly power, injury-in-fact and proof of damages.

We would be remiss if we did not state our dismay over certain aspects of the trial court's decisionmaking in this case. We are not so naive as to suggest that trial judges should *never* use proposed findings of counsel; indeed, such a suggestion would be absurd and would belie the reality of trial practice in the United States. Nor do we mean to suggest that trial judges may never tip their hands with regard to possible final judgments in a case. We do not even mean to suggest that trial judges must be devoid of personal views about legal issues. Rather, we mean to intimate that, because of their positions of great public responsibility, District Judges often must walk a very narrow course in the performance of their jobs on the bench. A District Judge, particularly one adjudicating a case of considerable public moment, must scrupulously avoid giving the parties or the public *any* basis for perceiving that

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* Sitting by designation pursuant to 28 U.S.C. § 294(d)(1982).

[1] *Section 2* of the Sherman Act provides, in pertinent part, that ***HN1***[] "every person who shall monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony." *15 U.S.C. § 2 (1982)*. The present action was brought pursuant to § 4 of the Clayton Act, which provides in pertinent part that ***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(a) (1982)*.

[2] ***Southern Pacific Communications Co. v. AT & T, 556 F. Supp. 825 (D.D.C. 1982)*** (as amended Jan. 10, 1983) (hereinafter cited as Mem. Op.).

he is deciding the case otherwise **[**5]** than pursuant to an application of controlling law to the facts and in the exercise of his impartial, independent, considered judgment. In our view, the trial judge has raised a serious concern that he failed to heed this precept in the present case.

Judges certainly may hold personal views on law and policy and may express those views under appropriate circumstances. But the Memorandum Opinion in this case, in which the District Judge held that the antitrust laws do not apply to the defendants' conduct and alternatively that the defendants' conduct did not violate those laws, was an inappropriate place for the Judge to advocate a personal policy view contrary to the policy underlying the antitrust laws. Moreover, it is never justifiable for a judge to abdicate to a party his duty to provide a reasoned explanation for his decision. The misplaced advocacy and extensive copying of findings and conclusions that occurred in this case at least created a danger that the parties and the public would perceive that the Judge impermissibly decided the case on the basis of his personal views rather than on the basis set forth in the Memorandum Opinion.

This is indeed precisely what has **[**6]** occurred in this case: SPCC's principal argument on appeal is that it was denied a fair trial because of the District Judge's legal and policy bias. Because of the questionable circumstances confronting us, we have considered this argument with the greatest of care. Despite our dismay over this matter, we have concluded, for the reasons set forth at length in Part II below, that SPCC has failed to prove that the District Judge allowed his personal, legal and policy views impermissibly to affect his decisionmaking.

Accordingly, ***HN3***[] we must affirm the District Court's judgment provided that the court's conclusions are based on correct legal standards and the court's findings of fact are not clearly erroneous. We specifically decline to abandon the "clearly erroneous" standard as SPCC advocates: we believe that the type of *de novo* review suggested by SPCC would be wholly inconsistent with the function of an appellate court. Nevertheless, in light of the special circumstances of this case, we have reviewed the District Court's findings against the record with particular, even painstaking, care. We emphasize, however, that this review is only for the purpose of determining whether **[**7]** the findings of the trial court must be set aside under the "clearly erroneous" standard.

We conclude that the District Court erred in holding that AT & T enjoys implied antitrust immunity with respect to the conduct at issue in this case. We also conclude that the District Court's holding that AT & T lacked monopoly power is based on an erroneous legal analysis. However, we sustain the District Court's alternative holding that AT & T did not maintain its monopoly power by engaging in predatory pricing or other exclusionary conduct. Because this holding is sufficient to affirm the District Court, we uphold the judgment in favor of AT & T without addressing the District Court's alternative holdings on the **[*985]** issues of injury-in-fact and proof of damages.

I. BACKGROUND

A. *Competition in the Intercity Private Line Market*

Prior to 1969, AT & T had a lawful monopoly in the market for interstate, intercity private line common carrier telecommunications services. [3] AT & T provided these services through its Long Lines Department acting in

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[3] This case principally involves three types of private line services: point-to-point, FX and CCSA. The District Court described these services as follows:

> Point-to-point private line service, which plaintiffs initially sought authorization to provide, connects two customer locations with a dedicated circuit that does not require use of switching systems because the circuit is available to the customer on a continuing and exclusive basis. In contrast, foreign exchange (FX) and common control switching arrangement (CCSA) services, which are involved in certain of plaintiffs' interconnection charges, require dedicated intercity circuits, but also provide a connection into a switching system, located in a telephone company switching center.

Mem. Op. at 855 n. 11 (citations to record omitted). For a more detailed description of FX and CCSA services, see Mem. Op. at 986 nn. 191-192.

partnership with the local Bell and independent operating telephone companies. These services were provided over the same nationwide **[**8]** network that was used to provide ordinary switched telephone services. [4]

[9]** In 1959, the Federal Communications Commission ("FCC") had liberalized the licensing of privately-owned microwave systems in *Allocation of Frequencies in the Bands Above 890 Mc*, 27 F.C.C. 359 (1959), *recon. denied*, 29 F.C.C. 825 (1960). The *Above 890* decision, however, only permitted entities to build microwave systems in order to provide telecommunications services for their own use. In 1963, Microwave Communications, Inc. ("MCI") took the next step by filing an application with the FCC to build a private microwave system between Chicago and St. Louis in order to provide point-to-point private line telecommunications services to business customers on a common carrier basis. MCI represented in its application that such a specialized carrier system was necessary to make some of the benefits of the *Above 890* decision available to small businesses by providing new and innovative specialized point-to-point private line services that were not being provided by the established carriers. The FCC granted MCI's application in 1969. *Microwave Communications, In., 18 F.C.C.2d 953 (1969)*, *recon. denied*, *21 F.C.C.2d 190 (1970)*. The *MCI* decision resulted in a deluge **[**10]** of applications from new "specialized common carriers," including SPCC, for authority to construct and operate facilities for similar private line communications systems between other specific city pairs. In response, the FCC instituted a rulemaking proceeding to determine "whether as a general policy the public interest would be served by permitting the entry of new carriers in the specialized communications field." *Specialized Common Carriers, 24 F.C.C.2d 318, 327 (1970)* (Notice of Inquiry). In *Specialized Common Carriers, 29 F.C.C.2d 870 (1971)*, *aff'd sub nom.* *Washington Utilities & Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir.)*, *cert. denied*, *423 U.S. 836, 96 S. Ct. 62, 46 L. Ed. 2d 54 (1975)*, the FCC declared that "a general policy in favor **[*986]** of the entry of new carriers in the specialized communications field would serve the public interest, convenience, and necessity." 29 F.C.C.2d at 920.

The *Specialized Common Carriers* decision left a number of significant questions unanswered. First, the decision did not specify what services the "specialized common carriers" were authorized to offer in the "specialized communications field," **[**11]** but noted merely that they would serve "evolving, new, diverse and specialized needs in a dynamic, rapidly growing market." 29 F.C.C.2d at 912. Second, the decision did not indicate what competitive response AT & T would be allowed to make to the entry of the specialized common carriers into the market. Rather, the Commission stated that:

> We do not find it necessary at this time and on this record to speculate concerning the manner in which the existing carriers may seek to respond to competitive conditions that may emerge in the market for new and developing specialized communications services. We do, however, stress our objective to promote and maintain an environment within which existing and any new carriers shall have an opportunity to compete fairly and fully in the sale of specialized services. Our rate-making and regulatory policies and practices will be appropriately adapted to accomplish this objective. There is no reason to deny the public the benefits that may derive from active and vigorous participation by the Bell System and Western Union in this market, so long as their participation is not a burden upon or significantly detrimental to their other services. **[**12]** Thus, it is our intention to permit the existing carriers to price their competitive services in a fashion that will realistically and reasonably reflect economic advantages, if any, that are inherent in the plant and operations of those carriers.

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[4] These services comprise local exchange telephone service and long distance service. The District Court described these services as follows:

> Local exchange telephone service is the ordinary service used in nearly all homes and businesses. From a technical standpoint, it involves a wire connection from the telephone set to a switching system in a nearby telephone company switching center that is in turn connected by transmission trunks to switching systems in other switching centers within the exchange area.
>
> Long distance service operates in a manner similar to local exchange service but typically involves a two-step process in which the user first gains access to the local switching system through a dial tone and then requests access to the long distance toll switching system (in many cases the exact same switch) by dialing an area code plus the number of the telephone the calling party wishes to reach.

Mem. Op. at 855 nn.9-10 (citations to transcript omitted).

> Moreover, we subscribe fully to the views of our staff, endorsed by the Department of Justice, that there should not be any "protective umbrella" for the new entrants or "any artificial bolstering of operations that cannot succeed on their own merits" (*Notice*, paragraph 44).

29 F.C.C.2d at 915. [5]

[13]** Finally, the decision did not dictate the terms and conditions under which the specialized common carriers would be entitled to interconnect with the Bell system. The specialized common carriers proposed to provide intercity services primarily by microwave transmission. However, it was neither technically nor economically practical to carry a signal by microwave directly to a customer's premises. To serve customers located in urban areas, it was necessary for the specialized common carriers to interconnect their intercity microwave systems with local distribution facilities. These local distribution facilities were only obtainable from the local telephone companies, which, in nearly all locations served by SPCC, were owned and controlled by AT & T. In addressing this critical issue of interconnection, the Commission stated only that:

> We reaffirm the view expressed in the *Notice* (paragraph 67) that established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable **[*987]** terms and conditions to be negotiated with the new carriers, and also afford their customers the option of obtaining local distribution **[**14]** service under reasonable terms set forth in the tariff schedules of the local carrier. Moreover, as there stated, "where a carrier has monopoly control over essential facilities we will not condone any policy or practice whereby such carrier would discriminate in favor of an affiliated carrier or show favoritism among competitors."

29 F.C.C.2d at 940 (footnote omitted).

As the new specialized common carriers began to enter the market, disputes arose among these new carriers, AT & T and the FCC concerning the types of services that the new carriers were authorized to provide, the kinds of interconnections to which they were entitled, the terms and conditions upon which such interconnections would be provided, and the nature of the competitive rate response that AT & T would be permitted to make in its own private line tariffs. The subjects of these disputes form the basis of the present antitrust suit.

B. *The Parties*

The plaintiffs in this case are SPCC and Transportation Microwave Corporation. The defendants are AT & T and the 24 Bell operating companies.

SPCC was formed in January 1970 as a wholly owned subsidiary of the Southern Pacific Company to provide **[**15]** business and governmental private line communications services over its own intercity microwave network. Shortly thereafter, SPCC filed initial applications with the FCC, seeking to construct and operate specialized common carrier microwave systems between Seattle and San Diego and between Los Angeles and St. Louis. The FCC granted these applications following its decision in the *Specialized Common Carriers* inquiry, and

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[5] AT & T made competitive price responses both to the *Above 890* decision and to the *MCI* and *Specialized Common Carriers* decisions. Four months after the *Above 890* decision, AT & T filed a new tariff, called Telpak, that offered substantial discounts for bundles of 60 channels (Telpak C) or 240 channels (Telpak D). Telpak was designed to eliminate the incentive for entities to construct private microwave systems for their own use where AT & T facilities were available. Similarly, following the *Specialized Common Carriers* decision, AT & T filed a new tariff, called Hi/Lo, that substantially reduced the rate for single-channel lines connecting high-density centers, where the specialized common carriers were likely to compete. Two years later, the FCC found Hi/Lo to be unreasonable. AT & T then filed a replacement tariff, known as the Multi-Schedule Private Line ("MPL") tariff, that similarly offered low rates on high-density routes. After each of the above tariffs was filed, the FCC suspended the tariff for the then maximum period of 90 days. After that period, each tariff went into effect and remained in effect throughout the lengthy FCC investigation of its reasonableness.

SPCC commenced commercial operations on December 26, 1973. Transportation Microwave Corporation is a 95%-owned subsidiary of the Southern Pacific group.

AT & T, through its Long Lines Department acting in partnership with the Bell and independent operating telephone companies, provides interstate and intercity telecommunications services in competition with SPCC. Each of the Bell operating companies possesses a lawful, exclusive franchise or monopoly in the geographic area in which it provides service.

C. *The Proceedings Below*

SPCC filed its complaint in this action on March 27, 1978, alleging violations of the Sherman Act and seeking, ultimately, $230.2 million in damages, trebled to $690.6 million pursuant to section 4 of the Clayton Act. SPCC's **[**16]** complaint contained a demand for trial by jury. AT & T promptly filed a motion to dismiss, arguing that the challenged conduct was subject to pervasive regulatory control and hence was immune from antitrust scrutiny. The District Court, Judge Richey presiding, rejected this argument and denied AT & T's motion to dismiss on July 2, 1979. The parties engaged in extensive discovery between 1979 and 1981. In February 1982, SPCC waived its earlier demand for a jury trial in order to try the case before Judge Richey. The case was submitted for trial on the charge that AT & T had possessed monopoly power and had misused that power during the period from 1968-1978 through conduct alleged to violate *section 2* of the Sherman Act.

Trial commenced on May 10, 1982, and lasted 33 trial days. SPCC argued at trial that AT & T had refused to accept the FCC mandate permitting competition in the intercity private line market. Plaintiffs also contended that AT & T had used its monopoly power over prices and its control of local distribution facilities unlawfully to foreclose competition. At & T conceded that it disagreed in principle with the FCC's policies because it believed that these policies **[**17]** threatened to destroy the rate structure that had been designed to foster the universal availability of telephone service. AT & T argued, however, that it opposed these policies only to the extent of speaking **[*988]** out against them. According to AT & T, it was committed to conducting its business fully in accordance with the FCC's decisions and orders and to providing competitors with access to its essential facilities on fair terms to the extent that doing so was consistent with its public responsibilities. Furthermore, AT & T argued, to the extent that the FCC permitted it to compete, it did so fully but fairly, using its superior efficiency due to economies of scale and scope to provide service at a lower cost and price than could be provided by SPCC.

SPCC completed its presentation of evidence, including the testimony of 24 witnesses and the introduction of approximately 1,400 exhibits, on June 14, 1982. On June 8, AT & T filed a motion for involuntary dismissal under *rule 41(b) of the Federal Rules of Civil Procedure*. On June 21, the District Court announced its decision to defer ruling on AT & T's motion until it had heard all of the evidence. Between June 23 and **[**18]** July 2, AT & T presented the testimony of 147 witnesses [6] and introduced over 7,900 exhibits. SPCC then presented rebuttal evidence, consisting of the testimony of nine witnesses and the introduction of 326 exhibits, and AT & T then introduced 23 exhibits in surrebuttal evidence. As the conclusion of the trial, the District Court requested proposed findings of fact and conclusions of law from both parties. SPCC submitted 375 pages of proposed findings and conclusions and AT & T submitted 486 pages of proposed findings and conclusions. Finally, on July 19, 1982, the trial court heard closing arguments.

Five months later, on December 21, 1982, the District Court issued a Memorandum Opinion and Order entering judgment for the defendants and dismissing the case with prejudice. The Memorandum Opinion, 605 typewritten pages long, is reprinted in 275 pages **[**19]** of the Federal Supplement. The opinion is overwhelmingly copied verbatim from AT & T's proposed findings of fact and conclusions of law. According to the uncontradicted computation of SPCC, the District Court adopted 730 of the 746 paragraphs of AT & T's proposed findings and conclusions; on a line-by-line basis (excluding quotations), 80.5% of the opinion is copied from AT & T's proposed findings and conclusions, 4.4% is copied from SPCC's proposed findings and conclusions (on all nonsubstantive

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[6] Most of the testimony in this case was presented in written form. Only 47 of AT & T's witnesses actually appeared in court. *See* Mem. Op. at 851 n.7.

matters), and 15.1% is original material. *See* Appellants' Opening Brief at 20 & n. 15; *see also* VI Record Excerpts at tab 97 (copy of Memorandum Opinion with each line attributed to source). The District Court even copied dozens of typographical errors from AT & T's submission; these were corrected before publication by an order filed January 10, 1983. In certain of the original portions of the Memorandum Opinion, the District Judge strongly expressed his agreement with AT & T's view that the FCC's decisions opening the telecommunications industry to competition were inimical to the public interest.

II. THE JUDICIAL BIAS ISSUE

SPCC's central argument on this appeal is that **[**20]** it was denied a fair trial because of the District Judge's bias. SPCC alleges that the Judge was biased because he approached the trial with the firm personal beliefs that an AT & T monopoly is in the public interest and that the antitrust laws should not, and do not, apply to AT & T. [7] **[*989]**

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[7] The District Judge expressed his beliefs most prominently in the course of the following discussion of implied antitrust immunity in the "Conclusion" section of his Memorandum Opinion:

> Under the controlling decisions of the Supreme Court, it is undisputed that matters subject to a pervasive scheme of public utility or common carrier regulation are not subject to the antitrust laws. *Pan American World Airways, Inc. v. United States, 371 U.S. 296, 300-01, 305, 309, 83 S. Ct. 476, 479, 482, 484, 9 L. Ed. 2d 325 (1963)*; *Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 387-89, 93 S. Ct. 647, 660, 34 L. Ed. 2d 577 (1973)*; *United States v. Radio Corp. of America, 358 U.S. 334, 348-49, 79 S. Ct. 457, 465, 3 L. Ed. 2d 354 (1959)*. Based on the evidence adduced at trial, the Court finds that all of the rates and practices of defendants challenged by SPCC in this case are subject to pervasive federal and state regulatory control under a public interest standard that is quite different from and inconsistent with the application of the antitrust laws. Though this reverses the Court's earlier 1979 ruling on a Motion to Dismiss, it is clear from all of the evidence now before this Court with respect to this plaintiff, that every action complained of in this case could have or should have been handled by the appropriate regulatory bodies, which responsibility the regulators miserably mishandled or failed to handle. What the FCC actually did over the years was talk about competition (in reality contrived) in order to achieve deregulation which has and will be shown to be contrary to the best interests of millions of Americans throughout the country and by those outside the profitable big city areas with a resultant loss of service, quality, and higher costs to those least able to afford this now essential service. It is clear that defendants could not make one penny more than what the various regulators allowed them. Indeed, AT & T had a double burden -- not only could their rates not be too low, but neither could they be too high. The states have done a particularly good job in regulating the defendants in order to insure the highest quality of service at the lowest possible cost for all of their citizens. There are many instances in which AT & T would seek a rate increase from the state, only to be denied all of it or part of it. The states were also very effective in regulating the interconnection problems as well. The picture became cloudy on the interconnection matter only because the FCC attempted, and quite successfully, to obtain jurisdiction over intrastate matters. Whether this was in the public interest will remain for another day. The bottom line of "public interest" has actually been construed as what some powerful interests in this country want as distinguished from what the public can afford, namely, safe, reliable service to everyone (instead of creamskimming the big city areas where profits are maximized) at the lowest possible cost to *all* and particularly those least able to afford telecommunications service, which should be our continued standard. This Court believes that the antitrust laws were never intended to destroy an essential public utility such as we have here. It may be necessary for Congress and the Justice Department to re-examine the problems herein discussed and to bring about the return of responsible regulation so that there will be no more contrived competition in profitable areas only. This Court believes that sound and honest regulation of telecommunications at the federal and state level is our only guarantee of access to this necessity throughout the *whole* country and not just part of it. Regulation in this area of telecommunications up until the 1970's at the federal and state levels has served this country well and it is hoped that sometime in the near future it will again do its proper job without abdication to the greed of a few, no matter how big or small.
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> It is necessary to mention the FCC again. It put the Specialized Common Carriers into business for the benefit of a few without taking into account the myriad of problems to our people and our national security. It was the FCC that never found TELEPAK (C & D) unlawful for over *20* years, as well as delayed making other very important decisions. It cannot be successfully disputed that whatever the FCC mandated throughout the relevant period of this case, that AT & T was obligated to, and did in fact, follow, no matter whether it made any sense in economics or law. It was primarily the FCC staff during this entire period, after permitting the Specialized Common Carriers entry into the market in the name of competition (really contrived), whose performance, was, to say the least, totally unprofessional and inadequate by virtue of the likes of Messrs. Cox, Hinchman, Tucker, and Scott. It was a result of their actions (or inaction) as well as a thin majority

SPCC further contends that the District Court's Memorandum Opinion -- extensively copied from AT & T's proposed findings of fact and conclusions of law, and adverse to SPCC on all significant factual and legal questions -- merely gave vent to the Judge's personal beliefs, and, consequently, failed to reflect his impartial application of the antitrust laws to the facts of the case. Thus, according to SPCC, we should vacate the opinion of the District Court and remand the case for a new trial, without consideration of the evidence. Alternatively, according to SPCC, we should abandon the "clearly erroneous" standard of review, and simply review the record to determine whether the Judge's convictions substantially influenced his judgment.

[21]** We must emphasize at the outset the narrow focus of SPCC's argument. Although a claim is made that plaintiffs were denied a fair trial, SPCC does not allege **[*990]** that the District Judge in any way interfered with plaintiffs' efforts to present their case. To the contrary, SPCC concedes that the Judge never foreclosed it from engaging in discovery, introducing documentary or testimonial evidence, engaging in cross-examination, presenting legal arguments, or citing applicable legal precedents. Thus, as SPCC also concedes, it was able to create a full, complete record for us to review. Furthermore, although SPCC asserts a charge of bias, there is no claim that the District Judge was biased in the sense of having adjudged the facts in advance of hearing the case. *Cf.* *Cinderella Career & Finishing Schools, Inc. v. FTC, 138 U.S. App. D.C. 152, 425 F.2d 583, 591 (D.C. Cir. 1970)*. Rather, SPCC asserts that the District Judge was biased only in the sense that he held firm views concerning law and policy and decided the case on the basis of these views, thus depriving SPCC of an impartial judgment. [8]

[22]** A. *Views on Law or Policy*

It is well established that ***HN4***[] the mere fact that a judge holds views on law or policy relevant to the decision of a case does not disqualify him from hearing the case. [9] **[**24]** *See, e.g.,* *Association of National Advertisers, Inc. v.*

> of the Commissioners in the 60's and 70's that has subjected AT & T to many lawsuits in the antitrust field now pending today. Had the FCC not engaged in its usual regulatory lag and dealt forthrightly and properly with the problems as they arose, then few, if any, of the cases would now be before the antitrust Courts, such as this one.

Mem. Op. at 1095-97 (emphasis in original) (footnotes omitted).

[8] SPCC alleged at oral argument that the District Judge also was biased in the sense that he harbored a personal animus against SPCC as a party. *See* Transcript of Oral Argument at 7-8. This allegation is based solely on statements the District Judge made to the effect that the specialized common carriers *as a class* were interested only in "creamskimming the big city areas where profits are maximized" and not in providing "safe, reliable service to everyone . . . at the lowest possible cost to *all* and particularly those least able to afford telecommunications service." Mem. Op. at 1096 (emphasis in original); *see* Transcript of Oral Argument at 8. We do not at all find that these and similar statements manifest a personal animus against SPCC, but only that they reflect the District Judge's policy views. Our review of the trial record provides no support for SPCC's allegation of *personal animus*. Indeed, at the conclusion of the trial, lead counsel for SPCC thanked the District Judge for the "great deal of goodwill toward the parties" that he had shown "throughout this case." Trial Transcript at 6048. We also find it significant that, after several years of pre-trial proceedings, SPCC waived its right to trial by jury to have the case tried before the District Judge, and that SPCC never sought to have the District Judge disqualified for personal bias.

[9] The issue in the present case is whether the appellants were denied a fair trial because of the District Judge's alleged bias, and not whether the District Judge should have disqualified himself for bias. ***HN5***[] Judicial disqualification in the federal courts is governed by two sections of the Judicial Code, *28 U.S.C. §§ 144*, *455 (1982)*. *Section 144* provides in pertinent part:

> ***HN6***[] Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. § 144 (1982). *Section 455* provides in pertinent part that ***HN7***[] "any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned," *id.* *§ 455(a)*, and "also" shall disqualify himself "where he has a personal bias or prejudice concerning a party," *id.* *§ 455(b)(1)*. These sections establish a more stringent standard for disqualification than is required by the right to a fair trial guaranteed by the due process clause. *See* *United States v. Haldeman, 181 U.S. App. D.C. 254, 559 F.2d 31, 130 n.276 (D.C. Cir. 1976)* (en banc) (per curiam), *cert. denied*, ***431 U.S. 933, 97 S. Ct. 2641, 53 L. Ed. 2d 250 (1977)***; *accord* *In re IBM Corp., 618 F.2d 923, 932 n. 11*

FTC, 201 U.S. App. D.C. 165, 627 F.2d 1151, 1174 (D.C. Cir. 1979) ("Administrators, and even judges, may hold policy views on questions of law prior to participating in a proceeding."), *cert. denied*, *447 U.S. 921, 100 S. Ct. 3011, 65 L. Ed. 2d 1113 (1980)*; *id. at 1177* (Leventhal, J., concurring) ("even judges are not disqualified merely because they have previously announced their positions on legal issues"); United States v. Haldeman, 181 U.S. App. D.C. 254, 559 F.2d 31, 136 n. 332 (D.C. **[*991]** Cir. 1976) (en banc) (per curiam) ("although fixed, an opinion on the law is not disqualifying"), *cert. denied*, *431 U.S. 933, 97 S. Ct. 2641, 53 L. Ed. 2d 250 (1977)*. Indeed, we can barely conceive of a judge coming to a case without holding at least certain preconceptions that may affect his approach to the case. "The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; **[**23]** and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices." In re J. P. Linahan, Inc., 138 F.2d 650, 651 (2d Cir. 1943). If a judge approached every case completely free of preconceived views concerning the relevant law and policy, we would be inclined not to applaud his impartiality, but to question his qualification to serve as a judge. [10]

Although it is both understood and accepted that judges do not approach a case empty-headed, it is also presumed that a judge will not prejudge any case. In each new case the judge confronts a new factual context, new evidence, and new efforts at persuasion. As long as the judge is capable of refining his views in the process of this intellectual confrontation, and maintaining a completely open mind to decide the facts and apply the applicable law **[**25]** to the facts, personal views on law and policy do not disqualify him from hearing the case. ***HN9***[] The test may be stated in terms of whether the judge's mind is "irrevocably closed" on the issues as they arise in the context of the specific case. *See* FTC v. Cement Institute, 333 U.S. 683, 701, 92 L. Ed. 1010, 68 S. Ct. 793 (1948); *see also* Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482, 493, 49 L. Ed. 2d 1, 96 S. Ct. 2308, 2314 (1976) ("Nor is a decisionmaker disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'"); United States v. Haldeman, 181 U.S. App. D.C. 254, 559 F.2d 31, 136 (D.C. Cir. 1976) (en banc) (per curiam) ("a judge's comment is disqualifying only if it connotes a fixed opinion -- 'a closed mind on the merits of the case.'"), *cert. denied*, *431 U.S. 933, 97 S. Ct. 2641, 53 L. Ed. 2d 250 (1977)*.

In the present case, SPCC argues both that the District Judge held firm views about the policies and issues involved before hearing **[**26]** the case, and that his mind was irrevocably closed. We conclude, however, that SPCC has failed to establish either prong of this argument.

AT & T strongly disputes SPCC's contention that the District Judge held his policy or legal views prior to hearing the case, and argues that, to the contrary, the Judge developed his views during the course of the trial in response to the arguments and evidence presented by both parties. It seems clear that the Judge, at minimum, did not initially believe that the antitrust laws are inapplicable to AT & T's allegedly anticompetitive conduct, for, on July 2, 1979, the Judge entered a pre-trial order rejecting AT & T's motion to dismiss the case on the basis of implied antitrust immunity. In that order, the Judge noted that "it is consistent with the FCC's general goals for the specialized communications market, as well as with the agency's determinations in particular cases, that the antitrust laws and the Communications Act may be applied simultaneously and complementarily." Order at 8. The Judge explained

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(2d Cir. 1980); *see also* FTC v. Cement Institute, 333 U.S. 683, 702, 92 L. Ed. 1010, 68 S. Ct. 793 (1948) (most matters relating to judicial disqualification do not rise to a constitutional level); Tumey v. Ohio, 273 U.S. 510, 523, 71 L. Ed. 749, 47 S. Ct. 437 (1927) ("All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion."). Thus, ***HN8***[] a determination that a judge is not disqualified for bias necessarily includes a determination that the right to a fair trial is not violated by the judge's presiding over the case.

[10] *Cf.* Laird v. Tatum, 409 U.S. 824, 835, 34 L. Ed. 2d 50, 93 S. Ct. 7, 14 (1972) (Memorandum of Mr. Justice Rehnquist) ("Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."); In re J. P. Linahan, Inc., 138 F.2d 650, 652 (2d Cir. 1943) ("An 'open mind,' in the sense of a mind containing no preconceptions whatever, would be a mind incapable of learning anything, would be that of an utterly emotionless human being, corresponding roughly to the psychiatrist's descriptions of the feeble-minded.").

his change of position between the pretrial order and the final decision as being due to the failure of the "proof adduced at this trial" **[**27]** to substantiate the "facts **[*992]** alleged in the pleadings." Mem. Op. at 1096 n.341. In other words, far from initially holding a firm belief that the antitrust laws did not apply to AT & T, the trial judge initially held the view that the antitrust laws *did* apply to AT & T, and adopted the contrary view only after hearing the evidence. This hardly supports SPCC's charge of bias.

Moreover, we have examined the arguments and evidence presented in this case, and find AT & T's position that the District Judge developed his policy views as well as his legal views during the course of the trial to be at least highly plausible. The merits and demerits of the FCC's decision to allow competitive entry by the specialized common carriers were extensively debated by counsel during the trial. Indeed, SPCC itself, in an attempt to prove AT & T's anticompetitive intent, submitted documentary evidence setting forth AT & T's reasons for opposing the FCC's decision. One such document, a speech given by the then Chairman of the Board of Directors of AT & T, John D. deButts, to the annual convention of the National Association of Regulatory Utility Commissioners on September 30, 1973, **[**28]** is quoted in its entirety in the Memorandum Opinion. *See* Mem. Op. at 894-902. A comparison of that speech with the views expressed by the District Judge in the Conclusion" section of the Memorandum Opinion [11] reveals a striking similarity. This strongly suggests to us that the Judge developed his policy views during the trial. Most importantly, SPCC fails to offer any convincing evidence that the District Judge held his policy views prior to hearing the case.

Even if we were to assume that the trial judge began the case with certain firmly held views, SPCC has failed to establish that the Judge held these views with an "irrevocably closed" mind. Once again, the evidence suggests the opposite. The first such evidence is the Judge's denial of AT & T's pretrial motion to exclude SPCC's FX and CCSA [12] claims from the case, and his denial of AT & T's motion at the close of SPCC's case for involuntary dismissal under *rule 41(b)*. These actions are indicative of a judge who **[**29]** was fully prepared to hear all of the evidence before reaching a final decision, not a judge whose mind was irrevocably closed to persuasion. Second, the Judge repeatedly stated throughout the trial that he had not yet reached a conclusion on the merits of the case. Finally, as noted earlier, the Judge never foreclosed SPCC from engaging in discovery, introducing documentary or testimonial evidence, engaging in cross-examination, presenting legal arguments, or citing applicable legal precedents.

If the Judge was as biased as claimed by SPCC, it is unlikely that he would have been so consistently evenhanded in his administration of the trial proceedings. To assume bias in the face of such a fair trial is to conjure up a most duplicitous mind; we will not idly indulge such speculation about an officer of the law.

B. *Disagreement with Applicable Law or Policy*

We recognize that SPCC's argument goes beyond the assertion that the District **[**30]** Judge held certain views on law and policy with an irrevocably closed mind. SPCC further argues in essence that the Judge ignored the applicable ***antitrust law*** and simply decided the case on the basis of his view that an AT & T monopoly is good and competition against AT & T is bad. Once the Judge reached his decision in this manner, according to SPCC, he copied AT & T's proposed findings of fact and conclusions of law without further consideration in order to render his decision "appeal proof." [13]

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[11] *See* note 7 *supra*.

[12] For a brief description of FX and CCSA, see note 3 *supra*.

[13] In its brief and at oral argument, SPCC repeatedly referred to remarks made by the District Judge at a hearing on a post-judgment motion to the effect that his decision was "appeal proof" and would be affirmed. SPCC would have us believe that these remarks indicate that the District Judge deliberately and deviously set about to render a biased decision impervious to attack. SPCC neglected to quote the Judge's remarks in context, however. At the time the remarks were made, the District Judge was urging the parties to settle the case. The District Judge suggested to SPCC that although its intention to appeal was "perfectly proper," it would make more sense to settle instead because "the decision is appeal proof . . . unless the Court of Appeals is going to overrule 100 years of law about findings being clearly erroneous . . ., and I don't see how in the world in light

[31]** **[*993]** It is clear that the District Judge did hold the view that AT & T's former monopoly in private line telecommunications was in the public interest and that competitive entry into this market was contrary to the public interest. This view is inconsistent with the determination that the FCC made in *Specialized Common Carriers, 29 F.C.C.2d 870 (1971)*, *aff'd sub nom. Washington Utilities & Transportation Commission v. FCC, 513 F.2d 1142 (9th Cir.)*, *cert. denied*, *423 U.S. 836, 96 S. Ct. 62, 46 L. Ed. 2d 54 (1975)*, that competitive entry into this market *is* in the public interest. The FCC's determination was upheld by the Ninth Circuit and was given broad effect by this court in *AT & T v. FCC, 176 U.S. App. D.C. 288, 539 F.2d 767, 773-74 (D.C. Cir. 1976)*. The District Judge's proper role in deciding this case was to apply the antitrust laws to the facts *given* this policy of allowing competition. It was not part of his official role in deciding this case to pass judgment on, or even to express his personal views concerning, the FCC's policy decision to allow competition.

It is well established, however, that ***HN10***[] a judge is not disqualified merely because **[**32]** he personally disagrees with the policy underlying a law that he is bound to apply in a case. As Judge Leventhal noted, "in fulfilling the functions of applying or considering the validity of a statute, or a government program, the judge endeavors to put aside personal views as to the desirability of the law or program, and he is not disqualified because he personally deems the program laudable or objectionable." *Association of National Advertisers, Inc. v. FTC, 201 U.S. App. D.C. 165, 627 F.2d 1151, 1175 (D.C. Cir. 1979)* (Leventhal, J., concurring) (footnotes omitted), *cert. denied*, *447 U.S. 921, 100 S. Ct. 3011, 65 L. Ed. 2d 1113 (1980)*. [14] In the present case, however, it is alleged that the District Judge not only disagreed in the context of this case with the policy promoted by the antitrust laws, but also that instead of putting his personal views aside he allowed those views to dominate his judgement. SPCC principally relies on three factors to support this latter allegation: the statements made by the Judge in his Memorandum Opinion, the fact that the Judge largely copied his Memorandum Opinion from AT & T's proposed findings of fact and conclusions of law, and the **[**33]** fact that virtually every determination of credibility, finding of fact and conclusion of law is in favor of AT & T. For the reasons discussed below, we do not find these factors sufficient to overcome the strong presumption that judges in deciding cases do not substitute their personal views for controlling law.

1. *Statements in* **[**34]** *the Memorandum Opinion*

SPCC argues that we can deduce from the District Judge's policy statements in the Memorandum Opinion that these views were the basis for the Judge's decision. We disagree. It is true that the Judge interspersed comments about his view of the public interest with his analysis of one of the issues in this case, the issue **[*994]** of implied immunity. But the Judge did not base even his conclusion that AT & T enjoys implied immunity from the antitrust laws on his notions of the public interest, but rather on his conclusion -- with which we disagree -- that AT & T was subject to a pervasive scheme of regulation. One of the most troublesome comments that the Judge made was that he "believes that the antitrust laws were never intended to destroy an essential public utility such as we have here." Mem. Op. at 1097. We interpret this comment, however, merely to be a restatement of his conclusion that antitrust immunity can be implied from the scheme of public utility regulation applicable to AT & T.

In any case, even if the trial judge's views of the public interest *did* influence his judgment on the issue of implied antitrust immunity, the decision does **[**35]** not rest on the disposition of that issue. [15] Rather, the Judge went on to

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of this record it could be." Transcript of Hearing at 112 (Mar. 30, 1983). We do not find these remarks to be inappropriate in context, and we do not read them necessarily to indicate more than that the District Judge believed that his decision fully documented a total failure by SPCC to prove its case.

[14] Thus, for example, a judge who was vehemently opposed to the continuation of the Vietnam War was not disqualified from determining whether a draftee had been unlawfully inducted under the selective service laws. *Lawton v. Tarr, 327 F. Supp. 670 (E.D.N.C. 1971)*. Similarly, a judge whose Church was opposed to the proposed Equal Rights Amendment and to extension of its ratification deadline was not disqualified from determining whether a state legislature may rescind its prior adoption of the amendment and whether Congress may extend the ratification period after the time originally designated by Congress had elapsed. *Idaho v. Freeman, 478 F. Supp. 33 (D. Idaho 1979)*.

[15] Indeed, the Judge addressed the issue of implied antitrust immunity for the first time in the "Conclusion" section of the Memorandum Opinion, almost as an afterthought.

hold in the alternative that, even if the antitrust laws *do* apply, SPCC has failed to prove that AT & T unlawfully maintained monopoly power through anticompetitive conduct. It is solely on the basis of that holding that we affirm the District Court's judgment, and we find no evidence that the Judge's policy views impermissibly influenced that holding.

2. *Copied Findings of Fact and Conclusions of Law*

SPCC also argues that the fact that the District Judge overwhelmingly copied his Memorandum Opinion from AT & T's proposed findings of fact and conclusions of law supports the conclusion that the Judge's decision was based on his personal policy views and not on impartial application of the antitrust laws to the facts of the case. The argument, as we understand **[**36]** it, is that we cannot assume that the Judge actually based his judgment on the antitrust analysis contained in the Memorandum Opinion, because we cannot know whether he adopted that analysis after full consideration or merely copied it mechanically.

The short answer to this argument is that, ***HN11***[] given the absence of clear evidence to the contrary, we must presume that the Judge adopted these findings and conclusions after full consideration. In *United States v. Crescent Amusement Co., 323 U.S. 173, 89 L. Ed. 160, 65 S. Ct. 254 (1944)*, the Supreme Court noted:

> The defendants finally object to the findings on the ground that they were mainly taken verbatim from the government's brief. The findings leave much to be desired in light of the function of the trial court. But they are nonetheless the findings of the District Court. And they must stand or fall depending on whether they are supported by the evidence.

Id. at 184-85 (citation omitted); *accord United States v. El Paso Natural Gas Co., 376 U.S. 651, 656, 12 L. Ed. 2d 12, 84 S. Ct. 1044 (1964)*; *Afshar v. Department of State, 226 U.S. App. D.C. 388, 702 F.2d 1125, 1144 (D.C. Cir. 1983)*; *Valentino* ***[**37]*** *v. United States Postal Service, 218 U.S. App. D.C. 213, 674 F.2d 56, 60-61 n.2 (D.C. Cir. 1982)*. Indeed, in *Valentino* this circuit explicitly rejected the suggestion that the District Court's substantial acceptance of the prevailing party's proposed findings warrants departure from the "clearly erroneous" standard of review. *674 F.2d at 60-61 n.2*.

SPCC argues that this case is distinguishable from *Crescent Amusement Co., El Paso Natural Gas Co., Afshar, Valentino* and similar cases because of the sheer extensiveness of the copying. We find this argument unpersuasive. Proportionately, the extent of the copying was the same or less in the present case than in many others. The total number of pages copied reflects the size of the case more than the degree of abdication of the judge's responsibility for opinion writing.

Even apart from our presumption of regularity, however, we find that there is reason to believe that the Memorandum **[*995]** Opinion may reflect the actual thinking of the District Judge on the issues. First, counsel for AT & T explained at oral argument that AT & T's proposed findings of fact and conclusions of law were written to reflect the views **[**38]** of the District Judge that had been freely expressed throughout the trial in response to the testimony of the witnesses, the submissions of documentary evidence and the arguments of the parties. Our review of the record convinces us that there is considerable merit to this explanation. To an extent, therefore, AT & T merely performed a stenographic function. Moreover, we note that the District Judge did add a not insignificant amount of original material, including supplemental determinations of credibility, findings of fact and conclusions of law. This original material is interspersed throughout AT & T's submissions. This indicates to us that the trial judge did not mechanically copy AT & T's proposed findings and conclusions, but rather considered them and elaborated upon them where he considered it necessary.

Finally, we note that careful appellate review provides some safeguard against adoption of findings and conclusions that reflect excessive zeal of advocacy. Courts of appeals are able independently to review the legal analysis of a trial court's opinion for error, regardless of whether that analysis was written in the first instance by the District Judge or by the **[**39]** prevailing party. And, as long as the court of appeals has a full record -- which SPCC concedes we do in this case -- the court of appeals can "examine[] the decision with special care" for clear error in the findings of fact. *Valentino v. United States Postal Service, 674 F.2d at 60 n.2*. We may contrast this situation with the situation in Crandell v. United States, 703 F.2d 74 (4th Cir. 1983), one of the cases principally relied upon by SPCC. In *Crandell*, all of the findings in the district court's memorandum opinion relating to two key issues were lifted virtually verbatim from a report prepared by a government witness. 703 F.2d at 76. During the trial, the District Judge had prevented the plaintiff from effectively cross-examining this witness. *Id.* In contrast, as SPCC concedes, the District Judge in the present case never foreclosed SPCC from presenting its case and developing a full record for review.

Nevertheless, we wish to make clear that we cannot endorse ***HN12***[] the District Judge's action in extensively copying the proposed findings of fact and conclusions of law prepared by counsel for AT & T. As the Supreme Court noted in *El Paso Natural Gas Co.*, **[**40]** this practice "is an abandonment of the duty and the trust that has been placed in the judge." *376 U.S. at 657 n.4* (quoting J. Skelly Wright, Seminars for Newly Appointed United States District Judges 166 (1963)). As the present case illustrates, the parties, the public and the reviewing court can never be certain that the judge actually decided the case on the grounds given in the copied Memorandum Opinion. Confidence in the integrity of the judicial process inevitably suffers when judges succumb wholesale to this practice.

3. *One-sided Findings and Conclusions*

Finally, SPCC argues that it is difficult to credit to anything except judicial bias the fact that virtually every determination of the credibility of witnesses, finding of fact and conclusion of law in the Memorandum Opinion is in favor of AT & T. We conclude that ***HN13***[] the statistical one-sidedness of the trial court's evidentiary, factual and legal rulings simply cannot be used to support an inference of judicial bias. As the Second Circuit has noted:

> A trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may **[**41]** have created the impression of bias. Judicial independence cannot be subservient to a statistical study of the calls he has made during the contest.

In re IBM Corp., 618 F.2d 923, 929 (2d Cir. 1980) (rejecting IBM's argument that **[*996]** the disproportionate number of rulings by the trial judge against IBM and in favor of the Government constituted evidence of judicial bias).

This position is also supported by the Supreme Court's decision in *NLRB v. Pittsburgh Steamship Co., 337 U.S. 656, 93 L. Ed. 1602, 69 S. Ct. 1283 (1949)*. In that case, a trial examiner without exception had found the witnesses for the company untrustworthy and those for the union reliable, and the Board had adopted the examiner's findings. The court of appeals held that this fact alone showed bias: "It is enough to say that the unvarying repudiation of every witness for the petitioner because of falsity, evasion or faint recollection, along with the consistent exaltation of every union witness as truthful, forthright and accurate, destroys completely any confidence that might otherwise be placed in the findings of the trial examiner and stamp[s] them as arbitrary." *337 U.S. at 658* **[**42]** (quoting *Pittsburgh Steamship Co. v. NLRB, 167 F.2d 126, 129 (6th Cir. 1948))* (brackets in original). The Supreme Court reversed, holding that "total rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." *Id. at 659*.

C. *Case Law Relied on by SPCC*

SPCC relies primarily on five cases to support its argument that the District Judge should be reversed for bias: *Crandell v. United States, 703 F.2d 74 (4th Cir. 1983)*; *Nicodemus v. Chrysler Corp., 596 F.2d 152 (6th Cir. 1979)*; *Faulkner Radio, Inc. v. FCC, 181 U.S. App. D.C. 243, 557 F.2d 866 (D.C. Cir. 1977)*; *Reserve Mining Co. v. Lord, 529 F.2d 181 (8th Cir. 1976)*; and *Knapp v. Kinsey, 232 F.2d 458 (6th Cir.)*, *cert. denied*, *352 U.S. 892, 1 L. Ed. 2d 86, 77 S. Ct. 131 (1956)*.

In *Faulkner Radio*, this court remanded a case to the FCC because the administrative law judge, in resolving a conflict between the testimony of two parties who were lawyers and the testimony of opposing witnesses who were non-lawyers, apparently acted on the assumption that the FCC accords greater weight to the testimony of lawyers than to that of non-lawyers. Although **[**43]** the appellant couched its argument in terms of "bias," the court remanded because it considered it likely that the judge's credibility determinations were "predicated upon a material error of law." *557 F.2d at 870*. Thus, *Faulkner Radio* does not suggest that we should vacate the opinion below and remand the present case for a new trial without consideration of the evidence, as SPCC argues, but only that we should carefully review the District Judge's determinations of credibility and findings of fact to make certain that they, too, are not predicated upon material errors of law. [16]

[44]** In each of the other four cases relied on by SPCC, the court of appeals held that the district judge's *conduct during the trial* deprived the losing party of due process. This conduct consisted in part of statements made by the judge indicating bias, but also in each case involved significant -- even egregious -- interference by the judge with the attempts of the losing party to present its case. Indeed, in three of the cases the court of appeals concluded that the district judge had "simply assumed the role of an advocate" for the prevailing party. *Crandell, 703 F.2d at 77*; *see* Reserve Mining Co., 529 F.2d at 185 ("Judge Lord seems to have shed the robe of the judge and to have assumed the mantle of the advocate."); *Knapp, 232 F.2d at 467* (district **[*997]** judge "figuratively speaking, stepped down from the bench to assume the role of advocate for the plaintiff"). In none of these four cases was the decision of the court of appeals founded solely on the district judge's expressions of policy views and speculation that the district judge impermissibly based his decision on those views rather than on the applicable law.

D. *Summary*

We recognize the **[**45]** difficulty of proving that a trial judge not only held certain views about law or policy, but also approached a case with an "irrevocably closed" mind or actually substituted his personal views for controlling law in deciding a case. As we have indicated, ***HN14***[] there is a strong presumption against disqualifying a judge solely on the basis of his views about law or policy. Indeed, we assume that most judges do have personal views; but we also presume that these views do not invariably cause a judge to prejudge a case or to abandon his public responsibility to preside over a fair and wholly impartial adjudication. In other words, we expect that most judges are faithful to their enormous public trust.

In the present case, however, the issue of bias has been seriously raised in a context that we find troubling. We therefore have examined the trial judge's conduct in considerable detail. We find the plaintiffs' charges of bias to be unsupported by the factors SPCC cites, whether considered individually or together as a whole. Accordingly, we reject these charges and deny SPCC's requests that we reverse and remand for bias or that we abandon the "clearly erroneous" standard of review **[**46]** of the District Court's factfinding.

III. THE ANTITRUST ISSUES

A. *Introduction*

Turning now to the substantive issues that formed the subject of the trial, we note that the District Court outlined four elements of proof that SPCC had to satisfy in order to prevail on its antitrust claims:

> (1) that the defendant possesses monopoly power in a relevant market; (2) that the defendant has unlawfully exercised that power to attain, or maintain, a monopoly in the relevant market; (3) that the plaintiff has suffered injury in fact as a result of those unlawful acts; and (4) that damages in a reasonably ascertainable amount have been proved.

Mem. Op. at 870 (citations omitted). The District Court then concluded in a series of alternative holdings that SPCC had failed to satisfy *any* of these elements of proof. Finally, in the "Conclusion" section of its Memorandum

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[16] SPCC argues that many of the District Court's determinations of credibility in the present case were predicated on impermissible grounds. We have considered SPCC's allegations, and conclude that the District Court fully supported each determination of credibility critical to its holding on the issue of unlawful maintenance of monopoly power on the basis of legitimate considerations, such as demeanor, objectivity, expertise, experience, and the logic of the testimony. As we have already noted, it does not matter that certain of these findings were initially drafted by counsel for AT & T. What is important is that the District Judge adopted these findings as his own, that they have a basis in the record, and that there is nothing to suggest that they are clearly erroneous.

Opinion, the District Court held that, in any event, all of AT & T's rates and practices challenged by SPCC were immune from antitrust scrutiny because they were subject to a pervasive scheme of public utility or common carrier regulation. Thus, the District Court's judgment for AT & T rests **[**47]** on five principal alternative holdings.

B. *The "Clearly Erroneous" Standard of Review*

On appeal, SPCC raises two general arguments on the merits. First, SPCC argues that "on each and every issue on this appeal, SPCC presented evidence sufficient to prevail before an impartial decisionmaker." Appellants' Reply Brief at 5. Thus, SPCC essentially seeks to relitigate its charges against AT & T. SPCC repeats the allegations that it unsuccessfully made to the District Court, cites to evidence in the record that supports these allegations, and urges the Court of Appeals independently to review the evidence. These arguments assume that we have adopted SPCC's suggestion that we abandon the "clearly erroneous" standard on the ground that the trial court's factfinding was tainted by the District Judge's policy bias. [17] As discussed above in Part II, however, **[*998]** we reject SPCC's charge of judicial bias. Accordingly, ***HN15***[] we are bound by the rule that findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." *FED. R. CIV. P. **[**48]** 52(a)*. The Supreme Court has stated that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)*.

Thus, under the "clearly erroneous" standard, our review of findings of fact is critically limited. **[**49]** This point was aptly emphasized in *Krasnov v. Dinan, 465 F.2d 1298 (3d Cir. 1972)*, as follows:

> "In reviewing the decision of the District Court, our responsibility is not to substitute findings we could have made had we been the fact- finding tribunal; our sole function is to review the record to determine whether the findings of the District Court were clearly erroneous, i.e., whether we are 'left with a definite and firm conviction that a mistake has been committed.'" *Speyer, Inc. v. Humble Oil and Refining Co., 403 F.2d 766, 770 (3d Cir. 1968)*. ***HN16***[] It is the responsibility of an appellate court to accept the ultimate factual determination of the fact-finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data. Unless the reviewing court establishes the existence of either of these factors, it may not alter the facts found by the trial court. To hold otherwise would be to permit a substitution by the reviewing court of its finding for that of the trial court, and there is no existing authority for this in the federal judicial **[**50]** system, either by American common law tradition or by rule and statute.

Id. at 1302-03. We fully subscribe to this position and adhere to it in our review of the record in this case.

The District Court's lengthy Memorandum Opinion contains extremely detailed discussions of the evidence. On each factual issue, the District Court fully discusses the evidence introduced by SPCC as well as the evidence introduced by AT & T, and explains exactly why it finds AT & T's evidence persuasive and SPCC's unconvincing. In each instance where SPCC disagrees with the District Court's findings of fact, we have reviewed the evidence discussed by the District Court as well as the evidence cited by SPCC. In a number of these instances, we acknowledge that a factfinder rationally could resolve the conflicting evidence in a manner contrary to the determination of the District Court. In every instance, however, there is clearly substantial evidence to support the

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[17] The closest SPCC comes to arguing that the District Court's findings of fact should be set aside under the "clearly erroneous" standard is the following:

> Under the proposed standard of review, it is unnecessary for this Court to even reach the question of how the district court's opinion would be reviewed under a clearly erroneous test. However, even if such a test were applied, we do not concede, as AT & T alleges (AT & T Br., p. 23), that any or all of the district court's factfindings should be affirmed.

Appellants' Reply Brief at 4 n.4.

findings of the District Judge; and in no instance have we been left with the definite and firm conviction that a mistake in factfinding has been committed by the trial court.

Because of the nature of this case, we have **[**51]** been tempted to recite in detail every factual issue raised by appellants, including an explicit description of the relevant evidence in the record and an explanation of how that evidence as a whole supports the District Court's findings. We have decided, however, that this would both involve us in a task that is wholly unnecessary to our legitimate appellate function and result in a pointless exercise. For us to detail every factual issue would be essentially to repeat scores of pages of the District Court's comprehensive Memorandum Opinion. We are aware, however, that by merely stating our conclusions **[*999]** without engaging in such detailed discussions, we leave ourselves open to the charge that we have failed to consider the evidence. We therefore wish to emphasize that we have considered the evidence in the record relating to each and every factual issue raised by SPCC. [18] Indeed, it is only because of the need to engage in this time-consuming effort that it has taken us such a long time -- over three months -- to arrive at our decision and to release our opinion in this case.

[52]** Because we conclude that the District Court's findings are supported by the evidence and are not clearly erroneous, we focus our attention on SPCC's second general argument: that each of the District Court's alternative holdings is based on fundamental errors of law. We agree with SPCC's argument that the District Court's holding on the issue of implied antitrust immunity is incorrect as a matter of law. We also agree that the court's holding that AT & T lacked monopoly power is based on erroneous legal analysis. We conclude, however, that the District Court's alternative holding that AT & T did not "unlawfully exercise[] that power to attain, or maintain, a monopoly in the relevant market" must be sustained. In particular, we conclude that, given the District Court's findings of fact, SPCC has failed to prove that AT & T engaged in predatory pricing even under the legal test proposed by SPCC. We further conclude that the District Court in fact applied the correct legal test to evaluate SPCC's charges that AT & T engaged in exclusionary inter connection practices. We therefore affirm the judgment of the District Court solely on the ground that SPCC failed to satisfy this **[**53]** second element of proof, *i.e.*, maintenance of monopoly power by exclusionary conduct. [19] Given this disposition of the case, it is unnecessary for us to consider SPCC's legal and factual arguments on the issues of injury-in-fact and proof of damages.

C. *Implied Antitrust Immunity*

The District Court concluded that AT & T enjoys implied antitrust immunity, at least with regard to the pricing and interconnection practices at issue in this case, **[**54]** on the ground that these practices are subject to pervasive regulatory control under a public interest standard different from and inconsistent with the application of the antitrust laws. *See* Mem. Op. at 1095-97. We reject this conclusion.

The Supreme Court has repeatedly noted that ***HN18***[] "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *Otter Tail Power Co. v. United States, 410 U.S. 366, 372, 35 L. Ed. 2d 359, 93 S. Ct. 1022, 1027 (1973)* (quoting *United States v. Philadelphia National Bank, 374 U.S. 321, 350-51, 10 L. Ed. 2d 915, 83 S. Ct. 1715, 1734 (1963))*. The decision of the District Court in the present case notwithstanding, it is well settled that such repugnancy does not exist between the antitrust laws and the regulatory scheme applicable to AT & T's pricing and interconnection decisions. *See, e.g., MCI Communications Corp. v. AT & T, 708 F.2d 1081, 1101-5 (7th Cir.)*, *cert. denied*, *464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)*; *Phonetele, Inc. v. AT & T, 664 F.2d 716, 726-37 (9th Cir. 1981),* **[**55]** *cert. denied*, *459 U.S. 1145, 103 S. Ct. 785, 74 L. Ed. 2d 992 (1983)*; *Northeastern Telephone Co. v. AT & T, 651 F.2d 76, 82-84 (2d Cir. 1981)*, *cert. denied*, *455 U.S. 943, 71 L. Ed. 2d*

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[18] However, because we do not reach the issues of injury-in-fact and proof of damages, we have not considered the factual disputes pertaining to these issues.

[19] "***HN17***[] Exclusionary" conduct may be defined as "conduct, other than competition on the merits or restraints reasonably 'necessary' to competition on the merits, that reasonably appear capable of making a significant contribution to creating or maintaining monopoly power." 3 P. AREEDA & D. TURNER, ***ANTITRUST LAW*** para. 626, at 83 (1978). The issue is whether the defendant's conduct is reasonable in light of its business needs, or whether it unreasonably excludes competition. *See Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230 (1st Cir. 1983)*.

654, 102 S. Ct. 1438 (1982); *Mid-Texas Communications* ***[*1000]*** *Systems v. AT & T, 615 F.2d 1372, 1377-82 (5th Cir.)*, *cert. denied*, *449 U.S. 912, 101 S. Ct. 286, 66 L. Ed. 2d 140 (1980)*; *Sound, Inc. v. AT & T, 631 F.2d 1324, 1327-31 (8th Cir. 1980)*; *Essential Communications Systems v. AT & T, 610 F.2d 1114, 1116-25 (3rd Cir. 1979)*; *United States v. AT & T, 461 F. Supp. 1314, 1320-30 (D.D.C. 1978)*. We agree with the consistent analysis presented in these cases, and see no point in repeating it yet another time. We merely emphasize that, under the applicable regulatory scheme, the initial decision to file a tariff establishing rates or to provide interconnections to a competing specialized common carrier rests with AT & T, and AT & T's tariffs and interconnection decisions often become effective without FCC scrutiny or approval. At minimum, long regulatory delays often have preceded final FCC approval or disapproval of AT & T's allegedly predatory rates, [20] refusals **[**56]** to interconnect, or unreasonable and discriminatory terms and conditions of access to local distribution facilities. As Judge Greene concluded in *United States v. AT & T*, "it would be a gross misconception of the realities to equate the instant statutory scheme, the relatively weak regulatory controls which have implemented that scheme, and defendants' alleged activities which offend both the antitrust laws and the regulatory purposes, with the kind of explicit regulation endorsing industry conduct which the Supreme Court has held in relatively few instances to be inconsistent with antitrust enforcement." *461 F. Supp. at 1328*. [21]

[57]** D. *Monopoly Power*

HN19[] 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 historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698, 1704 (1966)*. Monopoly power is "the power to control prices or exclude competition." *Id. at 571* (quoting *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 100 L. Ed. 1264, 76 S. Ct. 994 (1956))*. ***HN20***[] In cases involving unregulated industries, courts frequently approach the problem of measuring market power by defining the relevant product and geographic market and computing the defendant's market share. Monopoly power is then ordinarily inferred from a predominant share of the market. *See id.* Reliance on statistical market share is a questionable approach in cases involving regulated industries, however. A predominant market share may merely be the result of regulation, and regulatory control may preclude the exercise **[**58]** of monopoly power. Therefore, in such cases market share should be at most a point of departure in determining whether monopoly power exists. Ultimately, a court should focus directly upon the ability of the regulated firm to control prices or exclude competition. *See MCI Communications Corp. v. AT & T, 708 F.2d 1081, 1106-07 (7th Cir.)*, *cert. denied*, *464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)*; Watson & Brunner, *Monopolization by Regulated "Monopolies": The Search for Substantive Standards*, 22 ANTITRUST BULL. 559, 565-68 (1977).

[*1001] The District Court's analysis of monopoly power in the present case is consistent with the above principles. The District Court defined the relevant market as "the interstate, intercity private line market (excluding sole source governmental telecommunications needs and short haul) in the geographic areas which plaintiffs elected to serve, or would have served in their 'but for' world." [22] **[**60]** Mem. Op. at 1097; *see id. at 871-77*. The

[20] *See* note 5 *supra*.

[21] Notwithstanding the District Court's holding on the issue of implied antitrust immunity, the court clearly recognized the inadequacy of the regulatory scheme, as implemented by the FCC, to prevent anticompetitive behavior. Thus, the District Court noted that "every action complained of in this case could have or should have been handled by the appropriate regulatory bodies, *which responsibility the regulators miserably mishandled or failed to handle*." Mem. Op. at 1096 (footnote omitted) (emphasis added). The District Court further noted that "it was the FCC that never found TEL-PAK (C & D) unlawful for over *20* years, as well as delayed making other very important decisions," and that "had the FCC not engaged in its usual regulatory lag and dealt forthrightly and properly with the problems as they arose, then few, if any, of the cases would now be before the antitrust Courts, such as this one." *Id. at 1097* (emphasis in original).

District Court then determined that AT & T's market share ranged from a high of 95.6% to a low of 66.5%, sufficient to support an inference of monopoly power. *Id. at 878*. Nevertheless, **[**59]** the District Court concluded that this inference was rebutted by AT & T's inability in fact to control prices or exclude competition. In particular, the District Court rejected SPCC's argument that AT & T had monopoly power by virtue of various barriers to market entry, such as costs and delays inherent in the regulatory process, substantial capital outlays and lengthy construction programs needed to build intercity telecommunications systems, brand loyalty enjoyed by AT & T, and AT & T's control of interconnection with its local distribution facilities. *See id. at 880-84*. The District Court noted that entry actually had occurred at a rapid pace. *See id. at 884-85*. [23] Finally, the District Court concluded that the complete control over prices and access to local distribution facilities exercised by the FCC and the state regulatory agencies precluded AT & T from exercising monopoly power. *See id. at 885-88*.

SPCC argues on appeal that the District Court's conclusions on the issues of barriers to entry and regulatory control were based on erroneous legal analysis, and that the court's overall conclusion that AT & T lacked monopoly power therefore must be set aside. We agree. In concluding that the regulatory agencies prevented AT & T from controlling price or excluding competition, the District Court erred, as it had in its analysis of implied antitrust immunity, in failing to consider the realities of the regulatory scheme. That scheme leaves pricing and interconnection decisions to AT & T in the first instance. The regulatory agencies are not always able to respond to alleged abuses immediately and effectively.

The District Court also erred in ruling that costs and delays imposed by the regulatory process are not barriers to entry. The District Court based this ruling on the ground that the regulatory agencies, and not AT & T, are responsible for these costs and delays. **[**61]** The defendant's innocence or blameworthiness, however, has absolutely nothing to do with whether a condition constitutes a barrier to entry. ***HN21***[] Any market condition that makes entry more costly or time-consuming and thus reduces the effectiveness of potential competition as a constraint on the pricing behavior of the dominant firm should be considered a barrier to entry, regardless of who is responsible for the existence of that condition. Thus, the costs and delays of the regulatory process clearly constitute barriers to entry. On this point, Judge Greene noted in *United States v. AT & T, 524 F. Supp. 1336 (D.D.C. 1981)*, that

> a persuasive showing has been made that [AT & T has] monopoly power (wholly apart from FCC orders with respect to interconnection) through various barriers to entry, such as the creation of bottlenecks, entrenched customer preferences, the regulatory process, large capital requirements, access to technical information, and disparities in risk. These factors, in combination with the evidence of market shares, suffice at least to meet the government's initial burden, and the burden is then appropriately placed upon **[*1002]** defendants to rebut **[**62]** the existence and significance of barriers to entry. On that basis, the defendants' regulatory defense to the government's claim of monopoly power must and will be rejected.

Id. at 1347-48 (footnotes omitted); *see also* G. BROCK, THE TELECOMMUNICATIONS INDUSTRY 198, 213-15 (1981).

Similarly, as noted by Judge Greene, ***HN22***[] the need for large capital outlays and lengthy construction programs in order to enter the market, and the need to overcome brand preference established by the defendant's having been first in the market or having made extensive "image" advertising expenditures, also constitute barriers to entry. *United States v. AT & T, 524 F. Supp. at 1348*; *see also* *Transamerica Computer Co. v. IBM, 481 F. Supp. 965, 976 (N.D. Cal. 1979)*, *aff'd*, *698 F.2d 1377 (9th Cir.)*, *cert. denied*, *464 U.S. 955, 104 S. Ct. 370, 78 L. Ed. 2d 329*

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[22] SPCC argues that the relevant market should be defined as the nationwide market for all business and government intercity telecommunications services. Mem. Op. at 871; *see* Appellants' Opening Brief at 27 n.23. Given our disposition of this case, we need not decide this issue.

[23] SPCC argues that this finding is overstated. *See* Appellants' Opening Brief at 27; Appellants' Reply Brief at 19-20.

(1983); *see also* 2 P. AREEDA & D. TURNER, ***ANTITRUST LAW*** paras. 409d-409e (1978); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213, 228-29 (1979).

Finally, and perhaps most critically, AT & T's control of interconnection with its local distribution facilities constitutes **[**63]** a barrier to entry. *See* 2 P. AREEDA & D. TURNER, ***ANTITRUST LAW*** para. 409f (1978); G. BROCK, THE TELECOMMUNICATIONS INDUSTRY 198-99, 216-18 (1981). The District Court erroneously dismissed this factor on the ground that the FCC has power to mandate interconnection pursuant to *47 U.S.C. § 201(a) (1976)*, again ignoring the realities of control by AT & T in the first instance and of regulatory delay and inefficiency in policing alleged abuses.

It is not clear to us whether the District Court still would have found that AT & T lacked monopoly power had it properly considered the effect of regulatory control and barriers to entry. Accordingly, if the issue of monopoly power were dispositive, we would have to remand the case to the District Court. The court went on, however, to hold in the alternative that AT & T did not use its power over price and entry in an exclusionary manner. Because we conclude that this holding is supported even under the legal standards proposed by SPCC, we affirm the judgment of the District Court dismissing SPCC's monopolization action.

E. "*Willful Acquisition or Maintenance" of Monopoly Power*

As noted in Part III.D above, the second element **[**64]** of the offense of monopolization is the "willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. SPCC argues that AT & T willfully maintained its monopoly power by engaging in predatory pricing and exclusionary interconnection practices.

1. *The Predatory Pricing Charges*

SPCC alleges that AT & T willfully maintained monopoly power through predatory pricing of the Telpak, [24] **[**66]** Hi/Lo and MPL tariffs. [25] AT & T used each of these tariffs **[*1003]** to reduce prices in response to competition. Following the FCC's *Above 890* decision, AT & T faced competition in the market for bulk private line services from the users of these services, who were permitted to construct private microwave systems for their own use. AT & T responded by offering a greatly reduced bulk rate under the Telpak tariff. Similarly, following the *MCI* and *Specialized Common Carriers* decisions, AT & T faced competition from the specialized common carriers in the market for single **[**65]** channel private line services along low cost, high density routes. AT & T responded by reducing prices for these services first under the Hi/Lo tariff and later under the MPL tariff.

Ordinarily, price cuts are a necessary and desirable response to competition. Courts and commentators have recognized, however, that there may be circumstances in which price cuts serve an anticompetitive purpose. In particular, there is concern that a firm might deliberately sacrifice present revenues for the purpose of driving rivals out of the market and then recoup the losses through higher profits earned in the absence of competition. [26] **[**67]**

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[24] SPCC also argues that the structure of Telpak was anti-competitive even if Telpak was not preditorily priced. The District Court rejected SPCC's arguments after full consideration. *See* Mem. Op. at 947-53; *accord* *MCI Communications Corp. v. AT & T, 708 F.2d 1081, 1130-31 (7th Cir.)*, *cert. denied*, ***464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)***. We agree with the District Court's analysis. We note that the Telpak structure was designed for legitimate business reasons to duplicate the economic characteristics of the private microwave systems that large users of AT & T's private line services considered constructing for their own use following the FCC's *Above 890* decision. The District Court found after fully reviewing the evidence that AT & T continued to maintain and market Telpak throughout the 1960's and 1970's as a competitive alternative to private microwave. *See* Mem. Op. at 953-55. This finding is supported by the evidence and is not clearly erroneous.

[25] For a brief description of these tariffs, see note 5 *supra*.

[26] *See, e.g.*, *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 231 (1st Cir. 1983)*; *MCI Communications Corp. v. AT & T, 708 F.2d 1081, 1112 (7th Cir.)*, *cert. denied*, ***464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)***; *Northeastern Telephone*

The problem of differentiating between lawful price cuts and predatory price cuts presents considerable theoretical and practical difficulties, and has been the subject of a heated debate among scholars of ***antitrust law***. [27] In particular, courts and commentators have disagreed about whether the test should be based purely on the relationship between the firm's prices and costs, or whether evidence of subjective intent also should be considered. In addition, there is disagreement about which measures of cost are theoretically and practically appropriate.

In the present case, SPCC raises a barrage of objections to the District Court's analysis of the predatory pricing issue. According to SPCC, the District Court made incorrect findings of fact concerning AT & T's costs, misconstrued the significance of the measures of cost used, and applied an incorrect legal test. In order to provide a framework for discussing the **[**68]** District Court's analysis and the contentions of the parties, we shall consider first the issue of the proper legal test to apply. SPCC alleges that the District Court improperly adopted the Areeda-Turner test, [28] and urges us essentially to adopt the Ninth Circuit's *Inglis-Transamerica* test. [29]

[*1004] ***HN23***[] The Areeda-Turner test establishes conclusive presumptions that prices are either lawful or predatory depending solely on the relationship between **[**69]** those prices and certain measures of the firm's costs. According to Professors Areeda and Turner, a price at or above average total cost [30] should be conclusively presumed lawful. This should be so even if the price is not profit-maximizing in the short run and even if the price was set in order to preserve or enhance market share by deterring rivals. The rationale for this rule is that when a firm prices at or above average total cost, its total revenues cover its total costs, including a normal return on investment. Such pricing can drive out only less efficient rivals; that is, rivals who are unable to produce equivalent goods or services at as low a cost as the monopolist. Such competition based on superior performance must, according to Areeda and Turner, be considered competition on the merits.

[70]** Professors Areeda and Turner further argued that a price at or above reasonably anticipated short run marginal cost [31] also should be conclusively presumed lawful. [32] **[**71]** Areeda and Turner acknowledged that

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Co. v. AT & T, 651 F.2d 76, 86 (2d Cir. 1981), *cert. denied*, ***455 U.S. 943, 102 S. Ct. 1438, 71 L. Ed 2d 654 (1982)***; Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698 (1975).

Some commentators have argued that this type of conduct is irrational and unlikely to occur in the case of an unregulated firm. *See, e.g.*, R. BORK, THE ANTITRUST PARADOX 144-60 (1978); Easterbrook, *Predatory Strategies and Counter Strategies*, 48 U. CHI. L. REV. 263 (1981); McGee, *Predatory Pricing Revisited*, 23 J. LAW & ECON. 289 (1980). A different argument leading to the same conclusion can be made in the case of a firm subject to overall rate-of-return regulation. *See, e.g.*, Testimony of Kenneth J. Arrow, *United States v. AT & T*, Civ. Action No. 74-1698 (D.D.C.), at 35-37.

[27] The seminal and most influential article has been Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). For other prominent views, see, *e.g.*, R. BORK, THE ANTITRUST PARADOX 144-60 (1978); R. POSNER, ***ANTITRUST LAW***: AN ECONOMIC PERSPECTIVE 184-96 (1976); Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1 (1979); Joskow & Klevorick, A *Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213 (1979); Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1977); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977).

[28] *See* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV 697 (1975); *see also* 3 P. AREEDA & D. TURNER, ANTI-TRUST LAW paras. 711-721 (1978 & Supp. 1982).

[29] *See Transamerica Computer Co. v. IBM, 698 F.2d 1377 (9th Cir.)*, *cert. denied*, ***464 U.S. 955, 104 S. Ct. 370, 78 L. Ed. 2d 329 (1983)***; ***William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir. 1981)***, *cert. denied*, ***459 U.S. 825, 74 L. Ed. 2d 61, 103 S. Ct. 57, 103 S. Ct. 58 (1982)***.

[30] Average total cost is the sum of fixed cost and total variable cost, divided by output. Fixed cost is the sum of all costs that do not vary with output; total variable cost is the sum of all costs that vary with changes in output. Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV L. REV. 697, 700 (1975).

[31] Marginal cost is the increment to total cost that results from producing an additional increment of output. *Id.*

such pricing could drive out equally or more efficient rivals who have less staying power than the monopolist, and therefore possibly might not maximize long run consumer welfare. Nevertheless, Areeda and Turner concluded that allowing pricing as low as marginal cost is desirable because it produces the competitive and socially optimal result in the short run. Finally, Areeda and Turner recognized that marginal cost cannot readily be inferred from conventional business accounts, and therefore proposed that average variable cost [33] be used as a proxy for marginal cost.

The Ninth Circuit has rejected the idea that courts should distinguish lawful from predatory pricing solely on the basis of the relationship between the firm's prices and costs. Instead, under the Ninth Circuit's test, "to establish predatory pricing a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power." *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1035 (9th Cir. 1981)*, *cert. denied*, *459 U.S. 825, 74 L. Ed. 2d 61, 103 S. Ct. 57, 103 S. Ct. 58 (1982)*. The Ninth Circuit has, however, adopted a cost-based test for the purpose of allocating the burden of proof. Thus, according to the Ninth Circuit, if the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case **[**72]** of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors. *Id. at 1036*. If the plaintiff proves that the defendant's prices were below average total cost but not below average variable cost, the plaintiff bears the burden of proving by a preponderance of the evidence that the defendant's pricing was predatory in the sense that "the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power." *Id. at 1035-36*. Finally, if the plaintiff cannot prove that the defendant's prices were below average total cost, the plaintiff must prove by clear and **[*1005]** convincing evidence -- *i.e.*, that it is highly probably true -- that the defendant's pricing policy was predatory in the above sense. *Transamerica Computer Co. v. IBM, 698 F.2d 1377, 1388 (9th Cir.)*, *cert. denied*, *464 U.S. 955, 104 S. Ct. 370, 78 L. Ed. 2d 329 (1983)*.

Application of the above tests is complicated in the present case because AT & T is a **[**73]** multiservice firm. The measures of cost it uses for its private line services are "long run incremental cost" ("LRIC") and "fully distributed cost" ("FDC") rather than average variable cost or average total cost. The District Court did not precisely define these measures of cost. The court noted that "long run incremental costs or average incremental costs are a form of marginal costs reflecting the change in total costs caused by changes in output over a longer period of time." Mem. Op. at 922 (citations to record omitted). [34] The court described FDC as follows:

> Fully distributed cost is an accounting concept focusing on the historical costs reflected in the books of the company. Fully distributed costs require an allocation of the firm's total costs to the firm's various product lines. The allocation methods used to compute fully distributed cost are inherently arbitrary and have no economic basis.

Mem. Op. at 922 n. 105 (citations to record omitted).

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[32] Under the Areeda-Turner test, a price below reasonably anticipated short run marginal cost (or its proxy, average variable cost) is conclusively presumed predatory, unless at or above average total cost. *Id.* at 733.

[33] Average variable cost is the sum of all variable costs divided by output. Variable costs are costs that vary with changes in output. *Id.* at 700.

[34] The court cited an article by Professor Baumol that defines "average incremental cost" as follows:

> The average incremental cost of product X is defined as total company cost minus what the total cost of the company would be in the absence of production of X, all divided by the quantity of X being produced. Total costs refer to those that would prevail in the long-run with the output combinations specified.

Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1, 9 n.26 (1979); *see also* Joskow & Klevorick, A *Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 252 n.79 (1979).

[74]** With this background, we are ready to turn to consideration of the District Court's analysis of SPCC's predatory pricing charges and to SPCC's objections to that analysis. First, the District Court held that a cost-based standard must be adopted to judge SPCC's predatory pricing claims. Next, the court concluded that "marginal or incremental cost" is the appropriate cost to consider. The court then found that SPCC failed to prove that Telpak, Hi/Lo or MPL were priced below incremental cost. Accordingly, the court held that SPCC failed to prove that AT & T had engaged in predatory pricing. Although the court rejected FDC as an appropriate measure of cost for identifying predatory pricing, the court nevertheless made findings that Telpak, Hi/Lo and MPL were priced above FDC as well as above LRIC. *See* Mem. Op. at 918-33.

In conducting the above analysis, the District Court purported to adopt the Areeda-Turner test. The court did not, however, as SPCC alleges, rely on the somewhat controversial Areeda-Turner rule that a price at or above reasonably anticipated short run marginal cost (or its proxy, average variable cost) is conclusively presumed lawful. When the court stated **[**75]** that "marginal or incremental cost" is the appropriate cost to consider, it was referring to long run incremental cost. The court noted that "long run or average incremental costs . . . include certain items of long term expense that are typically considered fixed and would generally be excluded from a calculation of average variable cost, such as the cost of plant and equipment, as well as the cost of capital. It is generally recognized that long run or average incremental cost approximates anticipated average total cost for various levels of production." Mem. Op. at 922 (footnote and citations omitted). Thus, the court adopted only the relatively uncontroversial Areeda-Turner rule that a price at or above average total cost is conclusively presumed lawful.

SPCC argues on appeal that the District Court made errors of both fact and law. First, SPCC argues that the District Court erred in finding that Telpak, Hi/Lo and MPL were priced above LRIC and FDC. Second, SPCC argues that the District **[*1006]** Court erred in rejecting FDC as an appropriate measure of cost. According to SPCC, LRIC, at least as used by AT & T, corresponds to average variable cost, and FDC corresponds **[**76]** to average total cost. Third, SPCC argues that the District Court erred in adopting the Areeda-Turner test rather than the *Inglis-Transamerica* test. In sum, SPCC argues that the District Court should have ruled in its favor on its predatory pricing charges on the basis of *each* of the three alternative grounds provided by the *Inglis-Transamerica* test: (1) SPCC proved that AT & T priced below average variable cost (which SPCC equates with LRIC); (2) SPCC proved that AT & T priced below average total cost (which SPCC equates with FDC) with predatory intent; and (3) even if SPCC did not prove that AT & T priced below average total cost, SPCC proved by clear and convincing evidence that AT & T priced with predatory intent.

In response to these arguments, we must note that we have serious doubts about the usefulness of FDC as a measure of cost to be used in distinguishing lawful from predatory pricing. [35] We also have serious doubts about the correctness of SPCC's characterization of LRIC and FDC in terms of average variable cost and average total cost. [36] Given the District Court's findings of fact in the present case, however, it is unnecessary for us to resolve these **[**77]** issues. It is also unnecessary for us to decide today precisely what rule for identifying predatory pricing this circuit should adopt. We hold only that, accepting *arguendo* SPCC's legal arguments, SPCC cannot on the facts of this case prevail on *any* of the three grounds it advances.

[78]** First, we conclude that the District Court's findings that AT & T priced Telpak, Hi/Lo and MPL above both LRIC and FDC are not clearly erroneous. The evidence supporting these findings is discussed at considerable length in the District Court's opinion. Briefly, AT & T submitted a number of cost studies showing that the Telpak,

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[35] *See* MCI Communications Corp. v. AT & T, 708 F.2d 1081, 1114-25 (7th Cir.), *cert. denied*, ***464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)***; Northeastern Telephone Co. v. AT & T, 651 F.2d 76, 89-90 (2d Cir. 1981), *cert. denied*, ***455 U.S. 943, 71 L. Ed. 2d 654, 102 S. Ct. 1438 (1982)***; *cf.* ***Aeronautical Radio, Inc. v. FCC, 206 U.S. App. D.C. 253, 642 F.2d 1221, 1236-47 (D.C. Cir. 1980)*** (Wilkey, J., dissenting) (arguing that it was arbitrary and capricious for the FCC to prescribe fully distributed cost as a standard for establishing minimum rates in competitive markets), *cert. denied*, ***451 U.S. 920, 68 L. Ed. 2d 311, 101 S. Ct. 1998, 101 S. Ct. 1999 (1981)***.

[36] *See* MCI Communications Corp. v. AT & T, 708 F.2d 1081, 1114-25 (7th Cir.), *cert. denied*, ***464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)***.

Hi/Lo and MPL rates were projected to be above LRIC and FDC, and actually were above those costs. AT & T's studies were corroborated by a study performed by an independent accounting firm. A number of economists testified that AT & T's cost studies were as soundly conceived and carried out as such studies practicably can be. In contrast, SPCC did not introduce a single study purporting to show AT & T's actual costs. SPCC introduced several internal AT & T documents allegedly showing that Telpak was not profitable. The District Court found these documents inconclusive:

> For the most part, the Court cannot tell what kind of analysis underlies these documents or what they were intended to reflect; and for this reason alone, the Court cannot give this evidence any significant weight. It appears, however, that several of the documents do not even **[**79]** relate to Telpak's revenue/cost relationship and that several others in fact show that [sic] Telpak rates to be covering costs. Moreover, other of the documents do not appear to reflect current conditions at all, but rather to show rough projections into 1977 and 1980 which were associated with some kind of rate planning effort (*e.g.*, PX2-0168; PX2-0175). But by 1977, AT & T had filed to terminate Telpak, thus rendering these projections of little significance. On balance, the Court cannot find that these unexplained documents are sufficient to meet plaintiffs' burden of proof, **[*1007]** particularly when compared to AT & T's detailed, formal studies.

Mem. Op. at 929-30 (footnotes omitted). SPCC also introduced the testimony of two cost witnesses, Mr. Tucker and Mr. Scott, who took AT & T's own cost studies, adjusted them for alleged errors in data and methodology, and then recalculated the cost figures. The recalculated figures showed that Hi/Lo and MPL were priced below LRIC and FDC. SPCC concedes, however, that "Messrs. Scott and Tucker did not purport to establish the true FDC and LRIC for Hi/Lo and MPL." Appellants' Opening Brief at 86. In any case, **[**80]** the District Court found that Mr. Tucker and Mr. Scott were not knowledgeable about AT & T's actual plant, engineering, or costs; that there were unexplained inconsistencies in their studies; and that AT & T's witnesses effectively responded to Mr. Tucker's and Mr. Scott's criticisms and demonstrated that their calculations seriously overstated AT & T's costs. Finally, SPCC relied on the testimony of its principal cost witness, Dr. Melody. The District Court found that Dr. Melody's testimony was refuted by AT & T's witnesses. We have reviewed the evidence and testimony summarized above and conclude that the District Court's findings that Telpak, Hi/Lo and MPL were priced above LRIC and FDC are supported by the evidence and are not clearly erroneous.

Having established that the District Court's findings concerning AT & T's costs are not clearly erroneous, we now turn to SPCC's argument that it has proved predatory pricing under the *Inglis-Transamerica* test. SPCC concedes that FDC is equivalent to average total cost. Thus, even under SPCC's view, the District Court's findings that Telpak, Hi/Lo and MPL were priced above FDC mean that Telpak, Hi/Lo and MPL were priced above **[**81]** average total cost. In order to prevail under the *Inglis-Transamerica* test that it advocates, therefore, SPCC must present clear and convincing proof that AT & T priced with predatory intent; that is, that "the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power." *Inglis, 668 F.2d at 1035*. SPCC argues that it met this requirement by proving that AT & T priced below its short run profit-maximizing level in order to eliminate competition from the specialized common carriers. [37] The District Court considered SPCC's charge that AT & T priced below the profit-maximizing rate and found that the charge was unsupported. *See* Mem. Op. at 964-65. The District Court also considered SPCC's "intent" documents and found that these documents could not be read as evincing an anticompetitive intent within the meaning of *Inglis. See* *id. at 890-912, 922 n. 106*. We have reviewed the record and conclude that these findings are supported by the evidence and are not clearly erroneous.

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[37] We note that the First Circuit recently rejected the *Transamerica* rule after thoughtful consideration and held that prices above both marginal and average total cost, even if not profit-maximizing, are conclusively presumed lawful. *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 233-36 (1st Cir. 1983)*; *accord* *MCI Communications Corp. v. AT & T, 708 F.2d 1081, 1114 (7th Cir.)* (decided before *Transamerica*), *cert. denied*, ***464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)***.

Accordingly, even assuming *arguendo* that the *Inglis-Transamerica* **[**82]** test advocated by SPCC is the appropriate test to use, we conclude that SPCC has failed to prove that AT & T engaged in predatory pricing. [38]

2. *The Interconnection Charges*

SPCC alleged at trial that AT & T unlawfully maintained its monopoly power by engaging in various exclusionary interconnection practices. SPCC's theory was that AT & T was **[**83]** required to provide SPCC with full and nondiscriminatory access to the Bell operating companies' local distribution facilities under the "essential facilities" doctrine of the antitrust laws. AT & T **[*1008]** argued in defense that, to the extent that it had engaged at all in the alleged interconnection practices, its conduct was justified by its duty under the regulatory scheme to interconnect only when such interconnection is in the public interest. The District Court ruled in favor of AT & T on each of SPCC's interconnection charges. *See* Mem. Op. at 972-1054. SPCC's principal argument on appeal is that the District Court applied a legally incorrect standard for upholding AT & T's assertions of what SPCC terms the "regulatory justification defense." SPCC also contends that the District Court made errors in its factfinding. [39]

[84]** On appeal, SPCC focuses on five practices or courses of conduct in which AT & T allegedly engaged. Briefly, SPCC's allegations, each of which was rejected by the District Court, are as follows. First, according to SPCC, AT & T engaged in a course of conduct prior to SPCC's commencement of operations on December 26, 1973, that was intended to delay SPCC's entry into the market. SPCC sets forth the following scenario to support its first charge: Before SPCC could commence operations, it was necessary for AT & T and SPCC to establish the terms and conditions upon which AT & T would provide SPCC with interconnections to the Bell operating companies' local distribution facilities. In order to delay having to provide these interconnections, AT & T negotiated in bad faith with SPCC over the terms of a draft facilities contract. When these negotiations were nearing completion, AT & T unilaterally and in bad faith decided to provide the interconnections pursuant to facilities tariffs rather than pursuant to contract. Moreover, AT & T decided to file its tariffs with the state regulatory commissions rather than with the FCC. In October 1973, however, the FCC learned of this plan and **[**85]** ordered the tariffs to be filed with the FCC.

Second, according to SPCC, AT & T refused to provide SPCC with interconnections that would enable SPCC to provide certain switched services, known as FX and CCSA services. [40] It is contended that AT & T based its refusal in bad faith on the pretext that the *Specialized Common Carriers* decision did not authorize SPCC to provide these services, and that it would be contrary to the public interest for AT & T voluntarily to provide interconnections with its switched network, since such interconnections would have an adverse economic, technical and operational impact on the Bell system. On April 23, 1974, however, the FCC ruled that the *Specialized Common Carriers* decision had authorized the specialized common carriers to provide FX and CCSA services.

Third, according to SPCC, AT & T reclassified certain interstate circuits as intrastate circuits in order to deny SPCC interconnections **[**86]** and to place SPCC at a competitive disadvantage.

Fourth, SPCC claims that AT & T provided SPCC with interconnections and services that were operationally and technically inferior to those provided to AT & T's own Long Lines Department.

Finally, according to SPCC, AT & T charged SPCC discriminatorily and excessively high prices for interconnections.

Each of the above charges is based on the theory that the Bell operating companies' local distribution facilities are "essential facilities." By using its control over access to these essential facilities, AT & T had the ability to extend its

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[38] And, *a fortiori*, as the District Court concluded, SPCC has failed to prove that AT & T engaged in predatory pricing under the Areeda-Turner test.

[39] We have considered each of these factual contentions, and upon review of the record conclude that the District Court's findings of fact relating to SPCC's interconnection charges are supported by the evidence and are not clearly erroneous.

[40] For a brief description of FX and CCSA services, see note 5 *supra*.

natural monopoly power in the market for local public switched telephone service to the competitive market for intercity private line service. The antitrust laws therefore prohibit AT & T from unreasonably and discriminatorily restricting access to these essential facilities. *See Hecht v. Pro-Football, Inc., 187 U.S. App. D.C. 73, 570 F.2d 982, 992-93 (D.C. Cir. 1977), cert.* **[*1009]** *denied, 436 U.S. 956, 57 L. Ed. 2d 1121, 98 S. Ct. 3069 (1978); see also Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973); United States v. Terminal* **[**87]** *Railroad Association, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 (1912); MCI Communications Corp. v. AT & T, 708 F.2d 1081, 1132-33 (7th Cir.), cert. denied, 464 U.S. 891, 104 S. Ct.234, 78 L. Ed. 2d 226 (1983); United States v. AT & T, 524 F. Supp. 1336, 1352-53 (D.D.C. 1981).*

HN24[] Absolute equality of access to essential facilities, however, is not mandated by the antitrust laws. In *United States v. Terminal Railroad Association*, the Supreme Court required that ***HN25***[] access to essential facilities be afforded to competitors "upon such just and reasonable terms and regulations as will, in respect of use, character and cost of service, place every such company upon as nearly an equal plane as may be with respect to expenses and charges as that occupied by the proprietary companies." *224 U.S. at 411*. Similarly, in *Hecht*, this circuit stated that essential facilities must be shared on "fair terms," and noted that "the antitrust laws do not require that an essential facility be shared if such sharing would be impractical or would inhibit the defendant's ability to serve its customers adequately." *570 F.2d at 992-93; see also United States v. AT & T, 524 F. Supp. at 1360-61* **[**88]** ("problems of feasibility and practicability may be taken into account by the Court in determining the sufficiency under the law of the access to essential facilities granted by defendants to non-Bell carriers").

Denials of access or restrictive interconnection practices also possibly may be justified on the basis of AT & T's duties as an enterprise regulated under a "public interest" standard. AT & T's duty to provide interconnections with other carriers is governed by *section 201(a)* of the Communications Act, which provides:

> ***HN26***[] It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefore; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

47 U.S.C, § 201(a) (1976). When AT & T is presented **[**89]** with an interconnection request, it must decide in the first instance whether or not voluntarily to grant the request. Public policy will be vindicated only if AT & T makes this decision on the basis of the "public interest" standard of *section 201(a)* as it has been interpreted by the FCC. *See Mid-Texas Communications Systems v. AT & T, 615 F.2d 1372, 1389 (5th Cir.), cert. denied, 449 U.S. 912, 101*, S. Ct. 286, *66 L. Ed. 2d 140 (1980)*. It would therefore be contrary to public policy to permit antitrust liability against AT & T on the basis of interconnection decisions so made. *See id.*

In our view, and in the view of other circuits that have considered the issue, this regulatory justification defense is only applicable if AT & T's asserted "public interest" basis for its interconnection decision is reasonable and if AT & T actually made its decision at the time in good faith on that basis rather than solely on the basis of competitive considerations. The "reasonableness" component of this test requires that AT & T have a reasonable basis in terms of concerns for the public interest that are concrete, articulable, and recognized as legitimate by the appropriate regulatory **[**90]** agencies. *See, e.g., Phonetele, Inc. v. AT & T, 664 F.2d 716, 737-38 (9th Cir. 1981), cert. denied, 459 U.S. 1145, 103 S. Ct. 785, 74 L. Ed. 2d 992 (1983)*. As the Fifth Circuit noted in *Mid-Texas*, however, "though the refusal may be based upon articulable concerns of public policy, it may also be possible to rationalize a decision whose purpose is anticompetitive." *615 F.2d at 1380*. Thus, the "good faith" component **[*1010]** of the test is required as well. Accordingly, the Fifth Circuit held in *Mid-Texas* that Bell could defend its denials of interconnections only "to the extent that Bell *based* its decision here on articulable concerns relating to the public interest as defined in *section 201(a)*." *Id. at 1381* (emphasis added). The Fifth Circuit further stated that "if Bell was correct in its assessment [that interconnection was contrary to the public interest], *and if its purpose in* *refusing interconnection was to vindicate the public interest*, then the refusal, despite its obvious anticompetitive effect, would have been proper and entitled to protection from antitrust scrutiny." *Id. at 1390* (emphasis added).

In sum, we agree with the standard **[**91]** articulated by the Seventh Circuit, which includes both objective and subjective components:

> ***HN27***[] An ideal instruction would very briefly explain, for example, that a carrier has an obligation under the Communications Act to interconnect, but may deny interconnections if it determines that the public interest is to the contrary; and that if the carrier at the time had a reasonable basis in regulatory policy to conclude, and in good faith concluded, that denial of interconnections is required by concrete, articulable concerns for the public interest, then there is no liability under the antitrust laws.

MCI Communications Corp. v. AT & T, 708 F.2d 1081, 1138 (7th Cir.), *cert. denied*, *464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)*.

SPCC argues that the District Court in the present case erred as a matter of law by adopting and applying a test requiring only objective reasonableness. In consequence, according to SPCC, the District Court repeatedly upheld AT & T's after-the-fact rationalizations for its refusals voluntarily to provide interconnections and for the exclusionary practices in which it allegedly engaged after the FCC ordered it to provide interconnections. **[**92]** SPCC argues that the District Court ignored the evidence it introduced allegedly proving that AT & T's conduct was anticompetitively motivated and that AT & T's asserted public interest concerns were pretextual.

It is true that the District Court's discussion of the applicable legal standard for SPCC's interconnection charges focused on the element of objective reasonableness. *See* Mem. Op. at 972-78. The District Court stated that "a denial of interconnection prior to an FCC determination of the public interest will be deemed reasonable under the antitrust laws if there was an objectively reasonable basis for believing that the interconnection was not in the public interest based on recognized public interest considerations." Mem. Op. at 976. It is clear, however, that the District Court recognized and required the element of subjective good faith as well. For example, the District Court approvingly discussed the Fifth Circuit's analysis in *Mid-Texas* of the regulatory justification defense, which requires both reasonableness and good faith. Indeed, the District Court noted that "the Fifth Circuit recognized that it would be 'contrary to public policy to permit antitrust **[**93]** liability' to be imposed where the carrier denies interconnection *on the basis* of legitimate public interest factors." Mem. Op. at 977 (emphasis added).

More to the point, the District Court conducted a thorough examination of all of SPCC's evidence that AT & T acted with anticompetitive intent, and found that AT & T acted throughout in good faith. The District Court conceded that AT & T disagreed in principle with the policy decisions of the FCC and intended to oppose those decisions by speaking out against the FCC's policies. The District Court found, however, that in spite of this disagreement, AT & T was determined to live with the *Specialized Common Carriers* decision as long as it remained official policy and to cooperate fully with the FCC, to follow the FCC's orders, and to treat SPCC and the other specialized common carriers in a fair and nondiscriminatory manner. Moreover, the District Court found that AT & T made certain that its employees and the presidents of the Bell operating companies understood **[*1011]** AT & T's commitment to this policy of full cooperation. The District Court's discussion of this evidence and elaboration of these conclusions precede **[**94]** its discussion of the regulatory justification defense in the Memorandum Opinion; accordingly, there was no reason for the trial court to focus on the subjective good faith element of that defense, which it had already established had been satisfied.

Furthermore, in its subsequent discussion of SPCC's various specific interconnection charges, the District Court repeatedly reasserted its findings that AT & T acted in good faith. To take just one example, SPCC asserts that in accepting AT & T's regulatory justification for its refusal voluntarily to provide FX and CCSA interconnections, the District Court erred "in accepting . . . after-the-fact rationalization[s] while ignoring pervasive evidence of AT & T's bad faith." Appellants' Opening Brief at 43. Yet, in discussing AT & T's denial of FX and CCSA interconnections, the District Court noted that it had

> examined carefully a number of AT & T documents put into evidence here by SPCC which SPCC asserts show that AT & T knew that its conduct was inconsistent with the FCC's orders. The court finds, to the contrary, that none of these documents support that proposition directly or indirectly. What they do show is a general **[**95]** concern by Bell System employees at various levels about the potentially adverse economic, technical and operational consequences of FCC policy trends and possible future FCC directives.

Mem. Op. at 997 n.209.

We therefore reject as unfounded SPCC's argument that the District Court erred as a matter of law by adopting and applying an incorrect legal standard to judge the sufficiency of AT & T's assertions of the regulatory justification defense.

CONCLUSION

We reject SPCC's charge that it was denied a fair trial because of the District Judge's alleged legal and policy bias. We sustain the District Court's holding that SPCC failed to prove that AT & T engaged in predatory pricing or other exclusionary conduct in violation of *section 2* of the Sherman Act. Because this holding is sufficient to support the District Court's judgment in favor of AT & T, the judgment of the District Court is

Affirmed.

National Collegiate Athletic Ass'n v. Board of Regents

Supreme Court of the United States

March 20, 1984, Argued ; June 27, 1984, Decided

No. 83-271

Reporter

468 U.S. 85 *; 104 S. Ct. 2948 **; 82 L. Ed. 2d 70 ***; 1984 U.S. LEXIS 130 ****; 52 U.S.L.W. 4928; 1984-2 Trade Cas. (CCH) P66,139

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION v. BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA ET AL.

Prior History: [**1]** CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Disposition: *707 F.2d 1147*, affirmed.

Core Terms

television, games, athletics, football, college football, broadcasters, networks, output, rights, institutions, telecasts, intercollegiate, schools, amateurism, Sherman Act, sports, teams, regulations, attendance, programs, anticompetitive, compete, enhance, appearances, competitors, attractive, antitrust, procompetitive, audience, consumer

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 > Cartels & Horizontal Restraints > General Overview

HN2[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

A horizontal restraint of trade is created where an agreement among competitors exists on the way in which they will compete with one another. A restraint of this type has often been held to be unreasonable as a matter of law.

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

HN3[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Horizontal price fixing is ordinarily condemned as a matter of law under an "illegal per se" approach because the probability that these practices are anticompetitive is so high. A per se rule is applied when the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output. In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Higher Education & Professional Associations, Colleges & Universities

There is no doubt that the sweeping language of *15 U.S.C.S. § 1* applies to nonprofit entities. Courts impose antitrust liability on nonprofit entities that engage in anticompetitive conduct.

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

HN5[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A conclusion that a restraint of trade is unreasonable may be based either on the nature or character of the contracts, or on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

HN6[] Antitrust & Trade Law, Sherman Act

Under the Sherman Act, *15 U.S.C.S. § 1 et seq.*, the criterion to be used in judging the validity of a restraint on trade is its impact on competition.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN7[] Antitrust & Trade Law, Sherman Act

The Sherman Act, *15 U.S.C.S. § 1 et seq.*, prohibits every contract, combination, or conspiracy in restraint of trade or commerce among the states.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] Higher Education & Professional Associations, Colleges & Universities

A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of anti-trust law. Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.

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

HN9[] Monopolies & Monopolization, Actual Monopolization

Market power is the ability to raise prices above those that would be charged in a competitive market.

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

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

HN10[] Regulated Industries, Higher Education & Professional Associations

The absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.

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

Communications Law > ... > Regulated Entities > Broadcasting > General Overview

HN11[] Monopolies & Monopolization, Actual Monopolization

When a product is controlled by one interest, without substitutes available in the market, there is monopoly power.

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

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

Under the Rule of Reason, hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense, which competitively justifies a deviation from the operations of a free market.

Lawyers' Edition Display

Decision

NCAA exclusive football telecasting plan held Sherman Act violation.

Summary

The University of Oklahoma and the University of Georgia brought suit in the United States District Court for the Western District of Oklahoma against the National Collegiate Athletic Association (NCAA), challenging the validity under the Sherman Act of the NCAA's restraints in the televising of college football games. The District Court ruled that the NCAA unlawfully restrained trade by fixing the price for particular telecasts, boycotting and threatening to boycott potential broadcasters by its exclusive network football-broadcast contracts, and placing an artificial limit on the production of televised college football (*546 F Supp 1276*). The United States Court of Appeals for the Tenth Circuit affirmed but remanded for an appropriate modification of the injunctive decree, holding that the NCAA television plan constituted illegal per se price fixing, and that even if the television plan was not per se illegal, its anticompetitive limitation on price and output was not offset by any procompetitive justification sufficient to save the plan even when the totality of the circumstances was examined (*707 F2d 1147*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Stevens, J., expressing the views of Burger, Ch. J., and Brennan, Marshall, Blackmun, Powell, and O'Connor, JJ., it was held that (1) the record supported the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to customer preference, the NCAA restricted rather than enhanced the place of intercollegiate athletics in the nation's life; and (2) the NCAA television plan, which limited the total amount of televised intercollegiate football and the number of games that an NCAA member might televise, and which forbade any member to make any sale of television rights except in accordance with the basic plan, constituted a restraint on the operation of a free market in violation of 1 of the Sherman Act.

White, J., joined by Rehnquist, J., dissented on the ground that the essentially noneconomic nature of the NCAA's program of self-regulation offset any minimal anticompetitive effects of the television plan.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > TV contract -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]

A television plan adopted by an association of colleges and universities, which limits the total amount of televised intercollegiate football and the number of games that an association member may televise, and which forbids any member to make any sale of television rights except in accordance with the basic plan, constitutes a restraint on the operation of a free market, in violation of 1 of the Sherman Act (*15 USCS 1*), where the record supports the lower court's conclusion that by curtailing output and blunting the ability of member institutions to respond to customer preference, the association restricted rather than enhanced the place of intercollegiate athletics in the nation's life. (White and Rehnquist, JJ., dissented from this holding.)

APPEAL §1506 > findings -- two-court rule -- > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]

The United States Supreme Court accords great weight to a finding of fact which has been made by a United States District Court and approved by a United States Court of Appeals.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > reason -- > Headnote:
LEdHN[3][] [3]

The Sherman Act (*15 USCS 1 et seq.*) is intended to prohibit only unreasonable restraints of trade.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > per se rule -- > Headnote:
LEdHN[4][] [4]

A per se rule is applied when a practice facially appears to be one that would always or almost always tend to restrict competition and restrict output, in which event a restraint is presumed unreasonable without inquiring into the particular market context in which it is found.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §11 > nonprofit entities -- > Headnote:
LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]

Section 1 of the Sherman Act (*15 USCS 1*) applies to nonprofit entities.

EVIDENCE §173 > motive -- NCAA -- > Headnote:
LEdHN[6A][] [6A]***LEdHN[6B]***[] [6B]

As the guardian of an important American tradition, the National Collegiate Athletic Association's motives must be accorded a respectful presumption of validity.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §15 > motive -- > Headnote:
LEdHN[7A][] [7A]***LEdHN[7B]***[] [7B]

Good motives do not validate an otherwise anticompetitive practice.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > rule of reason -- > Headnote:
LEdHN[8][] [8]

A conclusion that a restraint of trade is unreasonable may be based either (1) on the nature or character of the contracts or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices; under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > per se rule -- > Headnote:
LEdHN[9][] [9]

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.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §19 > anticompetitive impact -- > Headnote:
LEdHN[10][] [10]

Under the Sherman Act (*15 USCS 1 et seq.*), the criterion to be used in judging the validity of a restraint on trade is its impact on competition.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §17 > consumer welfare -- > Headnote:
LEdHN[11][] [11]

A restraint that has the affect of reducing the importance of consumer preference in setting price and output is not consistent with the fundamental goal of ***antitrust law*** of serving as a consumer welfare prescription.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §19 > market power -- > Headnote:
LEdHN[12][] [12]

The absence of proof of market power does not justify a naked restriction on price or output; rather, a naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > price -- output -- > Headnote:
LEdHN[13][] [13]

When there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required to demonstrate the anticompetitive character of the agreement.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §19 > market -- > Headnote:
LEdHN[14][] [14]

The correct test for determining whether college football broadcasts constitute a separate market is whether there are other products that are reasonably substitutable for televised NCAA football games.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §19 > monopolies -- > Headnote:
LEdHN[15][] [15]

When a product is controlled by one interest, without substitutes available in the market, there is monopoly power.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > price -- defense -- > Headnote:
LEdHN[16][] [16]

Under the rule of reason, a price rise and output reduction place upon the one causing them a heavy burden of establishing an affirmative defense which competitively justifies the apparent deviation from the operations of a free market.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > defense -- > Headnote:
LEdHN[17][] [17]

The rule of reason does not support a defense based on the assumption that competition itself is unreasonable.

Syllabus

In 1981, petitioner National Collegiate Athletic Association (NCAA) adopted a plan for the televising of college football games of its member institutions for the 1982-1985 seasons. The plan recites that it is intended to reduce the adverse effect of live television upon football game attendance. The plan limits the total amount of televised intercollegiate football games and the number of games that any one college may televise, and no member of the NCAA is permitted to make any sale of television rights except in accordance with the plan. The NCAA has separate agreements with the two carrying networks, the American Broadcasting Cos. and the Columbia Broadcasting System, granting each network the right to telecast the live "exposures" described in the plan. Each network agreed to pay a specified "minimum aggregate compensation" to the participating NCAA members, and was authorized **[****2]** to negotiate directly with the members for the right to televise their games. Respondent Universities, in addition to being NCAA members, are members of the College Football Association (CFA), which was originally organized to promote the interests of major football-playing colleges within the NCAA structure, but whose members eventually claimed that they should have a greater voice in the formulation of football television policy than they had in the NCAA. The CFA accordingly negotiated a contract with the National Broadcasting Co. that would have allowed a more liberal number of television appearances for each college and would have increased the revenues realized by CFA members. In response, the NCAA announced that it would take disciplinary action against any CFA member that complied with the CFA-NBC contract. Respondents then commenced an action in Federal District Court, which, after an extended trial, held that the controls exercised by the NCAA over the televising of college football games violated *§ 1* of the Sherman Act, and accordingly granted injunctive relief. The court found that competition in the relevant market -- defined as "live college football television" -- **[****3]** had been restrained in three ways: (1) the NCAA fixed the price for particular telecasts; (2) its exclusive network contracts were tantamount to a group boycott of all other potential broadcasters and its threat of sanctions against its members constituted a threatened boycott of potential competitors; and (3) its plan placed an artificial limit on the production of televised college football. The Court of Appeals agreed that the Sherman Act had been violated, holding that the NCAA's television plan constituted illegal *per se* price fixing and that even if it were not *per se* illegal, its anticompetitive limitation on price and output was not offset by any procompetitive justifications sufficient to save the plan even when the totality of the circumstances was examined.

Held: The NCAA's television plan violates *§ 1* of the Sherman Act. Pp. 98-120.

(a) While the plan constitutes horizontal price fixing and output limitation, restraints that ordinarily would be held "illegal *per se*," it would be inappropriate to apply a *per se* rule in this case where it involves an industry in which horizontal restraints on competition are essential if the product is to be available **[****4]** at all. The NCAA and its members market competition itself -- contests between competing institutions. Thus, despite the fact that restraints on the ability of NCAA members to compete in terms of price and output are involved, a fair evaluation of their competitive character requires consideration, under the Rule of Reason, of the NCAA's justifications for the restraints. But an analysis under the Rule of Reason does not change the ultimate focus of the inquiry, which is whether or not the challenged restraints enhance competition. Pp. 98-104.

(b) The NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the District Court's findings establish that the plan has operated to raise price and reduce output, both of which are unresponsive to consumer preference. Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon the NCAA a heavy burden of establishing an affirmative defense that competitively justifies this apparent deviation from the operations of a free market. The NCAA's argument that its television plan can have no significant anticompetitive effect since it has no market power must be rejected. As a matter **[****5]** of law, the absence of proof of market power does not justify a naked restriction on price or output and, as a factual matter, it is evident from the record that the NCAA does possess market power. Pp. 104-113.

(c) The record does not support the NCAA's proffered justification for its television plan that it constitutes a cooperative "joint venture" which assists in the marketing of broadcast rights and hence is procompetitive. The District Court's contrary findings undermine such a justification. Pp. 113-115.

(d) Nor, contrary to the NCAA's assertion, does the television plan protect live attendance, since, under the plan, games are televised during all hours that college football games are played. Moreover, by seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to draw live attendance when faced with competition from televised games, the NCAA forwards a justification that is inconsistent with the Sherman Act's basic policy. "The Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *National Society of Professional Engineers v. United States, 435 U.S. 679, 696.* **[****6]** Pp. 115-117.

(e) The interest in maintaining a competitive balance among amateur athletic teams that the NCAA asserts as a further justification for its television plan is not related to any neutral standard or to any readily identifiable group of competitors. The television plan is not even arguably tailored to serve such an interest. It does not regulate the amount of money that any college may spend on its football program or the way the colleges may use their football program revenues, but simply imposes a restriction on one source of revenue that is more important to some colleges than to others. There is no evidence that such restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity. Moreover, the District Court's well-supported finding that many more games would be televised in a free market than under the NCAA plan, is a compelling demonstration that the plan's controls do not serve any legitimate procompetitive purpose. Pp. 117-120.

Counsel: Frank H. Easterbrook argued the cause for petitioner. With him on the briefs were George H. Gangwere and James D. **[****7]** Fellers.

Andy Coats argued the cause for respondents. With him on the brief were Clyde A. Muchmore, Erwin N. Griswold, J. Ralph Beaird, and James F. Ponsoldt.

Solicitor General Lee argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Assistant Attorney General McGrath, Deputy Solicitor General Wallace, Deputy Assistant Attorney General Ginsberg, Jerrold J. Ganzfried, Barry Grossman, and Andrea Limmer. [*]

Judges: STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and O'CONNOR, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, post, p. 120.

Opinion by: STEVENS

Opinion

[*88] **[***75]** **[**2953]** JUSTICE STEVENS delivered the opinion of the Court.

LEdHN[1A][] [1A] **[****8]** The University of Oklahoma and the University of Georgia contend that the National Collegiate Athletic Association has unreasonably restrained trade in the televising of college football games. After an extended trial, the District Court found that the NCAA had violated *§ 1* of the Sherman Act [1] and granted **[***76]** injunctive relief. *546 F.Supp. 1276 (WD Okla. 1982)*. The Court of Appeals agreed that the statute had been violated but modified the remedy in some respects. *707 F.2d 1147 (CA10 1983)*. We granted certiorari, *464 U.S. 913 (1983)*, and now affirm.

I

The NCAA

[**9]** Since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports. It has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs. In some sports, such as baseball, **[**2954]** swimming, basketball, wrestling, and track, it has sponsored and

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[*] Gerald A. Caplan and Alexander Halpern filed a brief for the National Federation of State High School Associations as amicus curiae urging reversal.

Forrest A. Hainline III and J. Laurent Scharff filed a brief for the Association of Independent Television Stations, Inc., as amicus curiae urging affirmance.

[1] *Section 1* provides in pertinent part:

HN1[] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ." 26 Stat. 209, as amended, *15 U. S. C. § 1*.

conducted national tournaments. It has not done so in the sport of football, however. With the **[*89]** exception of football, the NCAA has not undertaken any regulation of the televising of athletic events. [2]

The NCAA has approximately 850 voting members. The regular members are classified into separate divisions to reflect differences in size and scope of their athletic programs. Division I includes 276 colleges with major athletic programs; in this group only 187 **[****10]** play intercollegiate football. Divisions II and III include approximately 500 colleges with less extensive athletic programs. Division I has been subdivided into Divisions I-A and I-AA for football.

Some years ago, five major conferences together with major football-playing independent institutions organized the College Football Association (CFA). The original purpose of the CFA was to promote the interests of major football-playing schools within the NCAA structure. The Universities of Oklahoma and Georgia, respondents in this Court, are members of the CFA.

History of the NCAA Television Plan

In 1938, the University of Pennsylvania televised one of its home games. [3] From 1940 through the 1950 season all of Pennsylvania's home games were televised. App. 303. That was the beginning of the relationship between television and college football.

[**11]** On January 11, 1951, a three-person "Television Committee," appointed during the preceding year, delivered a report to the NCAA's annual convention in Dallas. Based on preliminary surveys, the committee had concluded that "television does have an adverse effect on college football attendance and unless brought under some control threatens to seriously harm the nation's overall athletic and physical **[*90]** system." *Id*., at 265. The report emphasized that "the television problem is truly a national one and requires collective action by the colleges." *Id*., **[***77]** at 270. As a result, the NCAA decided to retain the National Opinion Research Center (NORC) to study the impact of television on live attendance, and to declare a moratorium on the televising of football games. A television committee was appointed to implement the decision and to develop an NCAA television plan for 1951. *Id*., at 277-278.

The committee's 1951 plan provided that only one game a week could be telecast in each area, with a total blackout on 3 of the 10 Saturdays during the season. A team could appear on television only twice during a season. The plan also provided that the NORC would **[****12]** conduct a systematic study of the effects of the program on attendance. *Id*., at 279. The plan received the virtually unanimous support of the NCAA membership; only the University of Pennsylvania challenged it. Pennsylvania announced that it would televise all its home games. The council of the NCAA thereafter declared Pennsylvania a member in bad standing and the four institutions scheduled to play at Pennsylvania in 1951 refused to do so. Pennsylvania then reconsidered its decision and abided by the NCAA plan. *Id*., at 280-281.

During each of the succeeding five seasons, studies were made which tended to indicate that television had an adverse effect on attendance at college football games. During those years the NCAA continued to exercise complete control over the number of games that could be televised. *Id*., at 325-359.

From 1952 through 1977 the NCAA television committee followed essentially the same procedure for developing its television plans. It would first circulate a questionnaire to the membership and then use the responses as a basis for formulating **[**2955]** a plan for the ensuing season. The plan was then submitted to a vote by means of a mail referendum. **[****13]** Once approved, the plan formed the basis for NCAA's negotiations **[*91]** with the networks. Throughout this period the plans retained the essential purposes of the original plan. See 546 F.Supp., at 1283. [4]

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[2] Presumably, however, it sells the television rights to events that the NCAA itself conducts.

[3] According to the NCAA football television committee's 1981 briefing book: "As far as is known, there were [then] six television sets in Philadelphia; and all were tuned to the game." App. 244.

Until 1977 the contracts were all for either 1- or 2-year terms. In 1977 the NCAA adopted "principles of negotiation" for the future and discontinued the practice of submitting each plan for membership approval. Then the NCAA also entered into its first 4-year contract granting exclusive rights to the American Broadcasting Cos. (ABC) for the 1978-1981 seasons. ABC had held the exclusive rights to network telecasts of NCAA football games since 1965. *Id., at 1283-1284*.

[**14]** *The Current Plan*

The plan adopted in 1981 for the 1982-1985 seasons is at issue in this **[***78]** case. [5] **[****15]** This plan, like each of its predecessors, recites that it is intended to reduce, insofar as possible, the adverse effects of live television upon football game attendance. [6] It provides that "all forms of television of the football **[*92]** games of NCAA member institutions during the Plan control periods shall be in accordance with this Plan." App. 35. The plan recites that the television committee has awarded rights to negotiate and contract for the telecasting of college football games of members of the NCAA to two "carrying networks." *Id*., at 36. In addition to the principal award of rights to the carrying networks, the plan also describes rights for a "supplementary series" that had been awarded for the 1982 and 1983 seasons, [7] as well as a procedure for permitting specific "exception telecasts." [8]

[**16]** In separate agreements with each of the carrying networks, ABC and the Columbia Broadcasting System (CBS), the NCAA granted each the right to telecast the 14 live "exposures" described in the plan, in accordance with the "ground rules" set **[**2956]** forth therein. [9] Each of the networks agreed to pay a specified "minimum

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[4] The television committee's 1981 briefing book elaborates:

"In 1952, the NCAA Television Committee initiated a plan for controlling the televising of college football games. The plans have remained remarkably similar as to their essential features over the past 30 years. They have had the following primary objectives and purposes:

"1. To reduce, insofar as possible, the adverse effects of live television upon football game attendance and, in turn, upon the athletic and education programs dependent upon that football attendance;

"2. To spread television among as many NCAA member colleges as possible; and

"3. To provide football television to the public to the extent compatible with the other two objectives." *Ibid*.

[5] Because respondents sought and obtained only injunctive relief against future violations of *§ 1* in the District Court, we do not consider previous NCAA television plans except to the extent that they shed light on the purpose and effect of the current plan.

[6] "The purposes of this Plan shall be to reduce, insofar as possible, the adverse effects of live television upon football game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; to reflect properly the image of universities as educational institutions; to promote college football through the use of television, to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives." *Id*., at 35 (parenthetical omitted).

[7] The supplementary series is described in a separate article of the plan. It is to consist of no more than 36 exposures in each of the first two years and no more than 40 exposures in the third and fourth years of the plan. Those exposures are to be scheduled on Saturday evenings or at other times that do not conflict with the principal football series that is scheduled for Saturday afternoons. *Id*., at 86-92.

[8] An "exception" telecast is permitted in the home team's market of games that are sold out, and in the visiting team's market of games played more than 400 miles from the visiting team's campus, but in both cases only if the broadcast would not be shown in an area where another college football game is to be played. *Id*., at 62-72. Also, Division II and Division III institutions are allowed complete freedom to televise their games, except that the games may not appear on a network of more than five stations without the permission of the NCAA. *Id*., at 73-74.

aggregate compensation **[*93]** to the participating NCAA member institutions" during the 4-year period in an amount that totaled $ 131,750,000. In essence the agreement authorized each network to negotiate directly with member schools for the right to televise their games. The agreement itself does not describe the method of computing the compensation for each game, but the practice that has developed over the years and that the District Court found would be followed under the current agreement involved the setting of a recommended fee by a representative of the NCAA for different types of telecasts, with national telecasts being **[***79]** the most valuable, regional telecasts being less valuable, and Division II or Division III games commanding a still lower price. [10] **[****18]** The aggregate of all these payments presumably equals the total minimum aggregate compensation **[****17]** set forth in the basic agreement. Except for differences in payment between national and regional telecasts, and with respect to Division II and Division III games, the amount that any team receives does not change with the size of the viewing audience, the number of markets in which the game is telecast, or the particular characteristic of the game or the participating teams. Instead, the "ground rules" provide that the carrying networks make alternate selections of those games they wish to televise, and thereby obtain the exclusive right to submit a bid at an essentially fixed price to the institutions involved. See *546 F.Supp., at 1289-1293*. [11]

[*94] The plan also contains "appearance requirements" and "appearance limitations" which pertain to each of the 2-year periods that the **[****19]** plan is in effect. The basic requirement imposed on each of the two networks is that it must schedule appearances for at least 82 different member institutions during each 2-year period. Under the appearance limitations no member institution is eligible to appear on television more than a total of six times and more than four times nationally, with the appearances to be divided equally between the two carrying networks. See *id., at 1293*. The number of exposures specified in the contracts also sets an absolute maximum on the number of games that can be broadcast.

Thus, although the current plan is more elaborate than any of its predecessors, it retains the essential features of each of them. It limits the total amount of televised intercollegiate football and the number of games that any one team may televise. No member is permitted to make any **[**2957]** sale of television rights except in accordance with the basic plan.

Background of this Controversy

Beginning in 1979 CFA members began to advocate that colleges with major football programs should have a greater voice in the formulation of football television policy than they **[***80]** had in the **[****20]** NCAA. CFA therefore investigated the possibility of negotiating a television agreement of its own, developed **[*95]** an

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[9] In addition to its contracts with the carrying networks, the NCAA has contracted with Turner Broadcasting System, Inc. (TBS), for the exclusive right to cablecast NCAA football games. The minimum aggregate fee for the initial 2-year period of the TBS contract is $ 17,696,000. *546 F.Supp., at 1291-1292*.

[10] The football television committee's briefing book for 1981 recites that a fee of $ 600,000 was paid for each of the 12 national games telecast by ABC during the regular fall season and $ 426,779 was paid for each of the 46 regional telecasts in 1980. App. 250. The report further recites: "Division I members received $ 27,842,185 from 1980 football television revenue, 89.8 percent of the total. Division II's share was $ 625,195 (2.0 percent), while Division III received $ 385,195 (1.3 percent) and the NCAA $ 2,147,425 (6.9 percent)." *Id*., at 251.

[11] The District Court explained how the agreement eliminates competition for broadcasting rights:

"First, the networks have no intention to engage in bidding. Second, once the network holding first choice for any given date has made its choice and agreed to a rights fee for that game with the two teams involved, the other network is then in a monopsony position. The schools cannot threaten to sell the broadcast rights to any other network. They cannot sell to NBC without committing a violation of NCAA rules. They cannot sell to the network which had first choice over that particular date because, again, they would be in violation of NCAA rules, and the network would be in violation of its agreement with NCAA. Thus, NCAA creates a single eligible buyer for the product of all but the two schools selected by the network having first choice. Free market competition is thus destroyed under the new plan." *546 F.Supp., at 1292-1293*.

independent plan, and obtained a contract offer from the National Broadcasting Co. (NBC). This contract, which it signed in August 1981, would have allowed a more liberal number of appearances for each institution, and would have increased the overall revenues realized by CFA members. See *id., at 1286*.

In response the NCAA publicly announced that it would take disciplinary action against any CFA member that complied with the CFA-NBC contract. The NCAA made it clear that sanctions would not be limited to the football programs of CFA members, but would apply to other sports as well. On September 8, 1981, respondents commenced this action in the United States District Court for the Western District of Oklahoma and obtained a preliminary injunction preventing the NCAA from initiating disciplinary proceedings or otherwise interfering with CFA's efforts to perform its agreement with NBC. Notwithstanding the entry of the injunction, most CFA members were unwilling to commit themselves to the new contractual arrangement with NBC in the face of **[****21]** the threatened sanctions and therefore the agreement was never consummated. See *id., at 1286-1287*.

Decision of the District Court

After a full trial, the District Court held that the controls exercised by the NCAA over the televising of college football games violated the Sherman Act. The District Court defined the relevant market as "live college football television" because it found that alternative programming has a significantly different and lesser audience appeal. *Id., at 1297-1300*. [12] The District Court then concluded that the NCAA **[*96]** controls over college football are those of a "classic cartel" with an

"almost absolute control over the supply of college football which is made available to the networks, to television advertisers, and ultimately to the viewing public. Like all other cartels, NCAA members have sought and achieved a price for their product which is, in most instances, artificially high. The NCAA cartel imposes production limits on its members, and maintains mechanisms for punishing cartel members who seek to stray from these production quotas. The cartel has established a uniform price for the **[****22]** products of each of the member producers, with no regard for the differing quality of these products or the consumer demand for these various products." *Id., at 1300-1301*.

The District Court found that competition in the relevant market had been restrained in three ways: (1) NCAA fixed the price for particular telecasts; (2) its exclusive network contracts were tantamount to a group boycott of all other potential broadcasters and its threat of sanctions **[***81]** against its own members constituted a threatened boycott of potential competitors; and (3) its plan placed an artificial limit on the production of televised college football. *Id., at 1293-1295*.

In the District Court the NCAA offered two principal **[****23]** justifications for its television policies: that they protected the gate attendance of its members and that they tended to preserve a competitive balance among the football programs of the various schools. The District Court rejected the first justification because the evidence did not support the claim that college football television adversely affected gate attendance. *Id., at 1295-1296*. With respect to **[**2958]** the "competitive balance" argument, the District Court found that the evidence failed to show that the NCAA regulations on matters such as recruitment and the standards for preserving amateurism were not sufficient to maintain an appropriate balance. *Id., at 1296*.

[*97] *Decision of the Court of Appeals*

[12] The District Court held that the NCAA had monopolized the relevant market in violation of *§ 2* of the Sherman Act, *15 U. S. C. § 2*. See *546 F.Supp., at 1319-1323*. The Court of Appeals found it unnecessary to reach this issue, as do we.

The Court of Appeals held that the NCAA television plan constituted illegal *per se* price fixing, [707 F.2d, at 1152](). [13] **[****25]** It rejected each of the three arguments advanced by NCAA to establish the procompetitive character of its plan. [14] First, the court rejected the argument that the television plan promoted live attendance, noting that since the plan involved a concomitant reduction in viewership the **[****24]** plan did not result in a net increase in output and hence was not procompetitive. *Id., at 1153-1154*. Second, the Court of Appeals rejected as illegitimate the NCAA's purpose of promoting athletically balanced competition. It held that such a consideration amounted to an argument that "competition will destroy the market" -- a position inconsistent with the policy of the Sherman Act. Moreover, assuming *arguendo* that the justification was legitimate, the court agreed with the District Court's finding "that any contribution the plan made to athletic balance could be achieved by less restrictive means." *Id., at 1154*. Third, the Court of Appeals refused to view the NCAA plan as competitively justified by the need to compete effectively with other types of television programming, since it entirely eliminated competition between producers of football and hence was illegal *per se. Id., at 1155-1156*.

LEdHN[2B][] [2B]Finally, the Court of Appeals concluded that even if the television plan were not *per se* illegal, its anticompetitive limitation on price and output was not offset by any **[*98]** procompetitive justification sufficient to save the plan even when the totality of the circumstances was examined. **[***82]** *Id., at 1157-1160*. [15] **[****26]** The case was remanded to the District Court for an appropriate modification in its injunctive decree. *Id., at 1162*. [16]

II

LEdHN[3][] [3]There can be no doubt that the challenged practices of the NCAA **[****27]** constitute a "restraint of trade" in the sense that they limit members' freedom to negotiate and **[**2959]** enter into their own television contracts. In that sense, however, every contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade. [17]

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[13] **LEdHN[2A]**[] [2A]

The Court of Appeals rejected the District Court's boycott holding, since all broadcasters were free to negotiate for a contract as carrying networks and the threat of sanctions against members for violating NCAA rules could not be considered a boycott if the rules were otherwise valid. *707 F.2d, at 1160-1161*.

[14] In the Court of Appeals as well as the District Court, petitioner argued that respondents had suffered no injury of the type the antitrust laws were designed to prevent, relying on *Brunswick Corp*. v. *Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)*. Both courts rejected its position, *707 F.2d, at 1150-1152*; *546 F.Supp., at 1303-1304*. Petitioner does not seek review on that question in this Court. Brief for Petitioner 5, n. 1.

[15] The Court of Appeals rejected petitioner's position that it should set aside many of the District Court's findings as clearly erroneous. In accord with our usual practice, we must now accord great weight to a finding of fact which has been made by a district court and approved by a court of appeals. See, *e. g., Rogers v. Lodge, 458 U.S. 613, 623 (1982)*. In any event, petitioner does not now ask us to set aside any of the findings of the District Court, but rather argues only that both the District Court and the Court of Appeals erred as a matter of law. Brief for Petitioner 6, n. 2, 18-19.

[16] Judge Barrett dissented on the ground that the NCAA television plan's primary purpose was not anticompetitive. "Rather, it is designed to further the purposes and objectives of the NCAA, which are to maintain intercollegiate football as an amateur sport and an adjunct of the academic endeavors of the institutions. One of the key purposes is to insure that the student athlete is fully integrated into academic endeavors." *707 F.2d, at 1163*. He regarded the television restraints as fully justified "in that they are necessary to maintain intercollegiate football as amateur competition." *Id., at 1165*. He added: "The restraints upon Oklahoma and Georgia and other colleges and universities with excellent football programs insure that they confine those programs within the principles of amateurism so that intercollegiate athletics supplement, rather than inhibit, academic achievement." *Id., at 1167*.

[17] See, *e. g., Arizona v. Maricopa County Medical Society, 457 U.S. 332, 342-343 (1982)*; *National Society of Professional Engineers v. United States, 435 U.S. 679, 687-688 (1978)*; *Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918)*.

[*99] It is also undeniable that these practices share characteristics of restraints we have previously held unreasonable. The NCAA is an association of schools which compete against each other to attract television revenues, not to mention fans and athletes. As the District Court found, the policies of the NCAA with respect to television rights are ultimately **[****28]** controlled by the vote of member institutions. By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created ***HN2***[] a horizontal restraint -- an agreement among competitors on the way in which they will compete with one another. [18] A restraint of this type has often been held to be unreasonable as a matter of law. Because it places a ceiling on the **[***83]** number of games member institutions may televise, the horizontal agreement places an artificial limit on the quantity of televised football that is available to broadcasters and consumers. By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade. [19] Moreover, the District Court found that the minimum aggregate price in fact operates to preclude any price negotiation between broadcasters and institutions, **[*100]** thereby **[****29]** constituting horizontal price fixing, perhaps the paradigm of an unreasonable restraint of trade. [20]

[**30]** ***LEdHN[4]***[] [4]***LEdHN[5A]***[] [5A]***LEdHN[6A]***[] [6A]***LEdHN[7A]***[] [7A]***HN3***[] Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an "illegal *per se*" approach because the probability that these practices are anticompetitive is so high; a *per se* rule is applied when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc*. v. *Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979)*.In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found. Nevertheless, we have decided that it would be inappropriate to apply a *per se* rule to this case. This decision is not based **[**2960]** on a lack of judicial experience with this **[****31]** type of arrangement, [21] **[****32]** on the fact that the NCAA is organized as a nonprofit entity, [22] or **[***84]** on **[*101]** our respect for the NCAA's historic role in the preservation

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[18] See *Arizona v. Maricopa County Medical Society, 457 U.S., at 356-357*; *National Society of Professional Engineers v. United States, 435 U.S., at 694-696*; *United States v. Topco Associates, Inc., 405 U.S. 596, 608-611 (1972)*. See also *United States v. Sealy, Inc., 388 U.S. 350, 352-354 (1967)* (marketing association controlled by competing distributors is a horizontal combination). See generally Blecher & Daniels, Professional Sports and the "Single Entity" Defense Under Section One of the Sherman Act, 4 Whittier L. Rev. 217 (1982).

[19] See, *e. g., United States v. Topco Associates, Inc., 405 U.S., at 608-609*; *United States v. Sealy, Inc., supra; United States v. American Linseed Oil Co., 262 U.S. 371, 388-390 (1923)*; *American Column & Lumber Co*. v. *United States, 257 U.S. 377, 410-412 (1921)*.

[20] See, *e. g., Arizona v. Maricopa County Medical Society, 457 U.S., at 344-348*; *Catalano, Inc*. v. *Target Sales, Inc., 446 U.S. 643, 646-647 (1980) (per curiam); Kiefer-Stewart Co*. v. *Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951)*; *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 212-214 (1940)*; *United States v. Trenton Potteries Co., 273 U.S. 392, 396-398 (1927)*.

[21] While judicial inexperience with a particular arrangement counsels against extending the reach of *per se* rules, see *Broadcast Music, 441 U.S., at 9-10*; *United States v. Topco Associates, Inc., 405 U.S., at 607-608*; *White Motor Co*. v. *United States, 372 U.S. 253, 263 (1963)*, the likelihood that horizontal price and output restrictions are anticompetitive is generally sufficient to justify application of the *per se* rule without inquiry into the special characteristics of a particular industry. See *Arizona v. Maricopa County Medical Society, 457 U.S., at 349-351*; *National Society of Professional Engineers v. United States, 435 U.S., at 689-690*.

[22] ***LEdHN[5B]***[] [5B]***HN4***[] There is no doubt that the sweeping language of *§ 1* applies to nonprofit entities, *Goldfarb v. Virginia State Bar, 421 U.S. 773, 786-787 (1975)*, and in the past we have imposed antitrust liability on nonprofit entities which have engaged in anticompetitive conduct, *American Society of Mechanical Engineers, Inc*. v. *Hydrolevel Corp., 456 U.S. 556, 576 (1982)*. Moreover, the economic significance of the NCAA's nonprofit character is questionable at best. Since the District

and encouragement of intercollegiate amateur athletics. [23] Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.

[**33]** As Judge Bork has noted: "[Some] activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." R. Bork, The Antitrust Paradox 278 (1978). What the NCAA and its member institutions market in this case is competition itself -- contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football -- college football. The identification of this "product" with an academic tradition differentiates **[*102]** college football from and makes it more popular than professional sports to which it might otherwise be comparable, such **[****34]** as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice -- not only the choices available to sports fans but also **[**2961]** those available to athletes -- and hence can be viewed as procompetitive. [24]

Court found that the NCAA and its member institutions are in fact organized to maximize revenues, see *546 F.Supp., at 1288-1289*, it is unclear why petitioner is less likely to restrict output in order to raise revenues above those that could be realized in a competitive market than would be a for-profit entity. Petitioner does not rely on its nonprofit character as a basis for reversal. Tr. of Oral Arg. 24.

[23] ***LEdHN[6B]***[] [6B] ***LEdHN[7B]***[] [7B]

While as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice. See *United States v. Griffith, 334 U.S. 100, 105-106 (1948)*; *Associated Press v. United States, 326 U.S. 1, 16, n. 15 (1945)*; *Chicago Board of Trade v. United States, 246 U.S., at 238*; *Standard Sanitary Manufacturing Co*. v. *United States, 226 U.S. 20, 49 (1912)*; *United States v. Trans-Missouri Freight Assn., 166 U.S. 290, 342 (1897)*.

[24] See *Justice v. NCAA, 577 F.Supp. 356, 379-383 (Ariz. 1983)*; *Jones v. NCAA, 392 F.Supp. 295, 304 (Mass. 1975)*; *College Athletic Placement Service, Inc*. v. *NCAA*, 1975-1 Trade Cases para. 60,117 (NJ), aff'd mem., *506 F.2d 1050 (CA3 1974)*. See also *Brenner v. World Boxing Council, 675 F.2d 445, 454-455 (CA2 1982)*; *Neeld v. National Hockey League, 594 F.2d 1297, 1299, n. 4 (CA9 1979)*; *Smith v. Pro Football, Inc., 193 U. S. App. D. C. 19, 26-27, 593 F.2d 1173, 1180-1181 (1978)*; *Hatley v. American Quarter Horse Assn., 552 F.2d 646, 652-654 (CA5 1977)*; *Mackey v. National Football League, 543 F.2d 606, 619 (CA8 1976)*, cert. dism'd, ***434 U.S. 801 (1977)***; *Bridge Corp. of America v. The American Contract Bridge League, Inc., 428 F.2d 1365, 1370 (CA9 1970)*, cert. denied, ***401 U.S. 940 (1971)***; *Gunter Harz Sports, Inc*. v. *United States Tennis Assn., 511 F.Supp. 1103, 1116* (Neb.), aff'd, *665 F.2d 222 (CA8 1981)*; *Cooney v. American Horse Shows Assn., Inc., 495 F.Supp. 424, 430 (SDNY 1980)*; *Los Angeles Memorial Coliseum Comm'n v. National Football League, 468 F.Supp. 154, 165-166 (CD Cal. 1979)*, preliminary injunction entered, *484 F.Supp. 1274 (1980)*, rev'd on other grounds, *634 F.2d 1197 (CA9 1980)*; *Kupec v. Atlantic Coast Conference, 399 F.Supp. 1377, 1380 (MDNC 1975)*; Closius, Not at the Behest of Nonlabor Groups: A Revised Prognosis for a Maturing Sports Industry, 24 Boston College L. Rev. 341, 344-345 (1983); Kurlantzick, Thoughts on Professional Sports and the ***Antitrust Law***; *Los Angeles Memorial Coliseum* v. *National Football League*, 15 Conn. L. Rev. 183, 189-194 (1983); Note, Antitrust and Nonprofit Entities, 94 Harv. L. Rev. 802, 817-818 (1981). See generally *Hennessey v. NCAA, 564 F.2d 1136, 1151-1154 (CA5 1977)*; *Association for Intercollegiate Athletics for Women v. NCAA, 558 F.Supp. 487, 494-495 (DC 1983)*; *Warner Amex Cable Communications, Inc*. v. *American Broadcasting Cos., 499 F.Supp. 537, 545-546 (SD Ohio 1980)*; *Board of Regents v. NCAA, 561 P. 2d 499, 506-507 (Okla. 1977)*; Note, Tackling Intercollegiate Athletics: An Antitrust Analysis, 87 Yale L. J. 655, 665-666, 673-675 (1978).

[**35]** **[*103]** **[***85]** *Broadcast Music* squarely holds that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive. See *441 U.S., at 18-23*. Similarly, as we indicated in *Continental T. V., Inc*. v. *GTE Sylvania Inc., 433 U.S. 36, 51-57 (1977)*, a restraint in a limited aspect of a market may actually enhance marketwide competition. Respondents concede that the great majority of the NCAA's regulations enhance competition among member institutions. Thus, despite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints.

LEdHN[8][] [8]Our analysis of this case under the Rule of Reason, of course, does not change the ultimate focus of our inquiry. Both *per se* rules and the Rule of Reason are employed "to form a judgment about the competitive significance of the restraint." *National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978)*. **[****36]** ***HN5***[] A conclusion that a restraint of trade is unreasonable may be

"based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions." *Id., at 690* (footnotes omitted).

LEdHN[9][] [9]***LEdHN[10]***[] [10]*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to **[*104]** render unjustified further examination of the challenged conduct. [25] But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same -- whether or not the challenged restraint enhances **[***86]** competition. [26] **[****37]** ***HN6***[] Under the Sherman **[**2962]** Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition. [27]

[**38]** III

Because it restrains price and output, the NCAA's television plan has a significant potential for anticompetitive effects. [28] **[****39]** The findings of the District Court indicate that this **[*105]** potential has been realized. The

[25] See *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 15-16, n. 25 (1984)*; *Arizona v. Maricopa County Medical Society, 457 U.S., at 350-351*; *Continental T. V., Inc*. v. *GTE Sylvania Inc., 433 U.S. 36, 50, n. 16 (1977)*.

[26] Indeed, there is often no bright line separating *per se* from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct. For example, while the Court has spoken of a "*per se*" rule against tying arrangements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis. See *Jefferson Parish Hospital* *Dist. No. 2 v. Hyde, 466 U.S., at 11-12*.

[27] "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. ***HN7***[] And to this end it prohibits 'Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the Several States.'" *Northern Pacific R. Co*. v. *United States, 356 U.S. 1, 4-5 (1958)*.

[28] In this connection, it is not without significance that Congress felt the need to grant professional sports an exemption from the antitrust laws for joint marketing of television rights. See *15 U. S. C. §§ 1291-1295*. The legislative history of this exemption demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion

District Court found that if member institutions were free to sell television rights, many more games would be shown on television, and that the NCAA's output restriction has the effect of raising the price the networks pay for television rights. [29] **[****40]** **[***87]** Moreover, the **[*106]** court found that by fixing a price for television rights to all games, the NCAA creates a price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market. [30] **[****41]** And, of course, **[**2963]** since as a practical matter all member institutions need NCAA approval, members have no real choice but to adhere to the NCAA's television controls. [31]

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could run afoul of the Sherman Act, and in particular reflects its awareness of the decision in *United States v. National Football League, 116 F.Supp. 319 (ED Pa. 1953)*, which held that an agreement among the teams of the National Football League that each team would not permit stations to telecast its games within 75 miles of the home city of another team on a day when that team was not playing at home and was televising its game by use of a station within 75 miles of its home city, violated *§ 1* of the Sherman Act. See S. Rep. No. 1087, 87th Cong., 1st Sess. (1961); H. R. Rep. No. 1178, 87th Cong., 1st Sess., 2-3 (1961); 107 Cong. Rec. 20059-20060 (1961) (remarks of Rep. Celler); *id*., at 20061-20062 (remarks of Rep. McCulloch); Telecasting of Professional Sports Contests: Hearings on H. R. 8757 before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., 1-2 (1961) (statement of Chairman Celler); *id*., at 3 (statement of Rep. McCulloch); *id*., at 10-28 (statement of Pete Rozelle); *id*., at 69-70 (letter from Assistant Attorney General Loevinger).

[29] "It is clear from the evidence that were it not for the NCAA controls, many more college football games would be televised. This is particularly true at the local level. Because of NCAA controls, local stations are often unable to televise games which they would like to, even when the games are not being televised at the network level. The circumstances which would allow so-called exception telecasts arise infrequently for many schools, and the evidence is clear that local broadcasts of college football would occur far more frequently were it not for the NCAA controls. This is not a surprising result. Indeed, this horizontal agreement to limit the availability of games to potential broadcasters is the very essence of NCAA's agreements with the networks. The evidence establishes the fact that the networks are actually paying the large fees because the NCAA agrees to limit production. If the NCAA would not agree to limit production, the networks would not pay so large a fee. Because NCAA limits production, the networks need not fear that their broadcasts will have to compete head-to-head with other college football telecasts, either on the other networks or on various local stations. Therefore, the Court concludes that the membership of NCAA has agreed to limit production to a level far below that which would occur in a free market situation." *546 F.Supp., at 1294*.

[30] "Turning to the price paid for the product, it is clear that the NCAA controls utterly destroy free market competition. NCAA has commandeered the rights of its members and sold those rights for a sum certain. In so doing, it has fixed the minimum, maximum and actual price which will be paid to the schools appearing on ABC, CBS and TBS. NCAA has created the mechanism which produces a uniform price for each national telecast, and a uniform price for each regional telecast. Because of the NCAA controls, the price which is paid for the right to televise any particular game is responsive neither to the relative quality of the teams playing the game nor to viewer preference.

"In a competitive market, each college fielding a football team would be free to sell the right to televise its games for whatever price it could get. The prices would vary for the games, with games between prominent schools drawing a larger price than games between less prominent schools. Games between the more prominent schools would draw a larger audience than other games. Advertisers would pay higher rates for commercial time because of the larger audience. The telecaster would then be willing to pay larger rights fees due to the increased prices paid by the advertisers. Thus, the price which the telecaster would pay for a particular game would be dependent on the expected size of the viewing audience. Clearly, the NCAA controls grossly distort the prices actually paid for an individual game from that to be expected in a free market." *Id., at 1318*.

[31] Since, as the District Court found, NCAA approval is necessary for any institution that wishes to compete in intercollegiate sports, the NCAA has a potent tool at its disposal for restraining institutions which require its approval. See *Silver v. New York Stock Exchange, 373 U.S. 341, 347-349, and n. 5 (1963)*; *Associated Press v. United States, 326 U.S., at 17-18*.

LEdHN[11][] [11]The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete. [32] **[*107]** Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. [33] **[****43]** This latter point is perhaps **[***88]** the most significant, since "Congress designed the Sherman Act as a 'consumer welfare prescription.'" *Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979)*. ***HN8***[] A restraint that has the effect of reducing **[****42]** the importance of consumer preference in setting price and output is not consistent with this fundamental goal of anti-trust law. [34] Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman **[*108]** Act was intended to prohibit. See *Standard Oil Co*. v. *United States, 221 U.S. 1, 52-60 (1911)*. [35] **[****44]** At the same time, the **[**2964]** television plan eliminates competitors from the market, since only those broadcasters able to bid on

[32] See *Fashion Originators' Guild of America, Inc*. v. *FTC, 312 U.S. 457, 465 (1941)*; *Standard Sanitary Manufacturing Co*. v. *United States, 226 U.S., at 47-49*; *Montague & Co*. v. *Lowry, 193 U.S. 38 (1904)*.

[33] "In this case the rule is violated by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures." *Arizona v. Maricopa County Medical Society, 457 U.S., at 348*. The District Court provided a vivid example of this system in practice:

"A clear example of the failure of the rights fees paid to respond to market forces occurred in the fall of 1981. On one weekend of that year, Oklahoma was scheduled to play a football game with the University of Southern California. Both Oklahoma and USC have long had outstanding football programs, and indeed, both teams were ranked among the top five teams in the country by the wire service polls. ABC chose to televise the game along with several others on a regional basis. A game between two schools which are not well-known for their football programs, Citadel and Appalachian State, was carried on four of ABC's local affiliated stations. The USC-Oklahoma contest was carried on over 200 stations. Yet, incredibly, all four of these teams received exactly the same amount of money for the right to televise their games." *546 F.Supp., at 1291*.

[34] As the District Court observed:

"Perhaps the most pernicious aspect is that under the controls, the market is not responsive to viewer preference. Every witness who testified on the matter confirmed that the consumers, the viewers of college football television, receive absolutely no benefit from the controls. Many games for which there is a large viewer demand are kept from the viewers, and many games for which there is little if any demand are nonetheless televised." *Id., at 1319*.

[35] Even in the context of professional football, where Congress was willing to pass a limited antitrust exemption, see n. 28, *supra*, it was concerned about ensuring that telecasts not be subject to output limitations:

"Mr. GARY. On yesterday I had the opportunity of watching three different games. There were three different games on three different channels. . . .

"Would this bill prevent them from broadcasting three different games at one time and permit the league to enter into a contract so that only one game would be permitted?

"Mr. CELLER. The bill does not prevent what the gentleman saw yesterday. As a matter of fact the antitrust exemption provided by the bill shall not apply to any package contract which prohibits the person to whom league television rights are sold or transferred from televising any game within any area except the home area of a member club on the day when that club is playing a home game.

. . . .

"Mr. GARY. I am an avid sports fan. I follow football, baseball, basketball, and track, and I am very much interested in all sports. But I am also interested in the people of the United States being able to see on television the games that are played. I am interested in the television audience. I want to know that they are not going to be prohibited from seeing games that might otherwise be telecast.

"Mr. CELLER. I can assure the gentleman from Virginia that he need have no fears on that score." 107 Cong. Rec. 20060 (1961).

television rights covering the entire NCAA can compete. [36] Thus, as the District Court found, many telecasts that would occur in a competitive market are foreclosed by the NCAA's plan. [37]

[**45]** **[*109]** **[***89]** Petitioner argues, however, that its television plan can have no significant anticompetitive effect since the record indicates that it has no market power -- no ability to alter the interaction of supply and demand in the market. [38] We must reject this argument for two reasons, one legal, one factual.

LEdHN[12][] [12]***LEdHN[13]***[] [13] **[****46]** As a matter of law, ***HN10***[] the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Professional Engineers, 435 U.S., at 692*. [39] **[****47]** Petitioner does not quarrel with **[**2965]** the District Court's **[*110]** finding that price and output are not responsive to demand. Thus the plan is inconsistent with the Sherman Act's command that price and supply be responsive to consumer preference.

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[36] The impact on competitors is thus analogous to the effect of block booking in the motion picture industry that we concluded violated the Sherman Act:

"In the first place, they eliminate the possibility of bidding for films theater by theater. In that way they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit." *United States v. Paramount Pictures, Inc., 334 U.S. 131, 154 (1948)*.

[37] *546 F.Supp., at 1294*. One of respondents' economists illustrated the point:

"[It's] my opinion that if a free market operated in the market for intercollegiate television of football, that there would be substantially more regional and even more local games being televised than there are currently. I can take a specific example from my home state of Indiana.

"I am at Ball State University, which until recently was a division one-A institution, although now is a division one-AA institution in terms of intercollegiate football. When Ball State plays Indiana State, that is a hotly contested game in an intrastate sense. That is a prime example of the type of game that probably would be televised. For example, when Ball State is playing Indiana State at Terre Haute, Indiana, that [would be] a popular game to be televised in the Muncie area, and, vice versa, in Terre Haute when the game happens to be in Muncie." App. 506-507.

See also *id., at 607-608*.

[38] ***HN9***[] Market power is the ability to raise prices above those that would be charged in a competitive market. *Jefferson Parish Hospital* *Dist. No. 2 v. Hyde, 466 U.S., at 27, n. 46*; *United States Steel Corp*. v. *Fortner Enterprises, 429 U.S. 610, 620 (1977)*; *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956)*.

[39] "The fact that a practice is not categorically unlawful in all or most of its manifestations certainly does not mean that it is universally lawful. For example, joint buying or selling arrangements are not unlawful per se, but a court would not hesitate in enjoining a domestic selling arrangement by which, say, Ford and General Motors distributed their automobiles nationally through a single selling agent. Even without a trial, the judge will know that these two large firms are major factors in the automobile market, that such joint selling would eliminate important price competition between them, that they are quite substantial enough to distribute their products independently, and that one can hardly imagine a pro-competitive justification actually probable in fact or strong enough in principle to make this particular joint selling arrangement 'reasonable' under Sherman Act *§ 1*. The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye." P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37-38 (Federal Judicial Center, June 1981) (parenthetical omitted).

[40] We have never required proof of market power in such a case. [41] This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis. [42]

[**48]**

[*111] **[***90]** ***LEdHN[14]***[] [14]***LEdHN[15]***[] [15]As a factual matter, it is evident that petitioner does possess market power. The District Court employed the correct test for determining whether college football broadcasts constitute a separate market -- whether there are other products that are reasonably substitutable for televised NCAA football games. [43] Petitioner's argument that it cannot obtain supracompetitive prices from broadcasters since advertisers, and hence broadcasters, can switch from college football to other types of programming simply ignores the findings of the District Court. It found that intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience. [44] These findings amply support its conclusion that the NCAA possesses market power. [45] Indeed, the District Court's subsidiary finding that advertisers will pay a premium price per viewer to reach audiences watching college football because of their demographic **[****49]** characteristics [46] **[**2966]** is vivid evidence of the uniqueness of this product. [47] **[****51]** Moreover, the District Court's market **[*112]** analysis is firmly supported by our decision in *International Boxing Club of New York, Inc*. v. *United States, 358 U.S. 242 (1959)*, that championship boxing events are uniquely attractive to fans [48] and hence constitute a market separate

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[40] Moreover, because under the plan member institutions may not compete in terms of price and output, it is manifest that significant forms of competition are eliminated. See *Catalano, Inc*. v. *Target Sales, Inc., 446 U.S., at 648-649 (per curiam); Professional Engineers, 435 U.S., at 692-695*; *Paramount Famous Lasky Corp*. v. *United States, 282 U.S. 30, 43-44 (1930)*.

[41] See *United States v. McKesson & Robbins, Inc., 351 U.S. 305, 309-310 (1956)*; *United States v. Socony-Vacuum Oil Co., 310 U.S., at 221*. See also *Klor's, Inc*. v. *Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959)*.

[42] The Solicitor General correctly observes:

"There was no need for the respondents to establish monopoly power in any precisely defined market for television programming in order to prove the restraint unreasonable. Both lower courts found not only that NCAA has power over the market for intercollegiate sports, but also that in the market for television programming -- no matter how broadly or narrowly the market is defined -- the NCAA television restrictions have reduced output, subverted viewer choice, and distorted pricing. Consequently, unless the controls have some countervailing procompetitive justification, they should be deemed unlawful regardless of whether petitioner has substantial market power over advertising dollars. While the 'reasonableness' of a particular alleged restraint often depends on the market power of the parties involved, because a judgment about market power is the means by which the effects of the conduct on the market place can be assessed, market power is only one test of 'reasonableness.' And where the anti-competitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary." Brief for United States as *Amicus Curiae* 19-20 (footnote and citation omitted).

[43] See, *e. g., United States v. Grinnell Corp., 384 U.S. 563, 571 (1966)*; *United States v. E. I. du Pont de Nemours & Co., 351 U.S., at 394-395*; *Times-Picayune Publishing Co*. v. *United States, 345 U.S. 594, 612, n. 31 (1953)*.

[44] See *546 F.Supp., at 1297-1300*. See also Hochberg & Horowitz, Broadcasting and CATV: The Beauty and the Bane of Major College Football, 38 Law & Contemp. Prob. 112, 118-120 (1973).

[45] See, *e. g., Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S., at 27, n. 46*; *id., at 37-38, n. 7* (O'CONNOR, J., concurring in judgment); *Fortner Enterprises, Inc*. v. *United States Steel Corp., 394 U.S. 495, 504-506, and n. 2 (1969)*.

[46] See *546 F.Supp., at 1298-1300*.

[47] As the District Court observed, *id., at 1297*, the most analogous programming in terms of the demographic characteristics of its audience is professional football, and as a condition of its limited exemption from the antitrust laws the professional football leagues are prohibited from telecasting games at times that conflict with intercollegiate football. See *15 U. S. C. § 1293*.

from that for nonchampionship events. See *id., at 249-252*. [49] Thus, respondents **[***91]** have demonstrated that there is a separate market for telecasts of college football which "[rests] on generic qualities differentiating" viewers. *Times-Picayune Publishing Co*. v. *United States, 345 U.S. 594, 613 (1953)*. It inexorably follows that if college football broadcasts be defined as a separate market -- and we are convinced they are -- then the NCAA's complete control over those broadcasts provides a solid basis for the District Court's conclusion that the NCAA possesses market power with respect to those broadcasts. ***HN11***[] "When a product is controlled by one interest, **[****50]** without substitutes available in the market, there is monopoly power." *United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 394 (1956)*. [50]

[**52]**

[*113] ***LEdHN[1B]***[] [1B]***LEdHN[16]***[] [16]Thus, the NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the findings of the District Court establish that it has operated to raise prices and reduce output. ***HN12***[] Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market. See *Professional Engineers, 435 U.S., at 692-696*.We turn now to the NCAA's proffered justifications.

IV

Relying on *Broadcast Music*, petitioner argues that its television plan constitutes a cooperative "joint venture" which assists in the marketing of broadcast rights and hence is procompetitive. While joint ventures have no immunity from the antitrust laws, [51] as *Broadcast Music* indicates, a joint selling arrangement may "[make] possible a new **[****53]** product by reaping otherwise unattainable efficiencies." *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 365 (1982)* (POWELL, J., dissenting) (footnote omitted). The essential contribution **[**2967]** made by the NCAA's arrangement is to define the number of games that may be televised, to establish the price for each exposure, and to define the basic terms of each contract between the network and a home team. The NCAA does not, however, act as a selling agent for any school or for any conference of schools. The selection of individual games, and the negotiation of particular agreements, are matters left to the networks and the individual schools. Thus, the effect of the network plan is not to eliminate **[***92]** individual sales of broadcasts, since these still occur, albeit subject to fixed prices and output limitations. Unlike *Broadcast Music*'s blanket license covering broadcast rights **[*114]** to a large number of individual compositions, here the same rights are still sold on an individual basis, only in a noncompetitive market.

[**54]** The District Court did not find that the NCAA's television plan produced any procompetitive efficiencies which enhanced the competitiveness of college football television rights; to the contrary it concluded that NCAA

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[48] We approved of the District Court's reliance on the greater revenue-producing potential and higher television ratings of championship events as opposed to other events to support its market definition. See *358 U.S., at 250-251*.

[49] For the same reasons, it is also apparent that the unique appeal of NCAA football telecasts for viewers means that "from the standpoint of the consumer -- whose interests the statute was especially intended to serve," *Jefferson Parish Hospital* *Dist. No. 2 v. Hyde, 466 U.S., at 15*, there can be no doubt that college football constitutes a separate market for which there is no reasonable substitute. Thus we agree with the District Court that it makes no difference whether the market is defined from the standpoint of broadcasters, advertisers, or viewers.

[50] See, *e. g., Jefferson Parish Hospital* *Dist. No. 2 v. Hyde, 466 U.S., at 24-25*; *Northern Pacific R. Co*. v. *United States, 356 U.S., at 7-8*; *Times-Picayune*, 345 U.S., at 611-613. Petitioner seems to concede as much. See Brief for Petitioner 36-37; Tr. of Oral Arg. 6.

[51] See *Citizen Publishing Co*. v. *United States, 394 U.S. 131, 134-136 (1969)*; *United States v. Sealy, Inc., 388 U.S., at 353*; *Timken Roller Bearing Co*. v. *United States, 341 U.S. 593, 597-598 (1951)*; *Associated Press v. United States, 326 U.S., at 15-16*.

football could be marketed just as effectively without the television plan. [52] There is therefore no predicate in the findings for petitioner's efficiency justification. Indeed, petitioner's argument is refuted by the District Court's finding concerning price and output. If the NCAA's television plan produced procompetitive efficiencies, the plan would increase output and reduce the price of televised games. The District Court's contrary findings accordingly undermine petitioner's position. In light of these findings, it cannot be said that "the agreement on price is necessary to market the product at all." *Broadcast Music, 441 U.S., at 23*. [53] In *Broadcast Music*, the availability of a package product that no individual could offer enhanced the total volume of music that was sold. Unlike this case, there was no limit of any kind placed on the volume that might be sold in the entire market and each individual remained free to sell his own music **[****55]** without restraint. Here production has been limited, not enhanced. [54] **[*115]** No individual school is free to televise its own games without restraint. The NCAA's efficiency justification is not supported by the record.

[**56]** Neither is the NCAA's television plan necessary to enable the NCAA to penetrate the market through an attractive package sale. Since broadcasting rights to college football constitute a unique product for which there is no ready substitute, there is no need for collective action in order to enable the product to compete against its nonexistent competitors. [55] This is borne out by the District Court's finding that the NCAA's television plan *reduces* the volume of television rights sold.

V

[*93]** Throughout the history of its regulation of intercollegiate football telecasts, the NCAA has indicated its concern with **[**2968]** **[****57]** protecting live attendance. This concern, it should be noted, is not with protecting live attendance at games which *are* shown on television; that type of interest is not at issue in this case. Rather, the concern is that fan interest in a televised game may adversely affect ticket sales for games that will not appear on television. [56]

Although the NORC studies in the 1950's provided some support for the thesis that live attendance would suffer if **[*116]** unlimited television were permitted, [57] **[****58]** the District Court found that there was no evidence to

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[52] See *546 F.Supp., at 1306-1308*.

[53] Compare *id., at 1307-1308* ("The colleges are clearly able to negotiate agreements with whatever broadcasters they choose. We are not dealing with tens of thousands of relatively brief musical works, but with three-hour football games played eleven times each year"), with *Broadcast Music, 441 U.S., at 22-23* (footnotes omitted) ("[To] the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material. ASCAP, in short, made a market in which individual composers are inherently unable to compete fully effectively").

[54] Ensuring that individual members of a joint venture are free to increase output has been viewed as central in evaluating the competitive character of joint ventures. See Brodley, Joint Ventures and Antitrust Policy, 95 Harv. L. Rev. 1523, 1550-1552, 1555-1560 (1982). See also Note, United Charities and the Sherman Act, 91 Yale L. J. 1593 (1982).

[55] If the NCAA faced "interbrand" competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete. See *Continental T. V., Inc*., 433 U.S., at 54-57. Our conclusion concerning the availability of substitutes in Part III, *supra*, forecloses such a justification in this case, however.

[56] The NCAA's plan is not even arguably related to a desire to protect live attendance by ensuring that a game is not televised in the area where it is to be played. No cooperative action is necessary for that kind of "blackout." The home team can always refuse to sell the right to telecast its game to stations in the immediate area. The NCAA does not now and never has justified its television plan by an interest in assisting schools in "blacking out" their home games in the areas in which they are played.

[57] During this period, the NCAA also expressed its concern to Congress in urging it to limit the antitrust exemption professional football obtained for telecasting its games to contests not held on Friday or Saturday when such telecasts might interfere with attendance at intercollegiate games. See H. R. Rep. No. 1178, 87th Cong., 1st Sess., 3-4 (1961); 107 Cong. Rec. 20060-20061

support that theory in today's market. [58] **[****59]** Moreover, as the District Court found, the television plan has evolved in a manner inconsistent with its original design to protect gate attendance. Under the current plan, games are shown on television during all hours that college football games are played. The plan simply does not protect live attendance by ensuring that games will not be shown on television at the same time as live events. [59]

LEdHN[17][] [17]There is, however, a more fundamental reason for rejecting this defense. The NCAA's argument that its television plan is necessary to protect live attendance is not based on a desire to maintain the integrity of college football as a distinct and attractive product, **[****60]** but rather on a fear that the product will not prove sufficiently attractive to draw live attendance when faced with competition from televised games. At bottom the NCAA's position is that ticket sales for most college games are unable to compete in a free market. [60] The **[*117]** television plan protects ticket sales by limiting **[***94]** output -- just as any monopolist increases revenues by reducing output. By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act. "[The] Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Professional Engineers, 435 U.S., at 696*.

[**61]** VI

Petitioner argues that the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important and that it justifies the regulations challenged in this case. We agree **[**2969]** with the first part of the argument but not the second.

Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved. [61] It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.

[**62]** The NCAA does not claim that its television plan has equalized or is intended to equalize competition within any **[*118]** one league. [62] **[****63]** The plan is nationwide in scope and there is no single league or

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(1961) (remarks of Rep. Celler); *id*., at 20662; Hearings, *supra* n. 28, at 66-68 (statement of William R. Reed). The provision enacted as a result is now found in *15 U. S. C. § 1293*.

[58] See *546 F.Supp., at 1295-1296, 1315*.

[59] "[The] greatest flaw in the NCAA's argument is that it is manifest that the new plan for football television does not limit televised football in order to protect gate attendance. The evidence shows that under the new plan, many areas of the country will have access to nine hours of college football television on several Saturdays in the coming season. Because the 'ground rules' eliminate head-to-head programming, a full nine hours of college football will have to be shown on television during a nine-to-twelve hour period on almost every Saturday of the football season in most of the major television markets in the country. It can hardly be said that such a plan is devised in order to protect gate attendance." *Id., at 1296*.

[60] Ironically, to the extent that the NCAA's position has merit, it rests on the assumption that football telecasts are a unique product. If, as the NCAA argues, see *supra, at 111-112*, all television programming is essentially fungible, it would not be possible to protect attendance without banning all television during the hours at which intercollegiate football games are held.

[61] See Part II, *supra*.

[62] It seems unlikely, for example, that there would have been a greater disparity between the football prowess of Ohio State University and that of Northwestern University in recent years without the NCAA's television plan. The District Court found that in fact the NCAA has been strikingly unsuccessful if it has indeed attempted to prevent the emergence of a "power elite" in

tournament in which all college football teams compete. There is no evidence of any intent to equalize the strength of teams in Division I-A with those in Division II or Division III, and not even a colorable basis for giving colleges that have no football program at all a voice in the management of the revenues generated by the football programs at other schools. [63] The **[***95]** interest in maintaining a competitive balance that is asserted by the NCAA as a justification for regulating all television of intercollegiate football is not related to any neutral standard or to any readily identifiable group of competitors.

[**64]** **[*119]** The television plan is not even arguably tailored to serve such an interest. It does not regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenues that are generated by their football programs, whether derived from the sale of television rights, the sale of tickets, or the sale of concessions or program advertising. [64] The plan simply imposes a restriction on one source of revenue that is more important to some colleges than to others. There is no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity. At the same time, as **[**2970]** the District Court found, the NCAA imposes a variety of other restrictions designed to preserve amateurism which are much better tailored to the goal of competitive balance than is the television plan, and which are "clearly sufficient" to preserve competitive balance to the extent it is within the NCAA's power to do so. [65] And much more than speculation supported the District Court's findings on this score. No other NCAA **[****65]** sport employs a similar plan, and in particular the court found that in the most closely analogous sport, college basketball, competitive balance has been maintained without resort to a restrictive television plan. [66]

Perhaps the most important reason for rejecting the argument that the interest in competitive balance is served by the television plan is the District Court's unambiguous and well-supported finding that many more games would be televised in a free market than under the NCAA plan. The hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification under the Rule of **[*120]** Reason is that equal competition will maximize consumer demand **[****66]** for the product. [67] The finding that consumption will materially increase if the controls are removed is a compelling demonstration that they do not in fact serve any such legitimate purpose. [68]

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intercollegiate football. See *546 F.Supp., at 1310-1311*. Moreover, the District Court's finding that there would be more local and regional telecasts without the NCAA controls means that Northwestern could well have generated more television income in a free market than was obtained under the NCAA regime.

[63] Indeed, the District Court found that the basic reason the television plan has endured is that the NCAA is in effect controlled by schools that are not restrained by the plan:

"The plaintiffs and other CFA members attempted to persuade the majority of NCAA members that NCAA had gone far beyond its legitimate role in football television. Not surprisingly, none of the CFA proposals were adopted. Instead the membership uniformly adopted the proposals of the NCAA administration which 'legitimized' NCAA's exercises of power. The result was not surprising in light of the makeup of the voting membership. Of approximately 800 voting members of the NCAA, 500 or so are in Divisions II and III and are not subjected to NCAA television controls. Of the 275 Division I members, only 187 play football, and only 135 were members of Division I-A at the time of the January Convention. Division I-A was made up of the most prominent football-playing schools, and those schools account for most of the football games shown on network television. Therefore, of some 850 voting members, less than 150 suffer any direct restriction on their right to sell football games to television." *Id., at 1317*.

[64] Moreover, the District Court found that those schools which would realize increased revenues in a free market would not funnel those revenues into their football programs. See *id., at 1310*.

[65] See *id., at 1296, 1309-1310*.

[66] See *id., at 1284-1285, 1299*.

[67] See *Continental T. V., Inc*., 433 U.S., at 54-57. See also n. 55, *supra*.

VII

[*96]** ***LEdHN[1C]***[] [1C]The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete **[****67]** in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act. But consistent with the Sherman Act, the role of the NCAA must be to *preserve* a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Dissent by: WHITE

Dissent

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

The NCAA is an unincorporated, nonprofit, educational association whose membership includes almost 800 nonprofit public and private colleges and universities and more than **[*121]** 100 nonprofit athletic conferences and other organizations. Formed in 1905 in response to a public outcry concerning abuses in intercollegiate athletics, the NCAA, through its annual convention, establishes policies and rules governing its members' **[****68]** participation in college sports, conducts national championships, exerts control over some of the economic aspects of revenue-producing sports, and engages in some more-or-less commercial activities. See Note, Tackling Intercollegiate Athletics: An Antitrust Analysis, 87 Yale L. J. 655, 656-657 (1978). Although some of the NCAA's activities, viewed in isolation, bear a resemblance to those undertaken by professional sports leagues and associations, the Court errs in treating intercollegiate athletics under the NCAA's control as a purely commercial venture in which colleges and universities participate solely, or **[**2971]** even primarily, in the pursuit of profits. Accordingly, I dissent.

I

"While it would be fanciful to suggest that colleges are not concerned about the profitability of their ventures, it is clear that other, non-commercial goals play a central role in their sports programs." J. Weistart & C. Lowell, The Law of Sports § 5.12 (1979). The NCAA's member institutions have designed their competitive athletic programs "to be a vital part of the educational system." Constitution and Interpretations of the NCAA, Art. II, *§ 2(a)* (1982-1983), reprinted **[****69]** in App. 216. Deviations from this goal, produced by a persistent and perhaps inevitable desire to "win at all costs," have in the past led, and continue to lead, to a wide range of competitive excesses that prove harmful to students and institutions alike. See G. Hanford, Report to the American Council on Education, An Inquiry into the Need for and Feasibility of a National Study of Intercollegiate Athletics 74-76 (1974) (Hanford); **[***97]** Marco, The Place of Intercollegiate Athletics in Higher Education: The Responsibility of the Faculty, 31 J. Higher Educ. 422, 426 (1968). The fundamental policy **[*122]** underlying the NCAA's regulatory program, therefore, is to minimize such deviations and "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports." Constitution and Interpretations of the NCAA, Art. II, *§ 2(a)*, reprinted in App. 216. See *546 F.Supp. 1276, 1309 (WD Okla. 1982)*.

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[68] This is true not only for television viewers, but also for athletes. The District Court's finding that the television exposure of all schools would increase in the absence of the NCAA's television plan means that smaller institutions appealing to essentially local or regional markets would get more exposure if the plan is enjoined, enhancing their ability to compete for student athletes.

The NCAA, in short, "[exists] primarily to enhance the contribution made by amateur athletic **[****70]** competition to the process of higher education as distinguished from realizing maximum return on it as an entertainment commodity." *Association for Intercollegiate Athletics for Women v. NCAA, 558 F.Supp. 487, 494 (DC 1983)*, aff'd, *236 U. S. App. D. C. 311, 735 F.2d 577 (1984)*. In pursuing this goal, the organization and its members seek to provide a public good -- a viable system of amateur athletics -- that most likely could not be provided in a perfectly competitive market. See *Hennessey v. NCAA, 564 F.2d 1136, 1153 (CA5 1977)*. "Without regulation, the desire of member institutions to remain athletically competitive would lead them to engage in activities that deny amateurism to the public. No single institution could confidently enforce its own standards since it could not trust its competitors to do the same." Note, Antitrust and Nonprofit Entities, 94 Harv. L. Rev. 802, 817-818 (1981). The history of intercollegiate athletics prior to the advent of the NCAA provides ample support for this conclusion. By mitigating what appears to be a clear failure of the free market to serve the ends and goals of higher **[****71]** education, the NCAA ensures the continued availability of a unique and valuable product, the very existence of which might well be threatened by unbridled competition in the economic sphere.

In pursuit of its fundamental goal and others related to it, the NCAA imposes numerous controls on intercollegiate athletic competition among its members, many of which "are similar to those which are summarily condemned when **[*123]** undertaken in a more traditional business setting." Weistart & Lowell, *supra*, § 5.12.b. Thus, the NCAA has promulgated and enforced rules limiting both the compensation of student-athletes, see, *e. g., Justice v. NCAA, 577 F.Supp. 356 (Ariz. 1983)*, and the number of coaches a school may hire for its football and basketball programs, see, *e. g., Hennessey v. NCAA, supra*; it also has prohibited athletes who formerly have been compensated for playing from participating in intercollegiate competition, see, *e. g., Jones v. NCAA, 392 F.Supp. 295 (Mass. 1975)*, restricted the number of athletic scholarships its members may award, and established minimum academic standards for recipients of those scholarships; **[****72]** and it has pervasively regulated the recruitment process, student eligibility, practice schedules, squad size, the number of games **[**2972]** played, and many other aspects of intercollegiate athletics. See *707 F.2d 1147, 1153 (CA10 1983)*; *546 F.Supp., at 1309*. One clear effect of most, if not all, of these regulations is to prevent institutions **[***98]** with competitively and economically successful programs from taking advantage of their success by expanding their programs, improving the quality of the product they offer, and increasing their sports revenues. Yet each of these regulations represents a desirable and legitimate attempt "to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives." *Kupec v. Atlantic Coast Conference, 399 F.Supp. 1377, 1380 (MDNC 1975)*. Significantly, neither the Court of Appeals nor this Court questions the validity of these regulations under the Rule of Reason. See *ante*, at 100-102, 117; *707 F.2d, at 1153*.

Notwithstanding the contrary conclusion of the District Court, *546 F.Supp., at 1316*, **[****73]** and the majority, *ante*, at 117, I do not believe that the restraint under consideration in this case -- the NCAA's television plan -- differs fundamentally for antitrust purposes from the other seemingly anticompetitive aspects of the organization's broader program of self-regulation. **[*124]** The television plan, like many of the NCAA's actions, furthers several complementary ends. Specifically, the plan is designed

"to reduce, insofar as possible, the adverse effects of live television . . . upon football game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; to reflect properly the image of universities as educational institutions; to promote college football through the use of television, to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives." App. 35.

See also *id., at 244, 323, 640, 651, 672*. More generally, in my view, the television plan reflects the NCAA's fundamental policy of preserving **[****74]** amateurism and integrating athletics and education. Nor does the District Court's finding that the plan is intended to maximize television revenues, *546 F.Supp., at 1288-1289, 1315-1316*, warrant any implication that the NCAA and its member institutions pursue this goal without regard to the organization's stated policies.

Before addressing the infirmities in the Court's opinion, I should state my understanding of what the Court holds. To do so, it is necessary first to restate the essentials of the NCAA's television plan and to refer to the course of this case in the lower courts. Under the plan at issue, 4-year contracts were entered into with the American Broadcasting Cos. (ABC), Columbia Broadcasting System (CBS), and Turner Broadcasting System (Turner) after competitive bidding. Every fall, ABC and CBS were to present 14 exposures of college football and Turner would show 19 evening games. The overall price for each network was stated in the contracts. The networks select the games to be telecast and pay directly to the colleges involved what has developed to be **[*125]** a uniform fee for each game telecast. Unless within one of the exceptions, only the **[****75]** designated number of games may be broadcast, and no NCAA member **[***99]** may arrange for televising its games other than pursuant to the plan. Under this scheme, of course, NCAA members must compete against one another for television appearances, although this competition is limited somewhat by the fact that no college may appear on television more than six times in any 2-year period. In 1983, 242 games were televised, 89 network games and 153 under the exceptions provided in the television plan. In 1983, 173 schools appeared on television, 89 on network games and an additional 84 teams under the exceptions. Report of the 1983 NCAA Football Television Committee to **[**2973]** the 78th Annual Convention of the NCAA 61-65 (1984). [1]

[**76]** The District Court held that the plan constituted price fixing and output limitation illegal *per se* under *§ 1* of the Sherman Act; it also held that the scheme was an illegal group boycott, was monopolization forbidden by *§ 2*, and was in any event an unreasonable restraint of trade. It then entered an injunction that for all practical purposes excluded the NCAA from interfering with or regulating its members' arrangements for televising their football games. The Court of Appeals, while disagreeing with the boycott and monopolization holdings, otherwise upheld the District Court's judgment that the television plan violated the Sherman Act, focusing almost entirely on the price-fixing and output-limiting aspects of the television plan. The Court of Appeals, however, differed with the District Court with respect to the injunction. After noting that the injunction vested exclusive control of television rights in the individual schools, the court stated that, "[while] we hold that the NCAA cannot **[*126]** lawfully maintain exclusive control of the rights, how far such rights may be commonly regulated involves speculation that should not be made on the record of the instant **[****77]** case." *707 F.2d, at 1162*. The court expressly stated, for example, that the NCAA could prevent its members from telecasting games on Friday night in competition with high school games, *ibid*., emphasized that the disparity in revenue between schools could be reduced by "[a] properly drawn system of pass-over payments to ensure adequate athletic funding for schools that do not earn substantial television revenues," *id., at 1159*, and indicated that it was not outlawing "membership-wide [contracts] with opt-out and pass-over payment provisions, or blackout rules." *Id., at 1162*. It nevertheless left the District Court's injunction in full force and remanded the case for further proceedings in light of its opinion. Anticipating that the Court would grant certiorari, I stayed the judgment of the Court of Appeals. *463 U.S. 1311 (1983)*.

In affirming the Court of Appeals, the Court first holds that the television plan has sufficient redeeming virtues to escape condemnation as a *per se* violation of the Sherman Act, this because of the inherent characteristics of competitive athletics and the justifiable role of the **[****78]** NCAA in regulating college athletics. It nevertheless **[***100]** affirms the Court of Appeals' judgment that the NCAA plan is an unreasonable restraint of trade because of what it deems to be the plan's price-fixing and output-limiting aspects. As I shall explain, in reaching this result, the Court traps itself in commercial antitrust rhetoric and ideology and ignores the context in which the restraints have been imposed. But it is essential at this point to emphasize that neither the Court of Appeals nor this Court purports to hold that the NCAA may not (1) require its members who televise their games to pool and share the compensation received among themselves, with other schools, and with the NCAA; (2) limit the number of times any member may arrange to have its games shown on **[*127]** television; or (3) enforce reasonable blackout rules to avoid head-to-head competition for television audiences. As I shall demonstrate, the Court wisely and correctly does not condemn such regulations. What the Court does affirm is the Court of Appeals' judgment that the NCAA may not limit the number of games that are broadcast on television and that it may not contract for an overall

[1] Television plans with similar features have been in place since 1951. The 1951-1953 plans were submitted to the Antitrust Division of the Department of Justice for review. The Department took the matter "under study," App. 284-285, and, until this litigation, has apparently never taken the position that the NCAA's television plans were unlawful.

price **[****79]** that has the effect of setting the price for individual game broadcast rights. [2] I disagree with the Court in these respects.

[2974]** II

"In a competitive market," the District Court observed, "each football-playing institution would be an independent seller of the right to telecast its football games. Each seller would be free **[****80]** to sell that right to any entity it chose," and "for whatever price it could get." *546 F.Supp., at 1318*. Under the NCAA's television plan, member institutions' competitive freedom is restrained because, for the most part, television rights are bought and sold, not on a per-game basis, but as a package deal. With limited exceptions not particularly relevant to antitrust scrutiny of the plan, broadcasters wishing to televise college football must be willing and able to purchase a package of television rights without knowing in advance the particular games to which those rights apply. The real negotiations over price and terms take place between the broadcasters and the NCAA rather **[*128]** than between the broadcasters and individual schools. Knowing that some games will be worth more to them than others, the networks undoubtedly exercise whatever bargaining power they possess to ensure that the minimum aggregate compensation they agree to provide for the package bears some relation to the average value to them of the games they anticipate televising. Because some schools' games contribute disproportionately to the total value of the package, see *id., at 1293*, **[****81]** the manner in which the minimum aggregate compensation is distributed among schools whose games **[***101]** are televised has given rise to a situation under which less prominent schools receive more in rights fees than they would receive in a competitive market and football powers like respondents receive less. *Id., at 1315*.

As I have said, the Court does not hold, nor did the Court of Appeals hold, that this redistributive effect alone would be sufficient to subject the television plan to condemnation under *§ 1* of the Sherman Act. Nor should it, for an agreement to share football revenues to a certain extent is an essential aspect of maintaining some balance of strength among competing colleges and of minimizing the tendency to professionalism in the dominant schools. Sharing with the NCAA itself is also a price legitimately exacted in exchange for the numerous benefits of membership in the NCAA, including its many-faceted efforts to maintain a system of competitive, amateur athletics. For the same reasons, limiting the number of television appearances by any college is an essential attribute of a balanced amateur athletic system. Even with shared television **[****82]** revenues, unlimited appearances by a few schools would inevitably give them an insuperable advantage over all others and in the end defeat any efforts to maintain a system of athletic competition among amateurs who measure up to college scholastic requirements.

The Court relies instead primarily on the District Court's findings that (1) the television plan restricts output; and (2) the plan creates a noncompetitive price structure that is unresponsive to viewer demand. *Ante*, at 104-106. See, **[*129]** *e. g.*, *546 F.Supp., at 1318-1319*. These findings notwithstanding, I am unconvinced that the television plan has a substantial anticompetitive effect.

First, it is not clear to me that the District Court employed the proper measure of output. I am not prepared to say that the District Court's finding that "many more college football games would be televised" in the absence of the NCAA controls, *id., at 1294*, is clearly erroneous. To the extent that output is measured solely in terms of the number of televised games, I need not **[**2975]** deny that it is reduced by the NCAA's television plan. But this measure of output is not the proper **[****83]** one. The District Court found that eliminating the plan would reduce the number of games on network television and increase the number of games shown locally and regionally. *Id., at 1307*. It made no finding concerning the effect of the plan on total viewership, which is the more appropriate measure of output or, at least, of the claimed anticompetitive effects of the NCAA plan. This is the NCAA's position,

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[2] This litigation was triggered by the NCAA's response to an attempt by the College Football Association (CFA), an organization of the more dominant football-playing schools and conferences, to develop an independent television plan. To the extent that its plan contains features similar to those condemned as anticompetitive by the Court, the CFA may well have antitrust problems of its own. To the extent that they desire continued membership in the NCAA, moreover, participation in a television plan developed by the CFA will not exempt football powers like respondents from the many kinds of NCAA controls over television appearances that the Court does not purport to invalidate.

and it seems likely to me that the television plan, by increasing network coverage at the expense of local broadcasts, actually expands the total television audience for NCAA football. The NCAA would surely be an irrational "profit maximizer" if this were not the case. In the absence of a contrary finding by the District Court, I cannot conclude that respondents carried their burden of showing that the television plan has an adverse effect on output and is therefore anticompetitive.

Second, and even more important, I am unconvinced that respondents have proved that any reduction in the number of televised college football **[***102]** games brought about by the NCAA's television plan has resulted in an anticompetitive increase in the price of television rights. **[****84]** The District Court found, of course, that "the networks are actually paying the large fees because the NCAA agrees to limit production. If the NCAA would not agree to limit production, the networks would not pay so large a fee." *Id., at 1294*. Undoubtedly, this is true. But the market for television rights to college football competitions should not be equated to the markets **[*130]** for wheat or widgets. Reductions in output by monopolists in most product markets enable producers to exact a higher price for *the same product*. By restricting the number of games that can be televised, however, the NCAA creates a *new product* -- exclusive television rights -- that are more valuable to networks than the products that its individual members could market independently.

The television plan makes a certain number of games available for purchase by television networks and limits the incidence of head-to-head competition between football telecasts for the available viewers. Because competition is limited, the purchasing network can count on a larger share of the audience, which translates into greater advertising revenues and, accordingly, into larger payments **[****85]** per game to the televised teams. There is thus a relationship between the size of the rights payments and the value of the product being purchased by the networks; a network purchasing a series of games under the plan is willing to pay more than would one purchasing the same games in the absence of the plan since the plan enables the network to deliver a larger share of the available audience to advertisers and thus to increase its own revenues. In short, by focusing only on the price paid by the networks for television rights rather than on the nature and quality of the product delivered by the NCAA and its member institutions, the District Court, and this Court as well, may well have deemed anticompetitive a rise in price that more properly should be attributed to an increase in output, measured in terms of viewership.

Third, the District Court's emphasis on the prices paid for particular games seems misdirected and erroneous as a matter of law. The distribution of the minimum aggregate fees among participants in the television plan is, of course, not wholly based on a competitive price structure that is responsive to viewer demand and is only partially related to the value those **[****86]** schools contribute to the total package the networks agree to buy. But as I have already indicated, see **[*131]** *supra*, at 128, this "redistribution" of total television revenues is a wholly justifiable, even necessary, aspect of maintaining a system of truly competitive college teams. As long as the NCAA cannot artificially fix the price of the entire package and demand supercompetitive prices, this aspect of the plan should be of little concern. And I find little, if anything, in the record to support **[**2976]** the notion that the NCAA has power to extract from the television networks more than the broadcasting rights are worth in the marketplace.

III

Even if I were convinced that the **[***103]** District Court did not err in failing to look to total viewership, as opposed to the number of televised games, when measuring output and anticompetitive effect and in failing fully to consider whether the NCAA possesses power to fix the package price, as opposed to the distribution of that package price among participating teams, I would nevertheless hold that the television plan passes muster under the Rule of Reason. The NCAA argues strenuously that the plan and the network **[****87]** contracts "are part of a joint venture among many of the nation's universities to create a product -- high-quality college football -- and offer that product in a way attractive to both fans in the stadiums and viewers on [television]. The cooperation in producing the product makes it more competitive against other [television] (and live) attractions." Brief for Petitioner 15. The Court recognizes that, "[if] the NCAA faced 'interbrand' competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete." *Ante*, at 115, n. 55. See *Continental T. V., Inc*. v. *GTE Sylvania Inc., 433 U.S. 36, 54-57 (1977)*. It rejects the NCAA's proffered procompetitive justification, however, on the ground that college football is a unique product for which there are no available substitutes and "there is no need for collective action in **[*132]** order to enable the product to compete against its nonexistent competitors." *Ante*, at 115 (footnote omitted). This proposition is singularly unpersuasive.

It is one thing to say that "NCAA football is a unique product," *546 F.Supp., at 1299*, **[****88]** that "intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience." *Ante*, at 111 (footnote omitted). See *707 F.2d, at 1158-1159*; *546 F.Supp., at 1298-1300*. It is quite another, in my view, to say that maintenance or enhancement of the quality of NCAA football telecasts is unnecessary to enable those telecasts to compete effectively against other forms of entertainment. The NCAA has no monopoly power when competing against other types of entertainment. Should the quality of the NCAA's product "deteriorate to any perceptible degree or should the cost of 'using' its product rise, some fans undoubtedly would turn to another form of entertainment. . . . Because of the broad possibilities for alternative forms of entertainment," the NCAA "properly belongs in the broader 'entertainment' market rather than in . . . [a] narrower [market]" like sports or football. Grauer, Recognition of the National Football League as a Single Entity Under *Section 1* of the Sherman Act: Implications of the Consumer Welfare Model, *82 Mich. L. Rev. 1, 34, n. 156 (1983)*. **[****89]** See *National Football League v. North American Soccer League, 459 U.S. 1074, 1077 (1982)* (REHNQUIST, J., dissenting from the denial of certiorari); R. Atwell, B. Grimes, & D. Lopiano, The Money Game 32-33 (1980); Hanford, at 67; J. Michener, Sports in America 208-209 (1976); Note, 87 Yale L. J., at 661, and n. 31.

The NCAA has suggested a number of plausible ways in which its television plan might enhance the **[***104]** ability of college football telecasts to compete against other forms of entertainment. Brief for Petitioner 22-25. Although the District Court did conclude that the plan is "not necessary for effective marketing of the product," *546 F.Supp., at 1307*, its **[*133]** finding was directed only at the question whether college football telecasts would continue in the absence of the plan. It made no explicit findings concerning the effect of the plan on viewership and thus did not reject the factual premise of the NCAA's argument that the plan might enhance competition by increasing **[**2977]** the market penetration of NCAA football. See also *707 F.2d, at 1154-1156, 1160*. The District Court's finding **[****90]** that network coverage of NCAA football would likely decrease if the plan were struck down, *546 F.Supp., at 1307*, in fact, strongly suggests the validity of the NCAA's position. On the record now before the Court, therefore, I am not prepared to conclude that the restraints imposed by the NCAA's television plan are "such as may suppress or even destroy competition" rather than "such as merely [regulate] and perhaps thereby [promote] competition." *Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918)*.

IV

Finally, I return to the point with which I began -- the essentially noneconomic nature of the NCAA's program of self-regulation. Like Judge Barrett, who dissented in the Court of Appeals, I believe that the lower courts "erred by subjugating the NCAA's educational goals (and, incidentally, those which Oklahoma and Georgia insist must be maintained in any event) to the purely competitive commercialism of [an] 'every school for itself' approach to television contract bargaining." *707 F.2d, at 1168*. Although the NCAA does not enjoy blanket immunity from the antitrust laws, cf. *Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)*, **[****91]** it is important to remember that the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives." *Klor's, Inc*. v. *Broadway-Hale Stores, Inc., 359 U.S. 207, 213, n. 7 (1959)*.

The fact that a restraint operates on nonprofit educational institutions as distinguished from business entities is as "relevant **[*134]** in determining whether that particular restraint violates the Sherman Act" as is the fact that a restraint affects a profession rather than a business. *Goldfarb v. Virginia State Bar, supra, at 788, n. 17*. Cf. *Community Communications Co*. v. *Boulder, 455 U.S. 40, 56, n. 20 (1982)*. The legitimate noneconomic goals of colleges and universities should not be ignored in analyzing restraints imposed by associations of such institutions on their members, and these noneconomic goals "may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Goldfarb v. Virginia State Bar, supra, at 788, n. 17*. **[****92]** The Court of Appeals, like the District Court, flatly refused to consider what it termed "noneconomic" justifications advanced by the NCAA in support of the television plan. It was of the **[***105]** view that our decision in *National Society of Professional Engineers v. United States, 435 U.S. 679 (1978)*, precludes reliance on noneconomic factors in assessing the reasonableness of the television plan. *707 F.2d, at 1154*; see Tr. of Oral Arg. 24-25. This view was mistaken, and I note that the Court does not in so many words repeat this error.

Professional Engineers did make clear that antitrust analysis usually turns on "competitive conditions" and "economic conceptions." *435 U.S., at 690*, and n. 16. Ordinarily, "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." *Id., at 691*. The purpose of antitrust analysis, the Court emphasized, "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 **[****93]** the members of an industry." *Id., at 692*. Broadly read, these statements suggest that noneconomic values like the promotion of amateurism and fundamental educational objectives could not save the television plan from condemnation under the Sherman Act. **[*135]** But these **[**2978]** statements were made in response to "public interest" justifications proffered in defense of a ban on competitive bidding imposed by practitioners engaged in standard, profit-motivated commercial activities. The primarily non-economic values pursued by educational institutions differ fundamentally from the "overriding commercial purpose of [the] day-to-day activities" of engineers, lawyers, doctors, and businessmen, Gulland, Byrne, & Steinbach, Intercollegiate Athletics and Television Contracts: Beyond Economic Justifications in Antitrust Analysis of Agreements Among Colleges, *52 Ford. L. Rev. 717, 728 (1984)*, and neither *Professional Engineers* nor any other decision of this Court suggests that associations of nonprofit educational institutions must defend their self-regulatory restraints solely in terms of their competitive impact, without regard for the legitimate **[****94]** noneconomic values they promote.

When these values are factored into the balance, the NCAA's television plan seems eminently reasonable. Most fundamentally, the plan fosters the goal of amateurism by spreading revenues among various schools and reducing the financial incentives toward professionalism. As the Court observes, the NCAA imposes a variety of restrictions perhaps better suited than the television plan for the preservation of amateurism. *Ante*, at 119. Although the NCAA does attempt vigorously to enforce these restrictions, the vast potential for abuse suggests that measures, like the television plan, designed to limit the rewards of professionalism are fully consistent with, and essential to the attainment of, the NCAA's objectives. In short, "[the] restraints upon Oklahoma and Georgia and other colleges and universities with excellent football programs insure that they confine those programs within the principles of amateurism so that intercollegiate athletics supplement, rather than inhibit, educational achievement." *707 F.2d, at 1167* (Barrett, J., dissenting). The collateral consequences of the spreading of **[*136]** regional and national **[****95]** **[***106]** appearances among a number of schools are many: the television plan, like the ban on compensating student-athletes, may well encourage students to choose their schools, at least in part, on the basis of educational quality by reducing the perceived economic element of the choice, see Note, 87 Yale L. J., at 676, n. 106; it helps ensure the economic viability of athletic programs at a wide variety of schools with weaker football teams; and it "[promotes] competitive football among many and varied amateur teams nationwide." Gulland, Byrne, & Steinbach, *supra*, at 722 (footnote omitted). These important contributions, I believe, are sufficient to offset any minimal anticompetitive effects of the television plan.

For all of these reasons, I would reverse the judgment of the Court of Appeals. At the very least, the Court of Appeals should be directed to vacate the injunction of the District Court pending the further proceedings that will be necessary to amend the outstanding injunction to accommodate the substantial remaining authority of the NCAA to regulate the telecasting of its members' football games.

References

*54 **[****96]** Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 210*

15 USCS 1

US L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 16

L Ed Index to Annos, Restraints of Trade and Monopolies

ALR Quick Index, Restraints of Trade and Monopolies; Sports

Federal Quick Index, Monopolies and Restraints of Trade

Annotation References:

Application of federal antitrust laws to professional sports. 18 ALR Fed 489.

Application of state antitrust laws to athletic leagues or associations. 85 ALR3d 970.

Remington Prods. v. N. Am. Philips Corp.

United States District Court for the District of Connecticut

June 28, 1984, Decided; June 28, 1984, Filed

CIVIL ACTION NO. B-82-56 (RCZ)

Reporter
107 F.R.D. 642 *; 1984 U.S. Dist. LEXIS 24940 **

REMINGTON PRODUCTS, INC. vs. NORTH AMERICAN PHILIPS CORPORATION, N. V. PHILIPS' GLOEILAMPENFABRIEKEN, and SCHICK INCORPORATED

Subsequent History: Sanctions allowed by *Remington Products, Inc. v. North American Philips Corp., 107 F.R.D. 642, 1985 U.S. Dist. LEXIS 16574 (D. Conn., 1985)*

Core Terms

discovery, sanctions, documents, good faith, discovery order, compliance, default, noncompliance, recommended, disclosure, bad faith, factors, discovery request, exemption, contempt, nondisclosure, antitrust, failure to comply, anti trust law, district court, blocking, parties, negate, appropriate sanction, failure to provide, national interest, refuse to comply, default judgment, circumstances, authorities

Judges: [1]** Shaun S. Sullivan, Special Master.

Opinion by: Shaun S. Sullivan

Opinion

[*645] *RECOMMENDED RULING AND REPORT OF THE SPECIAL MASTER WITH RESPECT TO REMINGTON PRODUCTS, INC.'S MOTION FOR DEFAULT AND SANCTIONS AGAINST N. V. PHILIPS' GLOEILAMPENFABRIEKEN, DATED SEPTEMBER 9, 1983*

In this antitrust action, plaintiff Remington Products, Inc. ("Remington") challenges the acquisition of the electric shaver assets of defendant Schick Incorporated ("Schick") by defendant North American Philips Corporation ("NAPC") and NAPC's parent, defendant N. V. Philips' Gloeilampenfabrieken ("N. V. Philips"). The District Court referred the case to the undersigned Special Master for a recommended ruling and report with respect to certain discovery disputes which have arisen between the parties.

The present discovery dispute results from the failure of N. V. Philips, a Dutch corporation and a defendant in this case, to provide any discovery in this action. On October 25, 1982, Remington filed a Motion to Compel Discovery against N. V. Philips. N. V. Philips in its Memorandum in Opposition argued that (1) certain portions of the requested discovery were irrelevant, (2) the discovery requested which might be relevant was duplicative of material **[**2]** provided by or available from NAPC, and (3) N. V. Philips was prevented by Article 39 of the Dutch Competition Code from complying with the discovery requests.

After oral argument on Remington's Motion to Compel, the Special Master recommended that (1) N. V. Philips' relevancy objection be sustained only as to those documents which reflect transactions or events not affecting the

U.S. market, and otherwise be overruled, (2) N. V. Philips be required to list relevant documents identical to those provided by NAPC, and otherwise recommended that the objection based **[*646]** on duplication of material in the possession of NAPC be overruled, and (3) N. V. Philips be ordered to comply with certain discovery requests, and be ordered to seek a waiver under Article 39 from the Dutch authorities. Recommended Ruling, dated January 7, 1983, at 2-9. The Court adopted the Recommended Ruling on January 24, 1983, and ordered N. V. Philips to comply with discovery in accordance with that ruling.

On February 1, 1983, N. V. Philips filed an application by letter with the Dutch Ministry of Economic Affairs (the "Ministry") requesting a waiver of the restrictions of Article 39, attaching to the application the pleadings **[**3]** in this case relating to discovery from N. V. Philips. The application stated:

> In accordance with American rules of practice, "discovery proceedings" have been initiated by Remington against both NAPC and our company in which Remington did not confine itself to the information already provided and offered by NAPC but insisted that also our company furnish information, documents, and "depositions." We have opposed these demands. See in this connection attachment A: 2a-2w.
>
> Nevertheless, on 24th January 1983 Judge Robert C. Zampano made the attached order (attachment A: 3).
>
> In compliance with Article 39 of the Dutch Economic Competition Act we hereby request you to grant us an exemption from the prohibition to comply with the Judge's order.

On March 9, 1983, Remington submitted a memorandum to the Ministry setting forth reasons why the waiver should be granted. The Ministry reached a "decision in principle" not to grant the waiver in May, 1983, and officially denied the request for a waiver by letter dated August 2, 1983. N. V. Philips subsequently informed the Court on August 19, 1983, of the Ministry's decision and stated that compliance with the Court's discovery order was "not possible".

On **[**4]** September 9, 1983, Remington filed a Motion for Default and Sanctions against N. V. Philips for N. V. Philips' failure to comply with the discovery order of the Court dated January 24, 1983. N. V. Philips filed a Memorandum in Opposition, dated November 18, 1983, to which Remington has responded with a Reply Memorandum, dated December 2, 1983. Oral argument on the motion was held before the Special Master on December 19, 1983.

I.

A. *N. V. Philips*

N. V. Philips is the largest company in The Netherlands, with over $ 16 billion in annual worldwide gross revenues. N. V. Philips manufactures and sells a myriad of products, many of which are exported to and sold in the United States. [*] Electric shavers manufactured by N. V. Philips have been sold in the United States since 1948 under the NORELCO brand name, with over 3 million such shavers presently being sold in the United States each year.

In the course of its business operations N. V. Philips has frequently sought the protection of American laws. For example, N. V. Philips has **[**5]** sought and received U.S. trademark registrations and patent registrations for many of its products, including electric shavers. N. V. Philips has also resorted to American courts and agencies with respect to disputes regarding its business interests. [**]

The amended complaint in this action names N. V. Philips as a defendant in all four counts, which counts allege violations of *Sections 1* and *2* of the Sherman Act, *Section 7* of the Clayton Act, and *§§35-26* and *35-27* of the Connecticut General Statutes. **[*647]** N. V. Philips has not contested the Court's jurisdiction over it as a party in this case.

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[*] *E.g.*, televisions, radios, video cassette recorders, coffeemakers, hair dryers, home video games, cameras, home and office lighting equipment, and medical equipment.

[**] *See, e.g., N. V. Philips v. United States*, No. 149-83C, United States Claims Court, slip op., March 21, 1983; *N. V. Philips v. Atomic Energy Commission, 316 F.2d 401, 114 U.S. App. D.C. 400 (D.C. Cir. 1963)*; *In re N. V. Philips' Gloeilampenfabrieken*, Decision of the Comptroller General, No. B-207485.3 (May 3, 1983).

B. *Article 39*

Article 39 of the Dutch Competition Code states, in relevant part:

> 1. Save in so far as Our Ministers have prescribed an exception or, on request, have granted exemption, it shall be forbidden to comply deliberately with any measures or decisions taken by any other State, which relate to any regulations **[**6]** of competition, dominant positions or conduct restricting competition.
> 2. Exceptions and exemptions may have restrictions attached to them. They may be subject to conditions.

Article 39 is similar to nondisclosure statutes of several other nations, which are commonly termed "blocking statutes". Article 39 was enacted in response to an investigation and prosecution in the 1950's by the U.S. Department of Justice of an international petroleum cartel. The Dutch government prohibited disclosure of documents in that proceeding, and subsequently codified its position in Article 39.

There is no doubt, therefore, that the purpose of Article 39 is to frustrate the enforcement of U.S. ***antitrust law*** with respect to Dutch companies. [***] There has never been a reported prosecution of a Dutch company for failure to abide by Article 39.

II.

A party failing to comply with a discovery order of the Court is normally subject to sanctions pursuant to *Rule 37(b) of the Federal Rules of Civil Procedure*. *Rule 37(b)(2)* states the general rule that if "a party or an officer, director, or managing agent **[**7]** of a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just". Where, however, a foreign party's failure to comply is based on a statute of its own country which prohibits compliance, the court must balance several factors in determining whether sanctions are appropriate. *See* Restatement (Second) of the Foreign Relations Law of the United States, §40 (1965).

The seminal case regarding noncompliance with discovery orders based on foreign blocking statutes is *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958)*, in which a Swiss company suing to recover assets seized under the Trading with the Enemy Act failed to comply with a court order requiring disclosure of documents. The company claimed that disclosure would violate Swiss penal and banking secrecy laws. The district court dismissed the company's complaint as a sanction for noncompliance, but the Supreme Court reversed.

The Supreme Court held in *Societe* "that *Rule 37* should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance **[**8]** with a pretrial production order when it has been established that failure to comply has been due to inability, and not to wilfullness, bad faith, or any fault of petitioner." *357 U.S. at 212*. The Court did not hold that no sanctions were appropriate where good faith inability to comply is shown; in fact, the Court suggested that the district court would be justified in drawing adverse inferences at trial from the noncompliance. *357 U.S. at 213*. The Court held only that dismissal was not authorized by *Rule 37* where good faith had been demonstrated. *Id*.

The Court's holding in *Societe Internationale* was predicated on the fact that the Swiss company was seeking return of company assets which had been summarily seized by the government "without the opportunity for protest by any party claiming **[*648]** that seizure was unjustified under the Trading with the Enemy Act." *See* *357 U.S. at 210-11*. The district court's dismissal of the action thus raised *Fifth Amendment* due process concerns since "this summary power to seize property which is believed to be enemy-owned is rescued from constitutional invalidity under the *Due Process and Just Compensation Clauses of the Fifth Amendment* only by those provisions **[**9]** of the Act which afford a nonenemy claimant a later judicial hearing as to the propriety of the seizure." *357 U.S. at 210-11*.

[***] *See* Tentative Draft No. 3, Restatement (Revised) of Foreign Relations Law in the United States, §420 at 22.

A review of the case law involving blocking statutes decided subsequent to *Societe* will be helpful in evaluating N. V. Phillips' actions in the present case. The lower courts have relied heavily on Section 40 of the Restatement (Second) of Foreign Relations Law of the United States (1965) for guidance. Section 40 provides:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states,
>
> (b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
>
> (c) the extent to which the required conduct is to take place in the territory of the other state,
>
> (d) the nationality of the person, and
>
> (e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed **[**10]** by that state.

In *United States v. First National City Bank, 396 F.2d 897 (2d Cir. 1968)*, the court relied on §40 in affirming a civil contempt judgment against a bank for failure to comply with a grand jury subpoena requiring the bank to produce documents located in the bank's branch in Germany. After balancing the factors enumerated in §40, the court concluded that German law requiring bank secrecy did not excuse the bank's noncompliance. *396 F.2d at 905*. In reaching this decision, the court noted that violation of the German law would not subject the bank to criminal charges and that the bank was an American corporation rather than a German corporation. *Id. at 903, 905*.

A district court's decision not to order a bank to seek waivers from its customers to avoid Swiss bank secrecy law was affirmed in *Trade Development Bank v. Continental Ins. Co., 469 F.2d 35 (2d Cir. 1972)*. The Second Circuit observed that, while the district court unquestionably had the power to order the requests for waivers, and that the "power might appropriately have been exercised in a case such as this", the district court had not abused its discretion in reaching its decision. *469 F.2d at 40-41*. [****]

The imposition of sanctions in the form of a civil contempt for failure to comply with a discovery order was reversed in *In re Westinghouse Elec. Corp. Uranium Contracts Litigation, 563 F.2d 992 (10th Cir. 1977)*. In that case, Westinghouse sought discovery by subpoena of documents located in the Canadian offices of a Delaware corporation, which was not a party in the case. The Delaware corporation resisted the subpoena on grounds that a Canadian statute prohibited compliance. Although the Delaware corporation had sought a waiver **[**12]** from the Canadian authorities, which was denied, the district court **[*649]** held the corporation in contempt, finding that a good faith showing of inability to comply had not been made.

After review of *Societe* and §40, the Tenth Circuit in *Westinghouse* held the finding of lack of good faith to be clearly erroneous, and reversed the contempt judgment. *563 F.2d at 998-99*. In balancing the interests, the court noted Canada's national interest in controlling and supervising atomic energy, and observed that Westinghouse's defense did not "stand or fall on the present discovery order", since "the present discovery, though admittedly of potential significance, is still in a sense cumulative." *Id*.

The Ninth Circuit considered the blocking statute issue in *United States v. Vetco Inc., 691 F.2d 1281 (9th Cir.)*, *cert. denied*, *454 U.S. 1098, 102 S. Ct. 671, 70 L. Ed. 2d 639 (1981)*. The IRS had issued summonses to Vetco, an American corporation, requesting documents from Vetco and its overseas subsidiaries. Vetco sought to avoid compliance with respect to its Swiss subsidiary on the grounds, *inter alia*, that compliance would violate a Swiss

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[****] The **[**11]** approach of the Court in *Trade Development* has been frequently criticized on the grounds that the balancing of interests performed by the district court is appropriate only at the sanctions stage of the proceedings, and is not germane to the issue of whether an order compelling discovery should be entered. *See, e.g., Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1372 (10th Cir.)*, *cert. denied* ***439 U.S. 833, 99 S. Ct. 114, 58 L. Ed. 2d 129 (1978)***; Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation*, 14 Va. J. Int. L. 747, 753 (1974). Since discovery has already been ordered in this case, and a motion for sanctions has been filed, this distinction need not be addressed here.

criminal statute. The district court ordered Vetco to produce the documents, and issued a civil contempt **[**13]** citation when Vetco failed to comply. The Ninth Circuit affirmed. 691 F.2d at 1287-91. The court specifically noted that the case was not controlled by *Societe*, since there were no findings of good faith efforts by Vetco or that production would violate Swiss law. *Id. at 1287*. The court also distinguished *Societe* in that IRS summonses "serve a more pressing national function than civil discovery." *Id. at 1288*.

Both parties to this motion cite in their briefs *In re Uranium Antitrust Litigation, 480 F. Supp. 1138 (N.D. Ill. 1979)*. The issue decided in that case was whether discovery should be ordered in the face of blocking statutes rather than what sanctions should be imposed for noncompliance, so to that extent the case is inapposite. However, the court analyzed three factors in making its determination, [*****] which are of assistance in considering the present controversy: (1) the strength of the Congressional policies underlying the statute which forms the basis for the moving party's action; (2) whether the requested documents are crucial to the determination of a key issue in the litigation; and (3) an appraisal of the chances for flexibility in a country's application of its nondisclosure **[**14]** laws. *480 F. Supp. at 1154-55*. The court, in ordering the requested discovery, determined that: (1) the antitrust laws sued on by the plaintiff "are as important to the preservation of economic freedom and our free-enterprise system as the *Bill of Rights* is to the protection of our fundamental personal freedoms", quoting *United States v. Topco Associates, Inc., 405 U.S. 596, 610, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*, (2) the "inevitable inference is that the withheld information is likely to be the heart and soul of plaintiffs' case", and (3) the degree of leniency in the application of the nondisclosure laws of the several affected countries varied from country to country. *Id*.

Sanctions for failure to comply with a court order requiring production of documents were considered in another uranium antitrust case. In *General Atomic Co. v. Exxon Nuclear Co., 90 F.R.D. 290 (S.D. Cal. 1981)*, the plaintiff relied on the Canadian uranium nondisclosure statute as its defense to defendant's **[**15]** motion for dismissal of the complaint and default on the counterclaim for noncompliance. The court set out as the test for the motion:

> . . . Exxon must establish by a preponderance of the evidence that: (1) the failure to fully comply with the production orders was caused by "wilfullness, bad faith, or any fault" of [plaintiff]; (2) the withheld documents may be crucial to the outcome of this litigation; (3) Exxon is prejudiced by the failure of discovery in the presentation of its case; and (4) the **[*650]** sanctions sought are commensurate with the prejudice to Exxon and the degree of fault attributable to [plaintiff].
>
> *90 F.R.D. at 296*.

The court found bad faith amounting to "courting legal impediments" in plaintiff's deliberate storage of documents in Canada with the expectation that they would be unavailable for discovery and in the "destruction or disappearance" of certain documents in the United States. *Id. at 299, 304*. The court further determined that the requested documents were crucial to a fair trial, and that Exxon would be prejudiced by their nondisclosure. *Id. at 306*.

The *General Atomic* court then addressed the question of the sanction to be applied. Although the sanctions sought **[**16]** by Exxon were not precluded under *Societe*, "in view of the court's findings", the court determined that "their imposition should be reserved for extreme situations where lesser sanctions would be ineffective to cure the consequences of the discovery failure." *90 F.R.D. at 307*. In lieu of the more drastic remedy of a dismissal of the complaint and default on the counterclaim, the court chose to "deem designated facts presumed established subject to rebuttal by [plaintiff]", precluded plaintiff from asserting certain affirmative defenses, and waived the authenticity and other foundational requirements for Exxon as to certain documents. *Id. at 308*. The court expressly mentioned that "[a]n important factor in declining to impose harsher sanctions is the consideration that Exxon has some evidence [produced by plaintiff] available to utilize in the presentation of its claims." *Id*.

As in *Uranium Antitrust Litigation, supra*, *SEC v. Banca Della Svizzera Italiana, 92 F.R.D. 111 (S.D.N.Y. 1981)* concerned the propriety of a discovery order in the face of a Swiss nondisclosure statute rather than the question of

[*****] The court in *Uranium Antitrust* specifically declined to utilize §40 of the Restatement in its analysis, arguing that it is "simply impossible" to judicially balance the competing national interests of the United States with foreign countries.

sanctions for noncompliance. Nevertheless, Remington relies heavily on the analysis **[**17]** of Judge Pollock in *Banca*. The court in *Banca* utilized the §40 factors in its determination that discovery should be ordered, noting the importance of U.S. securities laws, the apparent lack of interest of the U.S. and Swiss governments in the case, the flexibility of the Swiss statute given the "necessity" defense available under it, and the defendant's lack of good faith in undertaking its securities transactions "fully expecting to use foreign law to shield it from the reach of our laws". *92 F.R.D. at 117-19*.

The most recent reported case considering sanctions for noncompliance with a discovery order, based on a blocking statute, is *In re Oil Spill by the Amoco Cadiz, 93 F.R.D. 840 (N.D. Ill. 1982)*. That case involved attempted discovery by the owners of a grounded oil tanker from the Republic of France, a party to the proceeding. The requested documents had been compiled by French government inquiry commissions. France refused to comply with the order compelling discovery, on the ground that disclosure would violate a French criminal nondisclosure statute. The owners sought a default judgment against France and dismissal of France's counterclaims. The court determined that France's **[**18]** refusal to comply was in good faith, and therefore refused the owners' request for default and dismissal. *93 F.R.D. at 843*. Instead, the court allowed the owners the admission into evidence of certain arguably objectionable documents, and stated that it would issue other appropriate rulings at trial to try to minimize the prejudice to the owners. *Id. at 844*.

Analysis of the foregoing cases leads to the following conclusions: (1) the mere existence of the prohibition against disclosure in Article 39 does not preclude the imposition of sanctions against N. V. Philips for its noncompliance with the Court's discovery order; (2) whether sanctions should be imposed depends on a balancing of interests under *Societe* and §40 of the Restatement; (3) if sanctions are imposed, the appropriate sanction is determined by evaluating the prejudice to Remington of N. V. Philips' noncompliance with the discovery order and the degree of culpability which can be attributed to N. V. Philips; (4) the sanction to be imposed must be designed as **[*651]** a just remedy, the purpose of which is to negate the impact of N. V. Philips' refusal to comply with the discovery order; and (5) the sanction of default is not permissible **[**19]** upon a finding of good faith by N. V. Philips.

III.

A review of the factors enumerated in §40 of the Restatement leads to the conclusion that the imposition of sanctions against N. V. Philips is warranted in the circumstances of this case.

The first factor--the competing interests of the two countries--militates in favor of an order designed to enforce this Court's prior discovery order. The vital national interest of the United States in the enforcement of its antitrust laws is unquestionable. As the court observed in *Uranium Antitrust Litigation*:

> Plaintiffs' complaint challenges activities by the defendants which, if true, would constitute massive violations of this nation's antitrust laws. "These laws have long been considered cornerstones of this nation's economic policies, have been vigorously enforced and the subject of frequent interpretation by our Supreme Court." *United States v. First National City Bank, 396 F.2d 897, 903 (2d Cir. 1968)*. They are as important to the preservation of economic freedom and our free-enterprise system as the *Bill of Rights* is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc., 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972)*.
>
> *480 F. Supp. at 1154*.

The **[**20]** fact that this is a private civil action rather than a public enforcement action does not in any manner diminish the importance of the national interest involved; indeed, Congress intended that the antitrust laws would be enforced through civil actions by non-governmental parties. *Id*.

The Dutch national interest, on the other hand, is much less compelling. The Ministry's letter denying N. V. Philips' exemption request hints that the Dutch concern is with confidentiality. ****** Article 39 is significantly different from

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****** The Ministry's letter states, in relevant part:

the Swiss bank secrecy law or the Canadian uranium law, which were involved in Banca and General Atomic, supra. Those nondisclosure laws seek to prevent disclosure of a certain *type* of information in *any* case. Article 39, however, seeks to prevent the disclosure of *all* information in only a single type of case, *i.e*. an antitrust case. It is therefore clear that the Dutch interest involved is not the confidentiality of business documents, but is rather the frustration of the antitrust laws of the United States. Frustration of the law enforcement efforts of another country is not a legitimate national interest which can justify the failure to enforce a valid Court order. **[**21]** *See* Tentative Draft No. 3, Restatement (Revised) of Foreign Relations Law of the United States, §420, Comment (b). Furthermore, to the **[*652]** extent that the Dutch government has any legitimate interest in preserving the confidentiality of the documents in question, that interest can be adequately protected through the Protective Order previously entered in this action on May 27, 1982. ******* Therefore, the first factor of §40 strongly favors granting the present motion.

The second factor is the extent and nature **[**23]** of the hardship that inconsistent enforcement actions would impose upon the party subject to both jurisdictions. Article 39 is a criminal statute, a fact found significant by the Supreme Court in *Societe* with respect to the Swiss law involved there. *See* 357 U.S. at 211. As previously noted, however, no prosecution has ever been pursued under Article 39. As in *Banca*, the availability to N. V. Philips of a "necessity" defense to any prosecution under Article 39 diminishes the hardship imposed on N. V. Philips. *See* Fokkema, Chorus, Hodis and Lissar, *Introduction to Dutch Law for Foreign Lawyers*, at 339. Furthermore, just as the Supreme Court observed in *Societe* that inability to comply is distinguishable from refusal to comply, so might a Dutch court determine that disclosure by N. V. Philips pursuant to a court order is not a "deliberate" disclosure within the meaning of Article 39. ******** Although the foregoing considerations may not completely remove all concern that N. V. Philips could face criminal penalties if it complies with this Court's order, they do greatly reduce that risk. *See, e.g.,* *SEC v. Banca Della Svizzera Italiana, 92 F.R.D. at 118-19*. Indeed, even if these considerations **[**24]** do not afford N. V. Philips a defense, the Dutch authorities must also consider moderating the enforcement of Article 39, in light of the factors outlined in §40 of the Restatement.

The three remaining factors of §40 of the Restatement--the country where compliance will take place, nationality of the person against whom the order is directed and the prospects for compliance with this Court's order if sanctions are imposed--"appear to be less important in [the Second] Circuit." *SEC v. Banca Della Svizzera Italiana, 92 F.R.D.*

> With respect to the first two parts of the decision of the District Court I inform you, also on behalf of the Minister of Foreign Affairs, that I refuse exemption in as far as it concerns information in documents--which also includes written answers to "interrogatories"--of N. V. Philips' Gloeilampenfabrieken which are in the Netherlands since it has not been determined that by complying with the request no conflict can occur with public international law or with the material or formal principles of the Dutch Competition Law.
>
> With respect to the last part of the decision of the District Court it is considered that it concerns behaviour, facts and circumstances in and outside **[**22]** the United States of America of N. V. Philips' Gloeilampenfabrieken, a company operating in the Netherlands.
>
> With respect to the behaviour mentioned in the preceding paragraph it is also considered that the "Notices of Deposition" by which the employees concerned of N. V. Philips' Gloeilampenfabrieken are summoned to make depositions are not subject to any limitation which would mean that information based on documents which are in the Netherlands, belonging to N. V. Philips' Gloeilampenfabrieken would not be excluded in the making of these depositions.
>
> I inform you, also on behalf of my abovementioned colleague, that I also refuse exemption with respect to this part of the decision of the American Judge involved viz, the appearance in person in order to answer questions and to give depositions, on the same grounds as put forward with respect to the order to produce documents and to answer "interrogatories".

******* Indeed, if N. V. Philips believes the outstanding protective order to be inadequate, the Special Master would be willing to consider recommending that the Court require any additional reasonable safeguards suggested by N. V. Philips.

******** By its express terms, Article 39 prohibits only "deliberate" disclosures. The record of the instant case, in which N. V. Philips has filed several briefs and motions in an effort to avoid disclosing the requested information, would appear to strongly refute any suggestion that N. V. Philips' disclosure--if such disclosure is hereafter made--was deliberate.

at 119. The court in *Banca* resolved the three factors in favor of the moving party with respect to discovery sought from a Swiss corporation. The *Banca* court's analysis of these factors can be applied with equal force to the instant case:

> It is significant nevertheless that [the three factors also] tip in **[**25]** favor of the SEC. Performance may be said to occur here as well as in Switzerland since the actual answering of the interrogatories will presumably take place in the United States, where BSI's lawyers are. As for citizenship, it is true that BSI is a Swiss corporation. However, its transnational character, as evidenced by its large number of foreign affiliates,… render this Court less reluctant to order BSI to conform to our laws even where such an order may cause conflict with Swiss law. Last, with respect to enforcement, this Court believes that an appropriate formal order directing the demanded disclosure, to the extent that compliance has been incomplete, will serve as the requisite foundation for any further actions that may be needed in the form of sanctions and should serve to bring home the obligations a foreign entity undertakes when it conducts business on the American securities exchanges.
>
> 92 F.R.D. at 119.

The final factor to be considered; as mandated by *Societe* and subsequent cases, is the good faith of N. V. Philips. That issue is, not unexpectedly, the subject of considerable disagreement between the parties. **[*653]** Under *Societe*, parties resisting discovery under a blocking **[**26]** statute show good faith when they "make all…efforts to the maximum of their ability" to comply. 357 U.S. at 205. Remington argues that the bad faith of N. V. Philips is demonstrated by the tenor of its exemption application to the Ministry, and by the fact that N. V. Philips provided discovery in another antitrust case in which it was a party, when it apparently was in the interest of N. V. Philips to comply with the requested discovery. *See* General Business Systems v. North American Philips Corp., 699 F.2d 965 (9th Cir. 1983). ********* N. V. Philips contends that the situation in *General Business Systems* is distinguishable from this case, and that its conduct in this case reflects its good faith.

By **[**27]** applying for an exemption from Article 39 from the Dutch Ministry, N. V. Philips certainly complied with the letter of the Court's order of January 24, 1983. However, the tenor of this application falls far short of the spirit of that order. ********** The application states that Remington "did not confine itself" to the discovery provided by NAPC, but "insisted" that N. V. Philips provide discovery. N. V. Philips then informs the Ministry that "[w]e have opposed these demands", and provides the Ministry with copies of its briefs opposing the requested discovery. The

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********* Remington also argues that N. V. Philips has the burden of showing its good faith. Since N. V. Philips is clearly able to comply with the Court's discovery order and has consciously decided not to do so, it is proper to place on it the burden of demonstrating good faith with respect to its reliance on Article 39. *See* Societe Internationale v. Rogers, 357 U.S. at 212; United States v. Vetco, Inc., 691 F.2d at 1287. Contra, General Atomic Co. v. Exxon Nuclear Co., 90 F.R.D. 290, 296 (S.D. Cal. 1981).

********** N. V. Philips conten that the tenor of the application is similar to that of an exemption request found to be in good faith in In re Westinghouse, supra, 563 F.2d at 999-1000. The request in *Westinghouse* stated, in part:

> Rio Algom Corporation, as a result, finds itself in a dilemma. It has no desire to offend the court in Utah, but if it complies with the court order in respect to any documents which are subject **[**28]** to the Uranium Information Security Regulations, then it would be in breach, and would cause individuals in Canada to be in breach of the Regulations. This dilemma could be resolved if the Honourable Minister of Energy, Mines and Resources were to consent to the release of the subject documents and to the disclosure of the contents of those documents.
>
> Rio Algom Corporation, therefore, respectfully requests the consent of the Honourable Minister of Energy, Mines and Resources to the release of all documents located in Canada which would respond to the subpoenas and to the disclosure or communication of the contents thereof by Mr. George R. Albino or any other officer, director or employee of Rio Algom Corporation.

A comparison of the two requests for exemption belies N.V. Philips' contention that its request is the equivalent of that approved in *Westinghouse*.

application strongly suggests that N. V. Philips remained opposed to the requested discovery and did not support the exemption application. As such, it is evidence which would support a finding of bad faith.

Remington also points out that N. V. Philips' application is deficient in that it does not mention important facts such as that the discovery order was limited to matters affecting the United States electric shaver market and that any confidential information would be protected by the Court's protective order in this case, dated May **[**29]** 27, 1982. N. V. Philips argues that it asked the Dutch authorities to consider information that Remington might submit, and that Remington in fact made such submissions. However, the question here is the good faith of N. V. Philips, and submissions by Remington are no substitute for a good faith application by N. V. Philips. ***********

[*654] Whether N. V. Philips' apparent lack of good faith in the exemption **[**30]** application would of itself compel a finding of bad faith, other conduct of N. V. Philips, both in the present action and in the General Business Systems litigation, supports a finding of bad faith with respect to N. V. Philips' reliance on Article 39. *See* General Atomic Co. v. Exxon Nuclear Co., supra, 90 F.R.D. at 295 ("While Gulf's efforts to overcome the Security Regulations constitute a *prima facie* showing of good faith to comply with the production orders, Gulf's conduct prior to the passage of the Security Regulations must also be evaluated to determine the appropriateness of sanctions.")

In its original objections to the discovery sought by Remington, N. V. Philips not only asserted Article 39, but also objected on grounds of relevancy and duplicative discovery to all of Remington's discovery demands. Although certain of Remington's discovery requests sought information not affecting the United States market, and accordingly N. V. Philips' relevancy objections were sustained as to these requests, the vast majority of Remington's requests to which N.V. Philips objected as to relevancy were clearly relevant. Similarly, N. V. Philips' objection that all discovery sought by Remington **[**31]** was duplicative because Remington had already obtained discovery of NAPC, a different party, was unsupportable.

The Recommended Ruling dated January 7, 1983, as ordered by the Court on January 24, 1983, expressed "no opinion at [that] time…on the good faith of N. V. Philips to [that] point." The indiscriminate nature of the relevancy and duplicative discovery objections to all discovery sought by Remington suggests that N. V. Philips' reliance on Article 39 was simply another basis for N. V. Philips to utilize to avoid providing any discovery to Remington, and was tantamount to "courting legal impediments" which the Supreme Court in *Societe* recognized as constituting bad faith. 357 U.S. at 209. This inference is confirmed by N. V. Philips' actions in *General Business Systems v. North American Philips Corp*.

General Business Systems was an antitrust suit brought against N. V. Philips and two of its American subsidiaries, NAPC and Philips Business Systems, Inc. GBS, a Philips' distributor for Northern California prior to its termination by Philips Business Systems in 1978, alleged violations of sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act with respect to defendants' **[**32]** small computer magnetic ledger cards. The discovery proceedings in that case suggest that N. V. Philips has not sought the protection of Article 39 where compliance with a discovery order was in its interest.

There is no question that N. V. Philips provided a great deal of discovery in *General Business Systems*, including answers to interrogatories, production of documents and depositions of employees. Remington argues that N. V. Philips' actions in *General Business Systems* demonstrate that N. V. Philips ignores Article 39 when it is convenient to do so and is using Article 39 in this case "solely as a device to avoid its lawful discovery obligations." N. V. Philips contends that *General Business Systems* is distinguished by the fact that the products at issue there were

*********** The fact that N. V. Philips asked the Dutch authorities to consider Remington's submissions may be some indicium of its good faith. However, given the following footnote from page 9 of the Recommended Ruling dated January 7, 1983, as ordered by the Court on January 24, 1983, failure of N. V. Philips to cooperate with Remington would have been clear bad faith:

> N. V. Philips indicated at oral argument that if discovery were ordered it would seek an exemption from Section 39 from the Dutch authorities, and agreed to allow Remington to provide "some input" in the application for an exemption from the Dutch statute. Since the good faith of N. V. Philips will be an important factor in any decision regarding sanctions, it is in its interest to consult with Remington on the application.…

manufactured in Germany, not The Netherlands, and the documents produced and interrogatory answers given contained information derived from Germany or elsewhere outside The Netherlands. N. V. Philips further states that its decision to provide discovery in *General Business Systems* was based on its conclusion that Article 39 did not prohibit compliance, and that it would be irrational to accept Remington's arguments because **[**33]** of N. V. Philips' decision to comply with discovery where Article 39 was not clearly triggered.

In camera review of the discovery available to the Special Master which was provided by N. V. Philips in *General Business Systems* reveals that N. V. Philips' characterization **[*655]** of the discovery it provided in that case is not accurate. It is clear that answers to interrogatories and documents produced by N. V. Philips contained information that could only have been derived from The Netherlands. *See* Remington Exhibits 33, 35-37. Thus, N. V. Philips was willing to construe Article 39 narrowly as not applying in order to make disclosure in the *General Business Systems* litigation. Although this is commendable in attempting to obey the conflicting requirements of two sovereigns, it demonstrates that N. V. Philips' reliance on Article 39 here, when its application is equally tenuous, was for the purpose of avoiding discovery rather than complying with the Dutch law.

The combination of the exemption application, the initial response to Remington's discovery requests and the disclosure made in *General Business Systems* compels the conclusion that N. V. Philips has not sustained its burden of showing **[**34]** good faith. Moreover, even if Remington had the burden of showing bad faith by N. V. Philips, a finding of bad faith on the part of N. V. Philips is justified on these facts. When this finding is viewed in conjunction with a balancing of §40 factors, which strongly favor. Remington, it is clear that sanctions against N. V. Philips are appropriate. *See, e.g.,* General Atomic Co. v. Exxon Nuclear Co., supra, 90 F.R.D. at 306-07.

IV.

Having determined that sanctions are appropriate in this case, the next issue to be addressed is the form the sanctions should take. The principal goal in fashioning a sanction in this context is to encourage N. V. Philips to comply with the order issued by this Court. Consequently, the sanction should be sufficient to negate any benefit N. V. Philips might otherwise obtain in refusing to comply, and it must negate any prejudice that Remington would suffer from a failure of compliance. Secondly, the sanction should be designed, insofar as possible, so that it will not adversely affect any party to the action, other than N. V. Philips. Finally, the sanction chosen should be the one which does the least amount of damage to N. V. Philips, while accomplishing the **[**35]** first two stated goals. A corollary to this last principle is that the drastic remedy of default should be utilized only where there is no other alternative that will satisfy the first two goals.

Clearly, the importance of the requested discovery and the resultant prejudice to Remington of N. V. Philips' failure to provide that discovery is extreme. "[T]he heart of any American antitrust case is the discovery of business documents. Without them, there is virtually no case." *In re Uranium Antitrust Litigation, 480 F. Supp. at 1155*, *quoting* Note, *Discovery of Documents Located Abroad in U.S. Antitrust Litigation*, 14 Va. J. Int'l. L. 747 (1974). Remington claims that N. V. Philips has violated the antitrust laws by conspiring with NAPC and Schick. N. V. Philips' failure to provide any discovery not only virtually insulates it from liability for conspiracy, but also greatly prejudices Remington's entire conspiracy case. "The inevitable inference is that the withheld information is likely to be the heart and soul of plaintiffs' case." *In re Uranium Antitrust Litigation, 480 F. Supp. at 1155*. The discovery sought of N. V. Philips by Remington is, accordingly, crucial to its case.

Concomitant **[**36]** with the prejudice to Remington is the unfair advantage accruing to N. V. Philips as the result of its failure to provide any discovery. Given N. V. Philips' failure to demonstrate its good faith, it is clear that an appropriate sanction should attempt to prevent N. V. Philips' from profiting by its refusal to provide discovery. ************

In addition to the rights and interests of Remington and N. V. Philips, the appropriate sanction must take into account the interests of NAPC and Schick. Both of these defendants have provided discovery to Remington.

************ The discovery immunity claimed by N. V. Philips could very well lead to *de facto* antitrust immunity.

Accordingly, any sanction **[*656]** against N.V. Philips must be crafted as nearly as possible to avoid affecting NAPC and Schick. *************

In determining the appropriate sanction, the case **[**37]** law requires that the least onerous sanction be imposed that is consistent with the factors and interests discussed *supra* at 28-29. *See Wilson v. Volkswagen of America Inc., 561 F.2d 494, 504 (4th Cir. 1977)*, *cert. denied*, *434 U.S. 1020, 98 S. Ct. 744, 54 L. Ed. 2d 768 (1978)*; *Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1127 (5th Cir.)*, *cert. denied*, *400 U.S. 878, 91 S. Ct. 118, 27 L. Ed. 2d 115 (1970)*. A harsh sanction is not appropriate if a lesser sanction is sufficient to do justice under the circumstances. *See Webber v. Eye Corp., 721 F.2d 1067, 1069 (7th Cir. 1983)*; Note, *Standards for Imposition of Discovery Sanctions*, 27 Me. L. Rev. 247, 266 (1975).

Rule 37(b) provides a wide range of sanctions for failure to comply with a discovery order. In addition to the general authority of the court to "make such orders in regard to the failure as are just", *Rule 37(b)* specifically provides for the following sanctions: (1) the award of reasonable expenses, including attorney's fees, incurred as a result of the failure to provide discovery; (2) an order designating facts to be taken as established for the purposes of the action; (3) an order precluding the disobedient party from supporting or opposing designated issues; (4) an order striking out pleadings **[**38]** or parts thereof, or staying proceedings until compliance with the discovery order is achieved; (5) an order of contempt; and (6) an order rendering judgment by default or dismissal. Each of the foregoing sanctions will be analyzed in turn for its fitness with respect to the criteria set forth above.

The award of reasonable expenses, including attorney's fees, is the mildest of the *Rule 37(b)* sanctions. Such an award is clearly appropriate here. *See Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1374-75 (10th Cir.)*, *cert. denied*, *439 U.S. 833, 99 S. Ct. 114, 58 L. Ed. 2d 129 (1978)*. However, the award to Remington of reasonable expenses and attorney's fees is insufficient to negate the consequences of N. V. Philips' refusal to comply with discovery.

An order designating certain facts as established is useful when the discovery failure relates to discrete factual claims of the parties. *E.g., Evanson v. Union Oil Co., 85 F.R.D. 274, 278 (D. Minn. 1979)*, *appeal dismissed*, *619 F.2d 72 (8th Cir.)*, *cert. denied*, *449 U.S. 832, 101 S. Ct. 102, 66 L. Ed. 2d 38 (1980)*. Where, however, a party fails to provide any discovery, there are no discrete facts which can appropriately be established other than the totality of the factual allegations of the complaint. Moreover, **[**39]** where there are conspiracy allegations, it would be unreasonable to order a jury to take as established certain facts with regard to one alleged co-conspirator and not with regard to the others. ************** For example, it would clearly be prejudicial to NAPC to order a jury to take as established as to N. V. Philips that N. V. Philips conspired with NAPC, yet require the jury to determine whether NAPC conspired with N. V. Philips. Therefore, an order designating facts as established is not an appropriate sanction in this case.

An order precluding N. V. Philips from supporting or opposing designated issues suffers from similar infirmities. Since N. V. Philips failed to provide any discovery, it should logically be precluded on all issues, which would constitute a *de facto* default. Precluding N. V. Philips on only a single or few issues would be both arbitrary in terms of selection of issues and insufficient to negate the consequences of N. V. Philips' actions. Issue preclusion is therefore also not a practical solution.

[*657] The striking of N. V. Philips' answer and affirmative defenses would, as in general issue preclusion, **[**40]** constitute a *de facto* default. Merely striking the affirmative defenses would not negate the consequences of N. V. Philips' actions, since Remington would still be denied the documentary evidence, if it exists, necessary to prove the allegations of its complaint.

************* Although under certain circumstances an American subsidiary, such as NAPC, may be ordered to produce documents controlled by its foreign parent, *see Uranium Antitrust Litigation, 480 F. Supp. at 1152-53*, and presumably could also be sanctioned for failure to comply, the record is insufficient to justify such action against NAPC.

************** Remington claimed this case to a jury on March 8, 1982.

A contempt order in the form of a continuing fine for noncompliance could be directed solely at N. V. Philips. However, contempt is not appropriate under the circumstances. Although N. V. Philips has failed to demonstrate that it acted in good faith in its refusal to provide discovery as a result of Article 39, Article 39 is nevertheless an existing statute in N. V. Philips' home jurisdiction. By doing business in both the United States and the Netherlands, N. V. Philips has subjected itself to the conflicting requirements of two sovereigns. *See, e.g.,* *First Nat. City Bank v. I.R.S., 271 F.2d 616, 620 (2d Cir. 1959)*. So long as N. V. Philips is not allowed to take advantage of its failure to provide discovery, it is for N. V. Philips to decide which course to take to resolve the conflict. Therefore, contempt is not recommended as an appropriate sanction.

In addition to the specific sanctions analyzed above, several combinations **[**41]** and permutations of those sanctions have been considered and rejected for failing to meet the criteria listed *supra* at 28-29. The sanction remaining for consideration is a default against N. V. Philips. It is indisputable that a default judgment is "a drastic remed[y], and should be applied only in extreme circumstances." *Independent Prod. Co. v. Loew's, Inc., 283 F.2d 730, 733 (2d Cir. 1960)*. Moreover, default judgments are properly disfavored since they deny a party a decision on the merits and raise due process considerations. *Wilson v. Volkswagen of America, Inc., 561 F.2d at 503-04*; *General Atomic Co. v. Exxon Nuclear Co., 90 F.R.D. at 307*. Nevertheless, harsh sanctions such as default can be appropriate responses to bad faith failures to provide discovery because of the important specific and general deterrence functions of such sanctions. *See* *National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643, 96 S. Ct. 2778, 49 L. Ed. 2d 747 (1976)*; *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979)*.

Under the circumstances presented in this case, a default is the only sanction which negates the consequences of N. V. Philips' actions, while not affecting **[**42]** the rights of innocent parties such as NAPC and Schick. There is no less drastic sanction which would accomplish these aims. Nevertheless, in order to provide N. V. Philips with a final opportunity to comply with the Court's discovery order, the Special Master recommends that a default judgment be entered against N. V. Philips, to be followed by a hearing in damages pursuant to *Rule 55(b)(2) of the Federal Rules of Civil Procedure*, unless N. V. Philips within 60 days of the Court's adoption of this ruling affirms to the Court its intention to comply with the discovery order.

CONCLUSION

The Special Master recommends that a default judgment be entered against N. V. Philips unless it affirms to the Court its intention to comply with this Court's discovery order, dated January 24, 1983, within 60 days of the Court's adoption of this recommended ruling. The Special Master further recommends that N. V. Philips be ordered to pay Remington its reasonable expenses, including attorney's fees, incurred in connection with this motion.

Dated at New Haven, Connecticut, this 28 day of June, 1984.

/s/ Shaun S. Sullivan

Shaun S. Sullivan

Special Master

L.A. Draper & Son v. Wheelabrator-Frye, Inc.

United States Court of Appeals for the Eleventh Circuit

June 29, 1984

No. 83-7242

Reporter

735 F.2d 414 *; 1984 U.S. App. LEXIS 20972 **; 1984-2 Trade Cas. (CCH) P66,084; 39 Fed. R. Serv. 2d (Callaghan) 733

L.A. DRAPER & SON, Plaintiff-Appellant, v. WHEELABRATOR-FRYE, INC., a corporation, Hessco Industrial Supply, Inc., a corporation, Fred Z. Hester, an individual, Defendants-Appellees

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

Disposition: AFFIRMED AND REMANDED WITH INSTRUCTIONS.

Core Terms

state claims, pendent, district court, shot, four-state, sales, unfair competition, relevant market, antitrust claim, geographic, rule of reason, distributors, consumer, unfair, federal claim, antitrust, directed verdict, abuse of discretion, state law claim, factors, costs, conspired, customers, employees, prices, statute of limitations, federal court, convenience, suppliers, transport

LexisNexis® Headnotes

Civil Procedure > Preliminary Considerations > Venue > Individual Defendants

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

HN1[] **Venue, Individual Defendants**

See *28 U.S.C.S. § 1391(b)*.

Antitrust & Trade Law > Clayton Act > Jurisdiction

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Special Venue

HN2[] Clayton Act, Jurisdiction

The Clayton Act's specific venue provisions do not abolish or supersede venue provision of 28 U.S.C.S. § 1391(b).

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN3[] Regulated Practices, Trade Practices & Unfair Competition

A plaintiff establishes an antitrust violation by proving that defendants conspired to use unfair and predatory competitive means to eliminate the plaintiff as a competitor, and that the plaintiff's elimination from the marketplace in this fashion imposed an illegal restraint on trade under the rule of reason analysis.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN4[] Trials, Judgment as Matter of Law

On motions for directed verdict and for judgment notwithstanding the verdict the court should consider all of the evidence, not just that evidence which supports the non-mover's case, but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Evidence > Weight & Sufficiency

Civil Procedure > Trials > Jury Trials > General Overview

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

HN5[] Trials, Judgment as Matter of Law

If there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN6[] Trials, Judgment as Matter of Law

To avoid a directed verdict the plaintiff must present sufficient evidence to create a jury question with respect to each element of its case.

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN7[ ] **Regulated Practices, Trade Practices & Unfair Competition**

There is a policy against summary dispositions of antitrust cases where motive and intent play leading roles, and the proof is largely in the hands of the alleged conspirators and hostile witnesses, and where the plaintiff must build its case largely on circumstantial evidence.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

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

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

HN8[ ] **Standards of Review, Abuse of Discretion**

The dismissal without prejudice of the pendent state claims is to be judged on an abuse of discretion standard.

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

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

HN10[ ] **Antitrust & Trade Law, Clayton Act**

See *15 U.S.C.S. § 15*.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

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

HN11[] Per Se Rule & Rule of Reason, Per Se Violations

Depending on the claim presented, the court evaluates an alleged violation of 15 U.S.C.S. § 1 under a per se or rule of reason analysis. Certain activities, such as price fixing, have such a pernicious effect on competition and are so lacking in any redeeming virtue that they are deemed per se violations without inquiry into the nature of their impact on a particular market. Other restraints on trade, such as territorial restrictions that a manufacturer imposes on a distributor, have possible procompetitive influences on a given market and the legality of the restraint is judged under the rule of reason.

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

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

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 fact 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.

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

HN13[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The rule of reason inquiry must be tied to a particular market in which the challenged activity is alleged to impose an impermissible restraint. An antitrust policy divorced from market considerations would lack any objective benchmarks.

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

HN14[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In the circuit, the court evaluates a 15 U.S.C.S. § 1 claim that the defendants conspired to use unfair competitive means to drive plaintiff from the market place under the rule of reason standard.

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

Mergers & Acquisitions Law > Antitrust > General Overview

HN15[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The rule of reason test has two parts, under which the plaintiff must show: (1) a market effect that would be prohibited under the law of mergers; and (2) other conduct by the defendant that threatens Sherman Act values.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

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

HN16[] **Remedies, Damages**

Injury to a competitor need not result in injury to competition. The use of unfair means in substituting one competitor for another without more does not violate the antitrust laws. Unfair competitive means can be actionable under other legal theories, as is demonstrated by plaintiff's pendent state law claims. However, to avail itself of treble damages under *15 U.S.C.S. § 1*, plaintiff must show harm to competition in general, as well as its own injury as a competitor.

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

HN17[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The court therefore must evaluate whether, viewing the evidence offered at trial in the light most favorable to the plaintiff, it offered sufficient proof for a reasonable and fair minded jury to conclude: (1) that the defendants conspired to use unfair competitive means to destroy plaintiff's business, and (2) that the elimination of plaintiff and formation of another entity imposed an illegal restraint on competition under the rule of reason.

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

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

HN18[] **Market Definition, Relevant Market**

Plaintiff bears the burden of showing an injury to competition. To show such an injury, plaintiff first has to establish a particularized or relevant market in which the defendant's actions unreasonably restrained trade. An antitrust plaintiff thus makes out a prima facie case under the rule of reason only upon proof of a well-defined relevant market upon which the challenged anticompetitive actions would have substantial impact.

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

HN19[] **Regulated Practices, Market Definition**

Evaluations of the market power of the parties involved and the anticompetitive effect of an alleged restraint, both of which are essential to the rule of reason analysis, are rendered impossible in the absence of proof regarding the economic significance, or relevance, of the market allegedly influenced by the defendant's conduct.

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

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

HN20[] **Market Definition, Relevant Market**

The relevant market is defined generally as the area of effective competition. The market must contain both a product dimension, determined by the availability of substitutes to which consumers can turn in response to price increases and other existing or potential producer's ability to expand output, and a geographic dimension, the area in which the product or its reasonably interchangeable substitutes are traded, both of which must be shown to be economically significant. Within a broad market, economically significant sub-markets can exist that in themselves constitute relevant markets. Thus, although the geographic market in some instances may encompass the entire nation, under other circumstances it may be as small as a single metropolitan area.

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

HN21[] **Regulated Practices, Market Definition**

In determining the area of effective competition in which a product or its reasonably interchangeable substitutes are traded, such economic and physical barriers to expansion as transportation costs, delivery limitations and customer convenience and preference must be considered. The location and facilities of other producers and distributors are also essential in determining the relevant geographic market. Economically significant geographic barriers limit the ability of sellers outside the market to operate within, and the ability of purchasers to obtain the product from suppliers outside the geographic area. Price data, corroborated by the factors listed above, are perhaps the most probative evidence on the relevance of the given market.

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

HN22[] **Regulated Practices, Market Definition**

If sellers within the area are making price and output decisions protected from the need to take account of sellers outside the area, there is the distinct geographic market. If sellers within the market must take account of sellers outside it, either because those sellers are mobile and can easily come into the area to sell, or because buyers are mobile and can easily go outside the area to buy, the market is being defined too narrowly.

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

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

HN23[] **Market Definition, Relevant Market**

In affirming the district court's directed verdict on the antitrust claims, the court is mindful of the principle that relevant market definition is generally a question of fact for the jury. The court is also aware that the definition of a relevant market should be pragmatic, not formal or legalistic.

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

Estate, Gift & Trust Law > Wills > Beneficiaries > Elections

HN24[] Subject Matter Jurisdiction, Jurisdiction Over Actions

See *Ala. Code § 6-5-440* (1975).

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

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

HN25[] Jurisdiction, Jurisdictional Sources

Two factors determine whether state law claims lacking an independent federal jurisdictional basis can be heard in federal court with a federal claim over which the court has jurisdiction. To exercise pendent jurisdiction over state law claims not otherwise cognizable in federal court, the court must have jurisdiction over a substantial federal claim, and the federal and state claims must derive from a common nucleus of operative fact.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Governments > Courts > Authority to Adjudicate

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

HN26[] Supplemental Jurisdiction, Pendent Claims

The question for jurisdictional purposes is not whether the claims are without merit, but whether the prior decisions inescapably render the claims frivolous. The federal courts' power or jurisdiction to entertain pendent state claims ordinarily is determined on the pleadings.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

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

HN27[] Supplemental Jurisdiction, Pendent Claims

Dismissal of federal claims does not necessarily keep those claims from being substantial for purposes of jurisdiction over pendent state law claims.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

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

HN28[] Supplemental Jurisdiction, Pendent Claims

Even where the federal court has power to entertain the pendent state claims, it need not do so. Pendent jurisdiction is a matter of discretion, not of plaintiff's right.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

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

HN29[] **Supplemental Jurisdiction, Pendent Claims**

The discretion to entertain or dismiss the pendent state claims continues throughout the proceeding.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Governments > Courts > Judicial Comity

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

HN30[] **Supplemental Jurisdiction, Pendent Claims**

The district court's discretionary decision whether or not to entertain pendent state claims is guided generally by four factors: (1) whether the state law claims predominate in terms of proof, the scope of the issues raised, or the comprehensiveness of the remedy sought; (2) whether comity considerations warrant determination by a state court, i.e., is the state claim novel or particularly complex such that an accurate definitive interpretation of state law is necessary; (3) whether judicial economy, convenience, and fairness to the litigants would best be served by trying the federal and state claims together; and (4) whether the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong.

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

HN31[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

The timing of the federal court's decision to hear the state claims also influences the consideration of discretionary factors.

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

Governments > Courts > Judicial Comity

HN32[] **Subject Matter Jurisdiction, Supplemental Jurisdiction**

Comity requires that the court defer to the courts of Alabama for a ruling on the alleged unfair competition claim. It is most improper for a federal court, without suitable law to guide it, to plow new ground in a state law field.

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Ralph Gaines, Talladega, Alabama, Sidney Hardy, Talladega, Alabama, for Appellee.

Judges: Johnson and Anderson, Circuit Judges, and Tuttle, Senior Judge.

Opinion by: ANDERSON, III

Opinion

[*416] R. LANIER ANDERSON, III, Circuit Judge:

L.A. Draper & Sons, Inc. [1] **[**2]** (plaintiff in the action below) appeals a directed verdict on its antitrust claim against defendants, Wheelabrator-Frye, Inc. (referred to as "Whiffy"), [2] Hessco Industrial Supply, Inc. ("Hessco"), and Fred Hester, [3] and the **[*417]** dismissal without prejudice of its pendent state unfair competition claims.

[3]** The antitrust claim under *Section 1* of the Sherman Act involves a cause of action similar to that discussed in *Northwest Power Products, Inc. v. Omark Industries, Inc., 576 F.2d 83 (5th Cir.1978)*, *cert. denied*, *439 U.S. 1116, 59 L. Ed. 2d 75, 99 S. Ct. 1021 (1979)*, and *Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342 (5th Cir.1980)*, *cert. denied*, *450 U.S. 1030, 101 S. Ct. 1740, 68 L. Ed. 2d 226 (1981)*. Under the principles discussed in *Northwest* and *Page*, ***HN3***[] a plaintiff establishes an antitrust violation by proving that defendants conspired to use unfair and predatory competitive means to eliminate the plaintiff as a competitor, and that the plaintiff's elimination from the marketplace in this fashion imposed an illegal restraint on trade under the rule of reason analysis. Finding the plaintiff's proof in the instant case insufficient to state a claim under *Northwest* and *Page*, we affirm the district court's directed verdict on the plaintiff's antitrust claims.

With regard to the district court's decision to dismiss the pendent state claims without prejudice, *560 F. Supp. 1138*, we remand for a determination of Ladsco's ability to bring **[**4]** those claims in state court. If a state forum is still available for the unfair competition claims, we hold that the district court's dismissal was not an abuse of discretion. If not, we hold that the district court must entertain Ladsco's state claims.

FACTS

L. A. Draper & Sons, Inc., consists of two divisions, Ladmet and Ladsco, and is wholly owned by its president, Alan Draper. The plaintiff's Ladsco Division has been in the foundry supply business since the early 1950's. In 1979, when this cause of action arose, Ladsco distributed four products: (1) primary and secondary aluminum, (2) refractories, (3) grinding wheels, and (4) abrasive shot. [4] Since 1960 Ladsco has been obtaining that shot

[1] Hereinafter referred to as "Ladsco," the division of L. A. Draper & Sons involved in the current action.

[2] Employees of Wheelabrator-Frye use this nickname in reference to the company.

[3] A fourth co-defendant, Joseph O'Callahan, is the leading officer of Whiffy's materials cleaning division, located in Mishawaka, Indiana. The materials cleaning division manufactures the products involved in this case and O'Callahan was one of Whiffy's principal representatives in the transactions out of which the lawsuit arose. The trial court dismissed the claims against O'Callahan for improper venue. *See* §§ 4 and 12 of the Clayton Act, *15 U.S.C.A. §§ 15* and *22 (1982)* (authorizing suits against individuals for violations of the antitrust laws "in the district in which the defendant resides or is found to have an agent"); *Braun v. Berenson, 432 F.2d 538, 543-44 (5th Cir.1970)* (holding that a non-resident officer of the defendant corporation was not "found" in the forum state for purposes of § 4, even though he spent two weeks each year in the forum state on routine corporate business).

Should the district court determine that it must hear Ladsco's state claims pursuant to our instructions on remand, we find that venue was proper against O'Callahan under *28 U.S.C.A. § 1391(b) (1976)* ***HN1***[] ("[a] civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all the defendants reside, or in which the claim arose, except as otherwise provided by law"). The majority of courts considering the joint operation of the venue provisions of the Clayton Act and *§ 1391(b)* have held that ***HN2***[] the Clayton Act's specific venue provisions do not "abolish or supersede venue provision of *§ 1391(b)*." *First Pullen Commodity Services, Inc. v. A. G. Becker-Kipnis & Co., 507 F. Supp. 770, 773 (S.D.Fla.1981)* (also providing an exhaustive listing of the courts considering this issue). *See generally*, C. Wright & A. Miller & E. Miller, *Federal Practice & Procedure: Jurisdiction*, § 3818 at 110 (1975). Because the claims in this case arose in the Northern District of Alabama, we consider that venue was properly laid against O'Callahan under *§ 1391(b)* and on remand, if the court entertains the unfair competition claims, it should reinstate him as a party.

exclusively from the corporate defendant, Wheelabrator-Frye. In 1979 it obtained primary aluminum from Alcoa, secondary aluminum from the Ladmet Division of L. A. Draper & Sons, refractories from A. P. Green Refractories, and grinding wheels from Universal Grinding Wheels.

[5]** In 1979, the Ladsco Division of L. A. Draper & Sons had for many years been managed by the defendant, Fred Hester, who started with Ladsco in the early 1960's as a clerk typist and worked his way up through the ranks. By the early 1970's, Hester had become a vice president and director of Ladsco and was in charge of its **[*418]** day-to-day operations. Ladsco employed five salesmen under Hester's supervision, a warehouse supervisor, and numerous drivers and office personnel.

For some reason, Hester became dissatisfied with his Ladsco employment arrangement. During the summer of 1979 he formed plans to terminate his employment and enter into business in competition with Ladsco. To this end, he purchased a warehouse in Anniston, Alabama, the corporate home of Ladsco, and began obtaining equipment and setting up the warehouse for the foundry supply business. Within a short time, Ned Landers, Jerry Ellis, and Bill West, three of Ladsco's salesmen, had invested in Hester's new venture and made plans to join Hester once the business was started.

By the beginning of August, Hester had informed Ladsco's suppliers of his intent to leave Ladsco and begin a competing business. On **[**6]** July 31 and August 1, 1979, Hester had discussions with Wheelabrator-Frye officials, including the defendant O'Callahan, at Whiffy's offices in Mishawaka, Indiana. Wheelabrator-Frye immediately began to study the Ladsco-Hester situation.

On Thursday, August 23, 1979, Hester resigned. The following Monday, Mr. Draper presented most of the remaining Ladsco employees with an employment contract that included a covenant not to compete, in an effort to determine their continuing loyalty to Ladsco. None of the employees were willing to sign the contract; all were terminated. [5] Within three weeks all but one of the former Ladsco employees had begun to work for Hester's new company in competition with Ladsco. [6]

[7]** By the second week of September 1979, Hester's new business, under the name of Hessco, had begun to take orders. Its product lines and suppliers were virtually a mirror image of those Ladsco had offered until two weeks earlier. [7] Mr. Draper, now operating Ladsco himself with a vastly depleted workforce was told by Whiffy that Ladsco no longer had credit to purchase Whiffy shot, but could continue to receive a commission for arranging direct sales to Ladsco customers.

On September 5, Mr. O'Callahan traveled to Anniston and on behalf of Whiffy expressed an interest in purchasing both Ladsco, from Mr. Draper, and Hessco, from Mr. Hester. Hester accepted the offer and on September 20, 1979, Hessco became a wholly-owned subsidiary of Wheelabrator-Frye.

[8]** Hessco rapidly became a substantial force in the foundry supply business. It established warehouses in Anniston, Birmingham, and Chattanooga, all cities in which Ladsco maintained warehouse facilities. There is some evidence in the record that Hessco reduced its shot prices in the early months of operation to gain a stronger

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[4] Abrasive shot is a small, rounded steel pellet used in cleaning residue off the molds that foundries use to manufacture various metal products.

[5] Missing from the August 27th meeting was Mr. Bill Ellison, a Ladsco salesman working out of the Birmingham office. Hester and the three salesmen investing in the new venture testified that Ellison had not been approached about the new company because they were convinced of his loyalty to Mr. Draper. Ellison remained with Ladsco following the formation of Hessco.

[6] The only salesman who left Ladsco and did not join Hessco was Ladsco's salesman in the Carolinas. Hessco does not sell shot in the Carolinas.

[7] Ladsco's supplier of primary aluminum, Alcoa, did not become a Hessco supplier until early 1980. Ladsco had been purchasing secondary aluminum from the Ladmet division of L. A. Draper & Sons and continued to do so after Hester and the other employees left.

foothold in the marketplace. Unlike Ladsco, Hessco did not operate in the Carolinas, where Ladsco and Whiffy had for many years been in direct competition for shot sales.

Ladsco, on the other hand, suffered an immediate downturn in its business fortunes. It obtained shot, refractories, and grinding wheels from alternative manufacturers and continued to market foundry supplies in competition with its former employees. Although some customers remained with Ladsco, many customers shifted over to Hessco and its familiar salesmen **[*419]** and products. By the end of 1980, Hessco business reports stated that "Ladsco is selling very little shot."

Based on the foregoing, in the summer of 1980 Ladsco filed suit alleging that Hester and other employees had conspired to use unfair competitive means to eliminate Ladsco from the marketplace. Ladsco further alleged **[**9]** that Whiffy had joined in the conspiracy in an effort to reap the profits that Hessco had attained through its unfair competitive practices. According to Ladsco, the defendant's actions violated *§ 1* of the Sherman Act and state laws against unfair competition.

After extensive discovery, a jury trial began on March 15, 1982, in the United States District Court for the Northern District of Alabama. After thirteen days of testimony, Ladsco rested. The district court considered motions for directed verdict by Hessco, Hester, and Whiffy on both the antitrust and unfair competition claims. On April 1, the court heard a full day of legal arguments by the parties and announced its intention to file an order granting the directed verdict motions regarding the antitrust claims and dismissing the pendent state claims because they presented novel questions of Alabama law. The jury was dismissed. To allow the plaintiff an opportunity to file a separate state action on the unfair competition claims, the court proposed to delay in filing its order until April 9, 1982.

The court did not enter its order on April 9, 1982. Rather, for over six months the parties disputed the content of that **[**10]** order and Ladsco filed a motion for a new trial. On March 8, 1983, the district court had yet to issue its order and Ladsco filed a petition for mandamus. Eight days later the district court entered its order, *L.A. Draper & Son, Inc. v. Wheelabrator-Frye, Inc., 560 F. Supp. 1138 (N.D.Ala.1983)*, and Ladsco filed timely notice of appeal. [8]

ISSUES ON APPEAL AND STANDARD OF REVIEW

Ladsco presents two primary issues [9] on this appeal: (1) whether the district court properly directed a verdict in favor of the defendants on the antitrust claim, and (2) whether the district court properly **[**11]** dismissed the pendent state unfair competition claims.

With regard to the first issue, the standards for evaluating motions for directed verdict were clearly articulated in *Boeing v. Shipman, 411 F.2d 365 (5th Cir.1969)* (en banc). [10]

> ***HN4***[] On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence -- not just that evidence which supports the non-mover's case -- but in the light and

[8] While pursuing this appeal, Ladsco also filed suit on its unfair competition claims in the Alabama courts. Relying on *Ala.Code § 6-5-440* (1975), the state trial court dismissed Ladsco's action because this appeal was pending. The Alabama Supreme Court recently affirmed. The possibility that Ladsco may be unable to reassert its state claims in the Alabama courts is discussed more fully in Section II, *infra*.

[9] We have already addressed Ladsco's challenge to the dismissal of the defendant O'Callahan for improper venue, *supra* note 3. Ladsco also challenges several of the district court's evidentiary rulings. We have considered the excluded evidence in determining whether the district court properly dismissed Ladsco's claims. We have determined that Ladsco presented insufficient proof to avoid a directed verdict on the antitrust claims, even considering the excluded evidence, and we therefore do not address the lower court's specific evidentiary rulings.

[10] In *Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir.1981)* (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id. at 1209*.

> with **[**12]** all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other ***HN5***[] hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and **[*420]** fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

Id. at 374-75 **[**13]** (footnote omitted). *See also* *Huff v. Standard Life Ins. Co., 683 F.2d 1363, 1366 (11th Cir.1982)*; *Kaye v. Pawnee Const. Co., 680 F.2d 1360, 1364 (11th Cir.1982)*; *Malcolm v. Marathon Oil Co., 642 F.2d 845, 848 (5th Cir.1981)* ***HN6***[] (to avoid a directed verdict the plaintiff must present sufficient evidence to create a jury question with respect to each element of its case), *cert. denied*, *454 U.S. 1125, 102 S. Ct. 975, 71 L. Ed. 2d 113 (1981)*. In addition, we are mindful of the ***HN7***[] policy against summary dispositions of antitrust cases "where motive and intent play leading roles, [and] the proof is largely in the hands of the alleged conspirators [and hostile witnesses]," and where the plaintiff must build its case largely on circumstantial evidence. *Poller v. Columbia Broadcasting System, 368 U.S. 464, 473, 82 S. Ct. 486, 491, 7 L. Ed. 2d 458 (1962)*.

[14]** ***HN8***[]

The second issue -- the dismissal without prejudice of the pendent state claims -- is to be judged on an abuse of discretion standard. *See* *Jackson v. Stinchcomb, 635 F.2d 462, 473 (5th Cir.1981)*; *H & B Equipment Co. v. International Harvester Co., 577 F.2d 239, 248 (5th Cir.1978)*.

DISCUSSION

I. *The Antitrust Issues*

A. Generally

Section 1 of the Sherman Act provides:

> ***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 declared to be illegal.

15 U.S.C. § 1. ***HN10***[] Under § 4 of the Clayton Act, "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained." *15 U.S.C. § 15*. Ladsco alleges that the defendants conspired to use unfair competitive means to drive Ladsco from the marketplace and seeks treble damages for this alleged violation of *§ 1* of the Sherman Act.

HN11[] Depending on the claim presented, we evaluate an alleged violation of *§ 1* under a per se or rule of reason analysis. Certain activities, **[**15]** such as price fixing, have such a pernicious effect on competition and are so lacking in any redeeming virtue that they are deemed per se violations without inquiry into the nature of their impact on a particular market. *See* *Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958)* (discussing rationale behind per se rule). Other restraints on trade, such as territorial restrictions that a manufacturer imposes on a distributor, have possible procompetitive influences on a given market and the legality of the restraint is judged under the rule of reason. *See, e.g.,* *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. Under the rule of reason,

> ***HN12***[] 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 fact 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.

[16]**

[*421] *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 244, 62 L. Ed. 683 (1918)*. ***HN13***[] The rule of reason inquiry must be tied to a particular market in which the challenged activity is alleged to impose an impermissible restraint. *Continental TV., Inc. v. GTE Sylvania, Inc., 433 U.S. at 53 n.21, 97 S. Ct. at 2559 n.21* ("an antitrust policy divorced from market considerations would lack any objective benchmarks").

HN14[] In this circuit, we evaluate Ladsco's *§ 1* claim -- that the defendants conspired to use unfair competitive means to drive Ladsco from the market place -- under the rule of reason standard discussed in the *Northwest* and *Page* cases.

In *Northwest Power Products, Inc. v. Omark Industries, 576 F.2d 83 (1978)*, the Fifth Circuit addressed a claim similar to that presented here. The plaintiff, Northwest, was a former distributor of the defendant manufacturer's product. The defendant, Omark, had allegedly conspired with the plaintiff's key employees to substitute another sales company as its distributor. The new distributor then hired the former Northwest employees. Although Northwest suffered considerable injury as **[**17]** a competitor, the court held that it must further prove that defendant's conduct violated the antitrust laws under a rule of reason analysis. [11] *Accord Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342 (5th Cir.1980)* (finding rule of reason violation where defendant conspired with key employees of plaintiff to establish a subsidiary that drove plaintiff out of business). [12]

[18]** The rule of the *Northwest* and *Page* cases is that ***HN16***[] "injury to a competitor need not result in injury to competition. The use of unfair means in substituting one competitor for another without more does not violate the antitrust laws." *Manufacturing Research Corp. v. Greenlee Tool Co., 693 F.2d 1037, 1043 (11th Cir.1982)* (citing *Northwest, 576 F.2d at 90*). *See also Redwing Carriers, Inc. v. McKenzie Tank Lines, Inc., 594 F.2d 114 (5th Cir.1979)*. Unfair competitive means can be actionable under other legal theories, as is demonstrated by Ladsco's pendent state law claims. However, to avail itself of treble damages under *§ 1* of the Sherman Act, Ladsco must show harm to competition in general, as well as its own injury as a competitor.

Under the *Northwest/Page* analysis, ***HN17***[] we therefore must evaluate whether, viewing the evidence offered at trial in the light most favorable to the plaintiff, Ladsco offered sufficient proof for a reasonable and fairminded jury to conclude: (1) that the defendants conspired to use unfair competitive means to destroy Ladsco's business, and (2) that the elimination of Ladsco and formation of Hessco imposed an illegal restraint on competition **[**19]** under the rule of reason.

B. *Rule of Reason Analysis*

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[11] In so holding, the *Northwest* court expressly rejected the notion that a conspiracy to use unfair means to destroy a competitor was a per se violation of *§ 1* of the Sherman Act. *Id.* at 90. Prior to *Northwest*, a line of cases flowing from the First Circuit decision in *Albert Pick-Barth Co. v. Mitchell Woodbury Corp., 57 F.2d 96 (1st Cir.)*, *cert. denied*, ***286 U.S. 552, 52 S. Ct. 503, 76 L. Ed. 1288 (1932)***, had indicated that a conspiracy to engage in unfair competition was a per se violation of the antitrust laws.

[12] Following the discussion in *Northwest*, the *Page* court broke ***HN15***[] the rule of reason test down into two parts, under which the plaintiff must show: "(1) a market effect that would be prohibited under the law of mergers; and (2) other conduct by [the] defendant that threatens Sherman Act values." *624 F.2d at 1351*. Three findings were relevant to the *Page* Court's determination that the defendant had violated the rule of reason: (1) Associated was the most significant competitor in a concentrated market; (2) Page was a potential entrant into the market and its entry by taking over the business of the most significant competitor held potential for lessening competition; and (3) the newly created subsidiary had dramatic market power as was evidenced by its ability to raise prices and make excessive profits on its installation contracts. *Id. at 1351-53*.

Without deciding whether Ladsco offered sufficient proof on the conspiracy element of its *§ 1* claim, we address **[*422]** the more fundamental inadequacy in the proof offered at trial. To avoid a directed verdict on its antitrust claims, Ladsco had to introduce sufficient evidence to create a jury question on each element of its claim. *Malcolm v. Marathon Oil Co., 642 F.2d 845, 848 (5th Cir.1981)*. We must agree with the district court's determination that Ladsco offered insufficient proof of the relevant geographic market in which the defendant's actions allegedly restrained trade. *560 F. Supp. at 1144*. [13]

[20]** 1. The necessity of showing a relevant market

In order to prevail on a claim under the *Northwest/Page* analysis, ***HN18***[] Ladsco bore the burden of showing an injury to competition. To show such an injury, Ladsco first had to establish a particularized or relevant market in which the defendant's actions unreasonably restrained trade. In *Dougherty v. Continental Oil Co., 579 F.2d 954 (5th Cir.1978)*, *vacated by stipulation of the parties*, *591 F.2d 1206 (1979)*, the court stated:

> An antitrust plaintiff thus makes out a prima facie case under the rule of reason only upon "proof of a well-defined relevant market upon which the challenged anticompetitive actions would have substantial impact."

Id. at 962 (quoting *Cornwell Quality Tools Co. v. CTS Co., 446 F.2d 825 (9th Cir.1971)*, *cert. denied*, *404 U.S. 1049, 92 S. Ct. 715, 30 L. Ed. 2d 740 (1972))*. *See also* *Graphic Prods. Distribs., Inc. v. Itek Corp., 717 F.2d 1560, 1569 (11th Cir.1983)* (analyzing anticompetitive effect of territorial dealer restrictions under rule of reason); *Hornsby Oil Co. v. Champion Spark Plug Co., 714 F.2d 1384, 1393 & n. 8 (5th Cir.1983)* (same). ***HN19***[] Evaluations of the **[**21]** market power of the parties involved and the anticompetitive effect of an alleged restraint, both of which are essential to the rule of reason analysis, are rendered impossible in the absence of proof regarding the economic significance (or relevance) of the market allegedly influenced by the defendant's conduct. *See* *Dougherty v. Continental Oil Co., 579 F.2d at 962*; *Northwest Power Products, Inc. v. Omark Industries, Inc., 576 F.2d at 87*. [14]

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[13] At oral argument to this court, Ladsco contended for the first time that it had introduced sufficient evidence on each of three per se theories to avoid a directed verdict on the antitrust claims. These theories -- (1) resale price maintenance, (2) tying arrangements, and (3) group boycott -- were not included in Ladsco's complaint nor were they part of the amended pretrial order in the case. Ladsco's failure to assert its per se theories of recovery prior to oral argument before this court would generally preclude their consideration at this time. Furthermore, the district court did address these claims in the fashion in which Ladsco presented them below and in its briefs to this court. Ladsco had argued that these three factors contributed to a finding of "a threat to antitrust values" under the second prong of the *Northwest/Page* analysis. *See supra* note 12. Viewed in this context, the district court properly held that there was insufficient proof on these theories to constitute a "threat" to antitrust values, let alone a per se violation of the antitrust laws. *560 F. Supp. at 1140-44*.

Ladsco also argued that Whiffy was guilty of imposing territorial restrictions on Ladsco as a distributor. The district court found this allegation lacking in any factual basis. *560 F. Supp. at 1142-43*. In addition, territorial restrictions are judged under the rule of reason. *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. Thus, just as Ladsco's failure to establish a relevant market defeated its claim under *Northwest* and *Page*, absence of proof on the relevant market defeated the territorial restrictions allegation as well.

[14] The importance of the relevant market determination to a rule of reason analysis is illustrated by the Supreme Court decision in *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*. *Tampa Electric* was a case under § 3 of the Clayton Act and involved a requirement contract between the parties. The coal company defended its breach of that contract on grounds that the contract violated the antitrust laws because it imposed an illegal restraint on trade. Had the Court adopted the defendant's argument that the relevant geographic market consisted of Peninsular Florida, the contract at issue would have foreclosed 18% of the market. By broadening the relevant market to include those areas "to which the purchaser[s] [could] practicably turn for supplies," *id. at 327, 81 S. Ct. at 628, 5 L. Ed. 2d at 587*, the market foreclosure dropped to less than 1%.

In the instant case, without proof of a relevant market, there was no way for the jury to find a market effect that would be prohibited by the merger laws. Therefore, Ladsco could not meet its burden of proof under the first prong of the *Northwest/Page* analysis. *See supra* note 12.

[22]** **[*423]** 2. Defining a relevant market

HN20[] The relevant market is defined generally as "the area of effective competition." *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 82 S. Ct. 1502, 1523, 8 L. Ed. 2d 510 (1962)*. The market must contain both a product dimension (determined by the availability of substitutes to which consumers can turn in response to price increases and other existing or potential producer's ability to expand output), and a geographic dimension (the area in which the product or its reasonably interchangeable substitutes are traded), both of which must be shown to be economically significant. *Id. at 324-26, 82 S. Ct. at 1523-25*; *Hornsby Oil Co. v. Champion Spark Plug Co., 714 F.2d at 1393*. Within a broad market, economically significant submarkets can exist that in themselves constitute relevant markets. *Brown Shoe Co. v. United States, 370 U.S. at 325* & *336-37, 82 S. Ct. at 1523* & 1529-30 ("thus, although the geographic market in some instances may encompass the entire nation, under other circumstances it may be as small as a single metropolitan area").

Assuming *arguendo* that retail shot sales constituted a relevant product for which **[**23]** there are no readily apparent substitutes, the defendants argue and the district court found that Ladsco offered insufficient proof to create a jury question on the relevant geographic boundaries of the shot market. We agree.

HN21[] In determining the "area of effective competition" in which a product or its reasonably interchangeable substitutes are traded, "such economic and physical barriers to expansion as transportation costs, delivery limitations and customer convenience and preference must be considered." *Hornsby Oil Co. v. Champion Spark Plug Co., 714 F.2d at 1394*. The location and facilities of other producers and distributors are also essential in determining the relevant geographic market. *See Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 628, 5 L. Ed. 2d 580 (1961)*. Economically significant geographic barriers limit the ability of sellers outside the market to operate within, and the ability of purchasers to obtain the product from suppliers outside the geographic area. *Id.* Price data, corroborated by the factors listed above, are perhaps the most probative evidence on the relevance of the given market.

> ***HN22***[] If sellers within **[**24]** the area are making price and output decisions protected from the need to take account of sellers outside the area, there is the distinct [geographic] market. If sellers within the market must take account of sellers outside it, either because those sellers are mobile and can easily come into the area to sell, or because buyers are mobile and can easily go outside the area to buy, the market is being defined too narrowly.

L. Sullivan, *Handbook of the Law of Antitrust*, § 19 at 68 (1977). *See also* II P. Areeda & D. Turner, ***Antitrust Law***, para. 522 at 355 ("when prices and price movements in two territories are closely corrollated, a single market definition is strongly indicated").

3. Analyzing Ladsco's Proof

Ladsco has attempted to define two distinct geographic areas as relevant shot markets. Viewing Ladsco's evidence in a favorable light, as we must on review of a directed verdict, we address each proposed market and conclude that the proof was insufficient to support a jury finding that either market was economically significant.

a. The Four State Area

The first of the markets Ladsco identifies as relevant is the four-state area consisting of **[**25]** Alabama, Tennessee, Georgia, and Mississippi. This is an area in which Ladsco had for twenty years served as the exclusive distributor of Whiffy shot and had captured 50% of the shot sales. Hessco now fulfills a similar function and has about the same market share. Ladsco also offered proof that would support an inference **[*424]** that consumers in the four-state area were loyal to the salesmen formerly employed by Ladsco and now working for Hessco, and preferred local warehousing for quick delivery -- a factor also indicated by Hessco's establishment of local warehouses and operations identical to those used by Ladsco. Finally, Ladsco introduced evidence that shot is a heavy, lowcost item, where freight cost is a significant marketing consideration.

Notably absent from the record is any showing on how the four-state area functioned as a distinct or relevant geographic market. Ladsco offered no evidence on the location of shot manufacturers other than Whiffy and the ability of those manufacturers to sell in the four-state area. *Compare* *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. at 331, 81 S. Ct. at 630* (area of effective competition is area in which coal producers **[**26]** operated and were willing to compete for customers). Ladsco competed in the four-state area with eight to ten other distributors, but there is no evidence in the record on where those distributors obtained shot, sold shot (*i.e.*, we do not know the sales patterns of Ladsco's competitors; they may sell shot outside the four-state area), or where their warehouse facilities were located. Most importantly, Ladsco offered no evidence on the relationship of prices within the four-state area to other parts of the country. There was simply no evidence that could support an inference that if prices increased in the four-state area, purchasers could not obtain shot from distributors located elsewhere. *Compare, id. at 327, 81 S. Ct. at 628* (in order to find a market relevant, purchasers must, as a practical matter, be unable to turn to suppliers outside their own area); L. Sullivan, *supra* § 19 at 68.

Ladsco did show that it, and Hessco, adopted the four-state area as their sales area. However, as noted, there was no evidence that competing distributors used a similar sales pattern. Furthermore, any number of irrelevant considerations could have caused Ladsco and Hessco to **[**27]** limit their operation to a four-state area. For example, both Ladsco and Hessco sell a mix of several different foundry supplies. The geographic market limitations and consumer preferences that led to Ladsco and Hessco's four-state distribution pattern could have been created by any one of the products, or some mix of all four. *See* *United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 360-61, 83 S. Ct. 1715, 1739-40, 10 L. Ed. 2d 915 (1963)* (recognizing that banks, which offer a variety of services to a variety of customers, may face an "area of effective competition" that varies according to the service and customers). We are concerned here only with the geographic market for shot sales; and Ladsco's proof that it and Hessco served a four-state area with sales of various foundry supplies, unsupported by a showing that other shot sellers followed a similar sales pattern, is inconclusive on the sales pattern that prevailed in the shot market.

Even if Ladsco had shown that the four-state area was the predominant sales pattern for shot sales, that evidence without more would have been insufficient to present the issue to the jury. "Although actual sales patterns can aid in **[**28]** the interpretation of ambiguous price data or otherwise illuminate the character of the market, we should be aware that actual patterns can also be virtually meaningless." II P. Areeda & D. Turner, *supra* para. 522(b) at 357. The pattern of sales may only reflect established consumer preferences, but do not mean the customers would remain loyal if Ladsco or now Hessco would try to raise shot prices. For proof of sales patterns to support a geographic market definition, we would have to know that consumers could not realistically turn to outside distributors should prices rise within the four-state area. *Id. See also* *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. at 327, 81 S. Ct. at 628*; *RCM Supply Co. v. Hunter Douglas, Inc., 686 F.2d 1074 (4th Cir.1982)* (plaintiff's proof that it sold only in metropolitan Washington, D.C. area was inclusive on geographic market issue, in face of evidence that suppliers outside the market could and did make shipments into the area).

[*425] Ladsco also offered evidence that consumers were loyal to familiar salesmen and distributors that maintained local warehousing for quick and reliable services. This evidence, in conjunction **[**29]** with proof of price differentials between the four-state area and other portions of the country, might have created a jury issue on the four-state area as a relevant market. *See* *Brown Shoe Co. v. United States, 370 U.S. at 325, 82 S. Ct. at 1524* (practical indicia, such as consumer preference, can aid in defining an economically significant markets); II P. Areeda and D. Turner, *supra* para. 524 at 367 & 370 ("consumer convenience and preference . . . can narrow the scope of a geographic market * * * [however], we are inclined to view the identification of such barriers to entry as consumer preferences or the need for local sales or servicing facilities as serving no useful purpose other than to support price relationship data that point to separate markets").

The record in the instant case, however, is insufficient to afford any weight to Ladsco's proof of consumer preference as it relates to relevant market definition. Ladsco, which bore the burden of proving that it had identified an economically significant market, had to show how the alleged consumer preferences translated into market power for the firms within the four-state area and contributed to making that area **[**30]** a relevant market. Crucial information on the location of distribution facilities, the availability or nonavailability of shot at competitive prices from outside the four-state area, and the existence of price differentials is lacking. Ladsco's evidence on consumer preferences was therefore inconclusive and insufficient to create a question for the jury.

Finally, Ladsco's evidence on freight costs also was insufficient to create a jury question. Areeda & Turner state: "Two areas are ordinarily separate markets where there are no or only episodic sales between them and where transport costs exceed any price differentials between the two areas." II. P. Areeda & D. Turner, *supra* para. 523 at 358. *See also* *Hornsby Oil Co. v. Champion Spark Plug Co., 714 F.2d at 1393* (transport costs factor in determining relevant market); *United States v. Columbia Steel, 334 U.S. 495, 510-11, 68 S. Ct. 1107, 1115-16, 92 L. Ed. 1533 (1947)* (same). Transport costs, however, must be compared in order to support a given market definition. Ladsco had to present sufficient evidence for the factfinder to conclude that these costs foreclosed the market to shot suppliers outside the geographic **[**31]** area. *Id.*

In the instant case, Ladsco showed that transport costs into the four-state area from Whiffy's Virginia plant were a significant portion of the sales price of shot (15%). It failed to offer any proof on how Ladsco's cost related to other distributors or suppliers operating within or outside the four-state area. Because there was no proof of price differentials between the four-state area and other places where shot was sold, there was no indication that relative transport costs exceeded those differentials. Proof of the mere existence of significant transport costs from one plant into the four-state area could not support a conclusion that the four states were an economically significant, distinct, relevant market.

In short, the record is devoid of sufficient evidence on the operation of the four-state area as a relevant market to create a legitimate question of fact for the jury.

b. The Carolinas

Ladsco also asserted that North and South Carolina were a second relevant market in which the alleged Whiffy-Hessco conspiracy imposed an unreasonable restraint on trade. This is an area in which Ladsco and Whiffy had competed directly for shot sales. [15] As with **[**32]** regard to the **[*426]** four-state area, Ladsco introduced no proof on the location of manufacturers and distributors competing for shot sales in the Carolinas. There was no evidence on the relationship of prices in the Carolinas to other areas. [16]

[33]** For the reasons discussed with respect to the four-state area, we conclude that Ladsco did not offer sufficient proof to create a jury question on the definition of the Carolinas as a relevant market.

HN23[] In affirming the district court's directed verdict on the antitrust claims, we are mindful of the principle that relevant market definition is generally a question of fact for the jury. *See* *Heatransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964, 979-81 (5th Cir.1977)*, *cert. denied*, *434 U.S. 1087, 98 S. Ct. 1282, 55 L. Ed. 2d 792 (1978)*. We are also aware that the definition of a relevant market should be pragmatic, not formal or legalistic. *Brown Shoe Co. v. United States*, 370 U.S. 336 at 336-37, 82 S. Ct. at 1529-30. Nevertheless, we conclude that Ladsco failed to present sufficient evidence of the commercial realities within the industry to warrant a jury finding that either the four-state area or the Carolinas constitute an economically significant relevant market.

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[15] Contrary to Ladsco's assertion, the mere fact that it competed with Whiffy in the Carolinas is insufficient to establish the Carolinas as a relevant market. In support of its assertion, Ladsco cites the general proposition that a relevant market is the "area of effective competition." *E.g.,* *Brown Shoe Co. v. United States, 370 U.S. at 324, 82 S. Ct. at 1523*. However, the concept of effective competition in *Brown Shoe* and other cases that Ladsco cites is not limited to the parties in a given case, but encompasses the area in which suppliers of the product can effectively compete and purchasers can turn for supplies. *See, e.g.,* *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. at 327, 81 S. Ct. at 628* (discussing "area of effective competition").

[16] Indeed, the record indicates that prices in the Carolinas were similar to those in the four-state area. Whiffy supplied shot for the Carolinas and the four-state area from its Virginia plant. If anything, the record supports an inference that the Carolinas and the four states were part of a single market. Even combining these areas, however, there was insufficient proof to support a relevant market definition.

Without a well-defined relevant market upon which the defendant's alleged anticompetitive conduct might be judged, there was simply no way for the jury to conduct the rule of reason analysis required **[**34]** in this case. Accordingly, we must affirm the district court's directed verdict on the antitrust claim.

II. DISMISSAL OF THE PENDENT STATE LAW CLAIMS FOR UNFAIR COMPETITION

With regard to the district court's dismissal without prejudice of Ladsco's pendent state unfair competition claims, we must remand to the district court for reconsideration in light of recent developments in the state court action that Ladsco filed subsequent to the district court's final order in this case. *See supra* note 8. The district court's decision to dismiss the pendent state claims was based in large part on Ladsco's ability to obtain a state forum for its unfair competition claims. Ladsco filed the state action; and the Alabama Supreme Court recently affirmed the state trial court's dismissal of that action because this federal appeal was pending. *L.A. Draper & Sons, Inc. v. Wheelabrator-Frye, Inc., 454 So. 2d 506 (Ala.1984)*. [17]

[35]** The parties' briefs to this court have not addressed the issue of whether a state action remains available to Ladsco on its unfair competition claims. Accordingly, we remand to the district court to determine that issue, which, as we will discuss, has a decisive bearing in this particular case on the propriety of denying Ladsco a federal forum for its pendent state claims. *See Pharo v. Smith, 625 F.2d 1226, 1227 (5th* ***[*427]*** *Cir.1980)* (remanding to district court to redetermine whether pendent state claims should have been dismissed in light of possible statute of limitations bar to subsequent state suit).

A. *The State Law Claims Were Pendent Under the United Mine Workers v. Gibbs Analysis*

HN25[] Two factors determine whether state law claims lacking an independent federal jurisdictional basis can be heard in federal court with a federal claim over which the court has jurisdiction. To exercise pendent jurisdiction over state law claims not otherwise cognizable in federal court, "the court must have jurisdiction over a substantial federal claim and the federal and state claims must derive from a 'common nucleus of operative fact.'" *Jackson v. Stinchcomb, 635 F.2d 462,* ***[**36]*** *470 (5th Cir.1981)* (quoting *United Mine Workers v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966))*. *See generally C.* Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3567 pp. 443-47 (1975).

For jurisdictional purposes, Ladsco's antitrust claim was sufficiently substantial. ***HN26***[] "The question for jurisdictional purposes is 'not whether the claims are without merit but whether the prior decisions inescapably render the claims frivolous.'" *Jackson v. Stinchcomb, 635 F.2d at 471* (quoting *Curtis v. Taylor, 625 F.2d 645, 649-50 (5th Cir.1980))*. The federal courts' power or jurisdiction to entertain pendent state claims ordinarily is determined on the pleadings. *United Mine Workers v. Gibbs*, 373 U.S. at 727-28, 86 S. Ct. at 1139-40. Although Ladsco's proof on the federal claims ultimately was insufficient to create an issue for the jury, the claims at the pleading stage did state a cause of action similar to that recognized in *Northwest* and *Page*. Thus, the antitrust claims were not inescapably rendered frivolous by previous decisions. *See Warehouse Groceries Management v. Sav-U-Warehouse, 624 F.2d 655, 659 (5th* ***[**37]*** *Cir.1980)* ***HN27***[] (dismissal of federal claims does not necessarily keep those claims from being "substantial" for purposes of jurisdiction over pendent state law claims).

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[17] The state courts dismissed Ladsco's claim on the authority of *Ala.Code § 6-5-440* (1975), which provides:

> ***HN24***[] No plaintiff is entitled to prosecute two actions in the courts of this state at the same time for the same cause and against the same party. In such a case, the defendant may require the plaintiff to elect which he will prosecute, if commenced simultaneously, and the pendency of the former is a good defense to the latter if commenced at different times.

The Alabama Supreme Court interpreted the statute to preclude a state action while Ladsco's federal appeal on the same claim was pending. That court, however, did not address the issue of whether a state forum would be available to Ladsco following the conclusion of a federal action in which the merits of the state claim were not addressed.

In addition, Ladsco's state law unfair competition and federal antitrust claims derived from a "common nucleus of operative facts." *Jackson v. Stinchcomb, 635 F.2d at 470*. The actions of Hester and the three salesmen, along with the alleged conspiracy in which Whiffy participated, were the basis for both the federal and state claims. Considered without regard to their federal or state character, Ladsco's antitrust and unfair competition claims are such that they ordinarily would be tried in a single action. *See United Mine Workers v. Gibbs, 383 U.S. at 725, 86 S. Ct. at 1138*.

Because the federal claim was substantial, and the state claims arose from the same facts, the district court had the power to hear the pendent state claims. Subsequent developments, including the directed verdict against the federal antitrust claims, have not divested the district court's jurisdiction should the court determine on remand that a state forum is unavailable and that it must hear the pendent unfair competition claims. **[**38]** *See Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir.1982)* ("federal court may retain pendent jurisdiction over a state claim which is barred by the state period of limitations, even though all federal claims have been dismissed").

B. *The Discretionary Factors*

The Court in *Gibbs* held that ***HN28***[] even where the federal court has power to entertain the pendent state claims, it need not do so: "Pendent jurisdiction is a matter of discretion, not of plaintiff's right." *United Mine Workers v. Gibbs, 383 U.S. at 726, 86 S. Ct. at 1139*. *See also Laird v. Bd. of Trustees of the Inst. of Higher Learning of the State of Mississippi, 721 F.2d 529, 534 (5th Cir.1983)*; *Jackson v. Stinchcomb, 635 F.2d at 472*. ***HN29***[] The discretion to entertain or dismiss the pendent state claims continues throughout the proceeding. *See United Mine Workers v. Gibbs, 383 U.S. at 727, 86 S. Ct. at 1139*; *H & B Equipment **[*428]** Co. v. International Harvester Co., 577 F.2d 239, 248 (5th Cir.1978)* (holding that dismissal of pendent state unfair competition claims was not an abuse of discretion subsequent to trial that resulted in directed verdict against plaintiff's antitrust claims). **[**39]** *See generally*, C. Wright, A. Miller & E. Cooper, *supra*, § 3567 at 445.

HN30[] The district court's discretionary decision whether or not to entertain pendent state claims is guided generally by four factors: (1) whether the state law claims predominate in terms of proof, the scope of the issues raised, or the comprehensiveness of the remedy sought; (2) whether comity considerations warrant determination by a state court (*i.e.*, is the state claim novel or particularly complex such that an accurate definitive interpretation of state law is necessary); (3) whether judicial economy, convenience, and fairness to the litigants would best be served by trying the federal and state claims together; and (4) whether "the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong." *Jackson v. Stinchcomb, 635 F.2d at 473* (quoting *United Mine Workers v. Gibbs, 383 U.S. at 726-27, 86 S. Ct. at 1139-40*).

HN31[] The timing of the federal court's decision to hear the state claims also influences the consideration of these discretionary factors. For example, a state claim that does not appear predominant on **[**40]** the pleadings may emerge as such following discovery. Thus, a district court might properly find that the first factor warrants dismissal of the state claim sometime after the pleading stage. *See Jackson v. Stinchcomb, 635 F.2d at 472 n. 20*. Indeed, if the federal claims are dismissed prior to trial, *Gibbs* strongly encourages or even requires dismissal of the state claims. *United Mine Workers v. Gibbs, 383 U.S. at 726, 86 S. Ct. at 1139*. *See Joiner v. Diamond M. Drilling Co., 677 F.2d 1035, 1042 (5th Cir.1982)*; *Ray v. Tennessee Valley Authority, 677 F.2d 818, 825 (11th Cir.)*, *cert. denied*, *459 U.S. 1147, 103 S. Ct. 788, 74 L. Ed. 2d 994 (1983)*. Conversely, after a full trial on the merits, judicial economy and convenience counsel against dismissal of the state claims, which would thereby require an identical and duplicative proceeding in state court. *See Caserta v. Village of Dickinson, 672 F.2d 431, 433 (5th Cir.1982)*. If the statute of limitations had run on Ladsco's state claims while the action in federal court was pending, previous decisions of this court strongly indicate that dismissal of the state claims would be an abuse of discretion. *Ransom **[**41]** v. S & S Food Center, Inc., 700 F.2d 670, 678 (11th Cir.1983)*; *Stein v. Reynolds Securities, Inc., 667 F.2d at 34*; *Rheaume v. Texas Dept. of Public Safety, 666 F.2d 925, 931-32 (5th Cir.)*, *cert. denied*, *458 U.S. 1106, 102 S. Ct. 3484, 73 L. Ed. 2d 1367 (1982)*; *Henson v. Columbus Bank & Trust Co., 651 F.2d 320, 325 (5th Cir.1981)*; *Pharo v. Smith, 625 F.2d 1226, 1227 (5th Cir.1980)*. *See also Quality Foods de Cent. Am. v. Latin Am. Agribusiness Dev. Corp., 711 F.2d 989, 990-91 (11th Cir.1983)* (remanding for consideration of statute of limitations problem in dismissal of pendent claims, but noting that issue was not presented to district court and that delay causing statute of limitations problem was caused by plaintiff).

In examining the factors that guided the district court's determination to dismiss the pendent claims, we first assume that a state forum is still available to Ladsco on its unfair competition claims and find the decision was not an abuse of discretion. In the following section, we determine that if Ladsco's action in the state courts is now unavailable, the balance of discretionary factors tips in favor of the district court affording Ladsco **[**42]** a decision on the merits of its state claims, which were properly appended to a non-frivolous federal action.

1. Assuming a State Forum is Still Available

Once the district court had directed a verdict against the antitrust claims, it had only the state claims left to consider; as would of course be true in any case in which the federal claims are insufficient to **[*429]** create a jury issue. This predominance of the state claim, by itself, is not determinative; the federal claims can drop out of the case after trial yet dismissal of pendent state claims nevertheless might be an abuse of discretion. *See* *Caserta v. Village of Dickinson, 672 F.2d at 433* (holding that district court properly dismissed federal claims after trial, but abused discretion in dismissing pendent state claims).

The district court relied primarily upon the second factor, the novelty of the state unfair competition allegations, as grounds for dismissing the pendent claims.

> ***HN32***[] Comity requires that this court defer to the courts of Alabama for a ruling on the alleged unfair competition claim. That claim, as alleged in the complaint, has never been recognized by the Alabama courts. A preliminary **[**43]** search for Alabama authority has revealed a single case on the general issue, with facts quite dissimilar from the facts here. Thus, what is helpful in that opinion is, for the most part, mere dictum.
> * * *
> It is most improper for a federal court, without suitable law to guide it, to plow new ground in a state law field.

560 F. Supp. at 1146. We agree with the district court and the weight it placed upon this factor. *See* *Financial General Bankshares, Inc. v. Metzger, 220 U.S. App. D.C. 219, 680 F.2d 768, 776 (D.C.Cir.1982)* ("although the degree of uncertainty in state law is one of several factors that should guide the district court's discretion, it should be given considerable weight"); *Gregory v. Mitchell, 634 F.2d 199, 202 (5th Cir.1981)*. [18]

[44]** The legal ramifications of Hester and the three salesmen forming a competing business while in Ladsco's employ, and Whiffy's possible conspiratorial participation are by no means clear in Alabama law. Any decision on the parameters of the state law claim, if indeed one exists, should be rendered, if possible, by the Alabama courts. The district court's reliance on this important factor favoring dismissal of the pendent state claims was not misplaced.

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[18] Professor Wechsler articulated the rationale underlying this factor of the *Gibbs* decision as follows: "Federal courts are not the authorized expositors of state law; there is no mechanism by which their errors in such matters can be corrected on appeal by state courts." Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROB. 216, 232 (1948) (cited in *Gibbs, 383 U.S. at 726 n. 15, 86 S. Ct. at 1139 n. 15*). *See also* Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV.L.REV. 657, 666 (1968) ("A federal court's holding on a novel issue of state law may unduly limit later state consideration of the problem; a state court will be hesitant to create a conflict with the federal determination because of possible reliance upon that earlier exposition.")

The district court found that certification of the general question regarding the parameters of Ladsco's state claims would not be efficient or appropriate. 560 F.2d at 1146. However, should the court on remand determine that it must hear the state claims, it should consider whether it is feasible to narrow the state law questions sufficiently to certify specific questions to the Alabama Supreme Court.

At the time the district court rendered its decision on the state claims, considerations of judicial economy and convenience weighed against dismissal. The same witnesses would have to introduce virtually identical testimony in a duplicative state proceeding. *See* Phillips v. Smalley Maintenance Services, Inc., 711 F.2d 1524, 1531 (11th Cir.1983) (affirming district court's decision to exercise pendent jurisdiction over state claims, which avoided the necessity of dual proceedings in federal and state court and the need for witnesses to testify twice to the same facts). The dismissal of the state claims imposed a waste of judicial time and resources in the instant case.

However, in the district court's discretion, the convenience **[**45]** and economy considerations did not outweigh the novelty factor which favored dismissal of the state claims so that they might be determined by the Alabama courts. In this vein, we note that the district court made commendable efforts to ensure that a state forum was available for Ladsco's claims and to ameliorate any unfairness to Ladsco that might result from dismissal of the state claims. The court's order dismissing the pendent claims without prejudice was contingent **[*430]** upon securing from defendants a waiver of any portion of the statute of limitations that ran from the time Ladsco filed the federal action to the final order by the district court. *See* Stein v. Reynolds Securities, Inc., 667 F.2d at 34; Henson v. Columbus Bank & Trust Co., 651 F.2d at 325 (abuse of discretion to dismiss timebarred pendent state claims); Pharo v. Smith, 625 F.2d at 1227 ("that a plaintiff's state law claims will be time-barred if dismissed is certainly a factor, if not a determinative factor, a district court should consider in deciding whether to maintain jurisdiction over pendent state claims once the federal claims have been resolved"). [19]

[46]** If the district court was correct assuming that Ladsco could obtain a state forum for its novel state claims, we conclude that the dismissal was not an abuse of discretion.

2. If a State Action is Not Available

The district court evidenced sensitivity to the potential unfairness of its dismissal in the stipulation it obtained from defendants on the statute of limitations question. However, the court, while avoiding the statute of limitations problem, failed to account fully for the procedural bar of Ala.Code § 6-5-440 (1975) (discussed *supra* at note 17). [20] That provision forces a plaintiff to elect prosecution in a single forum; and, as applied on the instant facts, led to dismissal of Ladsco's state court claims because this appeal was pending.

[47]** Because the parties have not briefed the issue, we do not know whether Ladsco could reassert its state claims in the Alabama courts. If not, then the Alabama statute operated on these facts much like a statute of limitations in depriving Ladsco of a state forum because it chose to bring its state claims, which were properly pendent to the antitrust claims, in a single action in federal court. By analogy to the cases involving a statute of limitations bar to a subsequent state proceeding, [21] **[**48]** we conclude that Ladsco's inability to obtain a state forum for its claims would render the district court's dismissal of the pendent claims an abuse of discretion. [22]

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[19] With regard to the fourth factor, the pendent state law unfair competition claims were not so closely tied to federal policy as to warrant a federal forum for the state claims. *Compare* Jackson v. Stinchcomb, 635 F.2d at 473 (state law claims for wrongful discharge were pendent to federal claim under 42 U.S.C. § 1983 and involved important questions of federal policy that favored litigation in a federal forum). This factor thus does not point to an abuse of discretion in the district court's dismissal of the state claims.

[20] The district court's failure to account fully for the procedural bar in Ala.Code § 6-5-440 is understandable in light of then-existing interpretations of that section. In Terrell v. City of Bessemer, 406 So. 2d 337 (Ala.1981), the Alabama Supreme Court held that the section did not apply to prevent a state action if the federal court dismissed pendent state claims. The Alabama court did not clarify *Terrell*, or the operation of the statute when a federal appeal was pending, until Ladsoc filed its state claim.

[21] The instant case is distinguishable from Quality Foods de Central America v. Latin American Agribusiness Development Corp., 711 F.2d 989 (11th Cir.1983). In *Quality Foods*, the court "reluctantly" remanded to the district court for reconsideration of its dismissal of pendent state claims in light of a possible statute of limitations bar. Id. at 990-91. The court intimated that even if the district court found that the state claims were time-barred, it nevertheless might dismiss the pendent claims because the statute of limitations issue was not presented to the district court during its initial consideration of the pendent claims and any delay in the federal proceedings that may have led to the limitations problem was caused by the plaintiff's recalcitrance.

CONCLUSION

After examining the factors considered by the district court, we affirm its dismissal **[*431]** of Ladsco's state claims contingent upon a finding on remand that Ladsco can obtain a state forum for its claims. Although that dismissal was contrary to notions of economy and convenience, the novelty of the state claims was such that comity considerations strongly favor dismissal. We cannot say that the district court abused its discretion in determining that the need for a "surer-footed" rendering of state law weighed heavily enough to favor dismissal.

[49]** Conversely, should the district court determine on remand that Ladsco is unable to bring its unfair competition claims in the Alabama courts, the district court's dismissal would be extremely unfair to Ladsco. The court properly attempted to remove the unfairness of a statute of limitations bar, evidencing its sensitivity to the potential hardship caused by dismissal of the pendent claims, but understandably failed to account fully for the similar hardship imposed by *Ala.Code § 6-5-440*. The district court's discretion to dismiss pendent state claims should not work a hardship on Ladsco, simply because it elected a federal forum and chose to appeal its substantial federal and state claims to this court. The district court has jurisdiction over the pendent claims and should exercise that jurisdiction if an alternative forum is unavailable. *See* *Stein v. Reynolds Securities, Inc., 667 F.2d at 34*; *Henson v. Columbus Bank & Trust Co., 651 F.2d at 325*; *Pharo v. Smith, 625 F.2d at 1227*. *Cf.* *Jackson v. Stinchcomb, 635 F.2d at 472* (power to hear pendent claims ordinarily exercised).

The directed verdict against the antitrust claims is AFFIRMED. The dismissal with prejudice **[**50]** of the pendent state unfair competition claims is REMANDED WITH INSTRUCTIONS.

End of Document

Conversely, Ladsco argued to the district court prior to dismissal of the pendent claims that the Alabama courts would not consider its state claims should Ladsco pursue its right to appeal the district court's order.

[22] We place dispositive weight on the availability of a state court action in analyzing the dismissal of the pendent claims, because the dismissal, even without the unavailability of a state court action, was an extremely close question. If a state court action is not available, it would be an abuse of discretion to dismiss the pendent claims. *See* *Henson v. Columbus Bank & Trust Co., supra* (holding that district court abused its discretion in dismissing pendent claim on facts similar to but weaker than the instant facts).

Trace X Chemical, Inc. v. Canadian Industries, Ltd.

United States Court of Appeals for the Eighth Circuit

December 15, 1983, Submitted ; June 29, 1984, Filed

No. 83-1847

Reporter
738 F.2d 261 *; 1984 U.S. App. LEXIS 20963 **; 1984-2 Trade Cas. (CCH) P66,089

Trace X Chemical, Inc. and John F. Arens, Appellees, v. Canadian Industries, Ltd., C.I.L. Ammunition, Inc., I.C.I. America, Inc., and Imperial Chemical Industries Ltd., Appellants

Subsequent History: **[**1]** Rehearing En Banc Denied August 16, 1984.

Prior History: Appeal from the United States District Court for the Western District of Arkansas.

Core Terms

anti-competitive, monopoly power, monopolistic, primers, replace, manufacturing, Sherman Act, monopolization, purchases, prices, customers, insufficient evidence, district court, antitrust, shipped

LexisNexis® Headnotes

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

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

HN1[] **Monopolies & Monopolization, Attempts to Monopolize**

The appellate court's scope of review of a jury verdict is limited. The court must consider the evidence in the light most favorable to the party receiving judgment in its favor and give it the benefit of all legitimate inferences. But the jury's factfinding power is not without limit. When the evidence leaves no room for a reasonable difference of opinion as to the proper resolution of the case, it should be decided by the court as a matter of law.

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

HN2[] Sherman Act, Claims

The elements of an attempted monopolization claim under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, are as follows: (1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anti-competitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success.

Antitrust & Trade Law > Sherman Act > Claims

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

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Sherman Act, Claims

To establish monopolization in violation of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*, it must be shown that a party (1) possessed monopoly power in the relevant market, and (2) used its monopoly power to foreclose competition, gain a competitive advantage, or destroy a competitor.

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

HN4[] Actual Monopolization, Claims

To prove a violation of *§ 2* under the Sherman Act, *2 U.S.C.S. § 2*, whether based on a claim of attempted monopolization or actual monopolization, it must be shown that a party engaged in anti-competitive behavior. A mere showing of monopoly power unaccompanied by evidence of anti-competitive behavior is insufficient to support a claim for monopolization.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Monopolies & Monopolization, Actual Monopolization

Acts which would constitute an unlawful use of monopoly power are those derived from the monopolist's power in the market or its size, acts which could only have been performed by one with the requisite power. Anti-competitive conduct is conduct without legitimate business purpose. Such conduct makes sense only because it eliminates competition. Acts which are ordinary business practices typical of those used in a competitive market do not constitute anti-competitive conduct violative of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*. The exercise of business judgment cannot be found to be anti-competitive. To be labeled anti-competitive, the conduct involved must be such that its anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the firm's long term ability to reap the benefits of monopoly power.

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

Tax Law > Federal Income Tax Computation > Tax Accounting > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Monopolies & Monopolization, Actual Monopolization**

Section 2 of the Sherman Act, *15 U.S.C.S. § 2*, does not give purchasers the exclusive right to dictate the terms on which they will deal, nor does it require a monopolist to accede to every demand of its competitors or customers.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Monopolies & Monopolization, Actual Monopolization**

As long as he is acting in good faith, a seller does not lose the right to contest a customer's claim simply by having monopoly power.

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN8[] **Monopolies & Monopolization, Actual Monopolization**

Setting a high price is not in itself anti-competitive. *15 U.S.C.S. § 2*. *Section 2* of the Sherman Act does not forbid a monopolist to set profit-maximizing prices. Such conduct is not the exclusionary conduct that violates the antitrust laws, but rather is the normal, rational response of a business seeking to maximize profits, sales, or revenues.

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 > Sherman Act > General Overview

HN9[] **Sherman Act, Claims**

Evidence of anti-competitive intent alone is not enough; anti-competitive conduct or use of monopoly power must also be shown to prove a violation of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*.

Judges: McMillian, John R. Gibson, and Bowman, Circuit Judges.

Opinion by: GIBSON

Opinion

[*263] JOHN R. GIBSON, Circuit Judge.

Canadian Industries, Ltd., and CIL Ammunition, Inc., appeal from a judgment in favor of Trace X Chemical, Inc., and John F. Arens on their claim against the CIL group under *Section 2* of the Sherman Act, *15 U.S.C. § 2 (1982)*. Following the jury verdict of $ 500,000, the district court trebled the award pursuant to Section 4 of the Clayton Act, *15 U.S.C. § 15 (1982)*. CIL's motions for judgment notwithstanding the verdict and for a new trial were denied. Trace X manufactured and distributed cast TNT primers for use in the mining industry. CIL manufactured TNT and was the principal source of TNT for Trace X. Arens, Trace X's president, claimed that Trace X was forced out of business by CIL's anti-competitive conduct, particularly CIL's refusal of credit and its failure to replace allegedly defective TNT. CIL appeals **[*264]** from the judgment on the grounds that (1) there was insufficient evidence of any anti-competitive conduct **[**2]** on its part or that CIL caused the shutdown of Trace X's business, (2) the district court erred in admitting irrelevant, prejudicial documents, and (3) Trace X failed to adequately prove its damages. For the reasons stated below, we reverse.

I.

When Trace X first began to buy TNT from CIL, it did so through Gulf Oil Company, Trace X's principal customer. This arrangement permitted Trace X to use Gulf's credit. Trace X had not provided the financial information required by CIL's credit section; therefore, any direct purchases by Trace X were to be paid by cash or certified check.

In April, 1976, CIL's credit section authorized Trace X to make direct purchases on thirty days credit, up to a limit of $ 16,000 -- the cost of one truckload of TNT. If Trace X ordered more than one load in a month, it would have to pay for each load before receiving the next. If the order went through Gulf, however, CIL would extend unlimited credit.

To meet the demand of its rapidly increasing sales, Trace X relied solely on CIL for its supply of TNT. Since the Trace X primer was composed of approximately 95 percent TNT, Trace X was vitally concerned with the availability, quality, and price of TNT. **[**3]** Because of Trace X's ever-increasing need for TNT, Arens became interested in manufacturing TNT. In February, 1976, he contacted CIL about its patented continuous-process method for making TNT, and CIL offered to license its process at a cost of $ 3,500,000. Instead, in late 1976, Arens purchased the equipment and blueprints of a military batch-process TNT plant in Childersburg, Alabama. Arens planned to reconstruct the plant in Arkansas and operate it there. Trace X prepared a prospectus for potential investors in its TNT manufacturing process. By March, 1977, Trace X had commitments for investment only from Arens and Szaloczi, vice president of Trace X. No contracts or commitments had been made by any customer other than Trace X itself.

From April through September, 1976, CIL's deliveries of TNT to Trace X increased steadily. CIL billed Gulf for almost all of Trace X's purchases during this period, but Gulf refused to pay, stating that Trace X was responsible for the purchases. After totalling the amount due on all these purchases and subtracting the amount owed by CIL to Trace X for primers, Trace X owed CIL $ 160,000, an amount far beyond Trace X's credit limit of $ 16,000.

[4]** To settle this account CIL met with Arens in October of 1976. Arens argued that according to Trace X's accounts, CIL owed Trace X rather than Trace X owing CIL because Trace X had received no invoices from CIL, while Trace X invoices to CIL for primers remained unpaid. CIL threatened to stop shipping TNT to Trace X if arrangements were not made to pay for the TNT that Trace X had received. After negotiating, Trace X agreed to pay CIL the $ 160,000 over a ten-week period. Arens also gave CIL his personal guarantee. CIL agreed to ship 40,000 pounds of TNT a week for ten weeks to Trace X and reaffirmed its commitment to supply all of Trace X's TNT requirements subject to availability. CIL insisted that future purchases be cash in advance. In February, 1977, CIL gave Trace X the further written assurance that it would supply 100,000 pounds of TNT per week thereafter.

In September of 1976 some of Trace X's customers complained that primers were misfiring. Trace X took back the faulty primers, gave its customers credit, and made and shipped them new primers. Arens told CIL that primers manufactured by Trace X had been failing and that tests conducted by Trace X showed that the TNT was **[**5]** at fault. CIL disputed this and refused to replace the TNT. CIL maintained that it was Trace X's manufacturing process, rather than defective TNT, that had caused the primer misfires.

[*265] In March, 1977, Trace X again asked for credit, presenting financial statements for the year ending September, 1976. CIL's credit section again declined to grant credit, stating that it would reconsider if provided with current, audited information for the six months from October, 1976, through March, 1977.

Arens shut down Trace X's primer business and decided to abandon its TNT project in March, 1977. According to Arens he was forced to shut down because CIL refused to extend credit to Trace X and would not replace the allegedly defective TNT. At the meeting in late March when Arens again asked CIL to replace the TNT, Ingham, CIL's marketing manager responded: "Why would we do that? If we exchange the TNT, you will just use your profits to compete against us in the manufacture of TNT."

II.

By a general verdict the jury found that CIL violated *Section 2* of the Sherman Act by monopolizing interstate commerce and by attempting to monopolize interstate commerce. ***HN1***[] Our scope of review of **[**6]** a jury verdict is limited. *Roesch, Inc. v. Star Cooler Corp., 712 F.2d 1235, 1237 (8th Cir. 1983)*, *cert. denied*, *466 U.S. 926, 104 S. Ct. 1707, 80 L. Ed. 2d 180 (1984)* (en banc). We must consider the evidence in the light most favorable to Trace X and give it the benefit of all legitimate inferences. *Continental Ore Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 696, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*; *Roesch, Inc., 712 F.2d at 1237*; *J & J Farms, Inc. v. Cargill, Inc., 693 F.2d 830, 834-35 (8th Cir. 1982)*. But the jury's factfinding power is not without limit. When the evidence leaves no room for a reasonable difference of opinion as to the proper resolution of the case, it should be decided by the court as a matter of law. *Roesch, Inc. v. Star Cooler Corp., 671 F.2d 1168, 1171 (8th Cir. 1982)*, *aff'd by an equally divided court*, *712 F.2d 1235 (8th Cir. 1983)*; *Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 883 (8th Cir. 1978)*.

III.

HN2[] The elements of an attempted monopolization claim under *Section 2* of the Sherman Act are as follows: (1) specific intent to control prices or destroy competition in some part of commerce; (2) predatory **[**7]** or anti-competitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success. *Inglis v. ITT Continental Baking Co., 668 F.2d 1014, 1027 (9th Cir. 1981)*, *cert. denied*, *459 U.S. 825, 74 L. Ed. 2d 61, 103 S. Ct. 58 (1982)*; *Lekto-Vend Corp. v. Vendo Co., 660 F.2d 255, 270 (7th Cir. 1981)*, *cert. denied*, *455 U.S. 921, 71 L. Ed. 2d 461, 102 S. Ct. 1277 (1982)*; *Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 669 (9th Cir. 1980)*.

HN3[] To establish monopolization in violation of *Section 2* it must be shown that CIL: (1) possessed monopoly power in the relevant market, and (2) used its monopoly power to foreclose competition, gain a competitive advantage, or destroy a competitor. *United States v. Griffith, Inc., 334 U.S. 100, 107, 92 L. Ed. 1236, 68 S. Ct. 941 (1948)*; *Paschall v. Kansas City Star Co., 727 F.2d 692, 696 (8th Cir. 1984)* (en banc); *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)*.

Although at trial CIL contested every element of both claims, only the element of anti-competitive conduct or the use of **[**8]** monopoly power is at issue on appeal. [1] *HN4*[] To prove a violation of *Section 2* under the Sherman Act, whether based on a claim of attempted monopolization or actual monopolization, it must be shown that CIL engaged **[*266]** in anti-competitive behavior. As explained by the court in *Northeastern Tel. Co. v. American Tel. & Tel. Co., 651 F.2d 76 (2d Cir. 1981)*, *cert. denied*, *455 U.S. 943, 71 L. Ed. 2d 654, 102 S. Ct. 1438 (1982)*, a mere showing of monopoly power unaccompanied by evidence of anti-competitive behavior is insufficient to support a claim for monopolization. Therefore, a conclusion that CIL's activities were not anti-competitive would absolve it of liability under both claims. *651 F.2d at 85*. These general principles were outlined in the district court's charge to the jury.

[9]** According to Trace X, CIL engaged in monopolistic conduct with the intent and effect of driving Trace X out of business. Specifically, Trace X contends that CIL's refusal to extend credit or replace the defective TNT constituted anti-competitive, monopolistic conduct. CIL maintains, however, that its denial of credit and its refusal to replace the TNT were acts of ordinary commercial conduct.

HN5[] Acts which would constitute an unlawful use of monopoly power are those "derived from [the monopolist's] power in the market or its size, . . . acts which could only have been performed by one with the requisite power." *Telex Corp. v. IBM, 510 F.2d 894, 926* (10th Cir.), *cert. dismissed*, *423 U.S. 802, 46 L. Ed. 2d 244, 96 S. Ct. 8 (1975)*. *See* *Northeastern Tel. Co., 651 F.2d at 92*; *Berkey Photo, 603 F.2d at 275*. Anti-competitive conduct is conduct without legitimate business purpose. *Becker v. Egypt News Co., 713 F.2d 363, 366 (8th Cir. 1983)*; *Inglis, 668 F.2d at 1030-31*. Such conduct makes sense only because it eliminates competition. *Id.* Acts which are ordinary business practices typical of those used in a competitive market do not constitute anti-competitive **[**10]** conduct violative of *Section 2*. *Telex Corp., 510 F.2d at 925-26*. The exercise of business judgment cannot be found to be anti-competitive. To be labeled anti-competitive, the conduct involved must be such that its "anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the firm's long term ability to reap the benefits of monopoly power." *Inglis, 668 F.2d at 1030*.

Since a general verdict was returned against CIL, we must conclude that the jury considered the elements which constitute an antitrust violation, as properly instructed by the district court, and found that CIL had engaged in anti-competitive, monopolistic conduct. After a careful study of the record, however, we conclude that there is insufficient evidence as a matter of law to support such a finding. CIL's refusals to extend credit or replace the TNT were not invalid uses of monopoly power, but were, under the circumstances, ordinary business practices.

Our reading of the evidence does not reveal material conflicts in the facts. Insofar as there are differences in the testimony, they simply do not reach the essential antitrust issues presented. CIL presented **[**11]** uncontradicted evidence that Trace X's parent company was in bankruptcy and that Trace X had refused to supply Dun & Bradstreet with financial information. In addition, Trace X's auditors declined to give an opinion on Trace X's 1976 statement of earnings, and Trace X had been unable to secure credit from other sources. CIL's denial of credit to Trace X under these circumstances cannot be considered an unlawful use of monopoly power. *See* *Blair Foods, Inc., 610 F.2d at 671-72*. On the basis of the evidence presented, CIL's refusal to extend credit did not amount to unreasonable anti-competitive conduct, but rather constituted a valid exercise of business judgment. *See* *Becker, 713 F.2d at 366*; *see also* *Paschall, 727 F.2d at 697*; *Paschall v. Kansas City Star, 695 F.2d 322, 339-40 (8th Cir.*

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[1] For purposes of this appeal, CIL does not contest the fact that it has a monopoly in the TNT market. CIL also does not contest the element of anti-competitive intent, but rather argues that even if CIL were found to have had an anti-competitive intent, that would not, in the absence of anti-competitive, monopolistic conduct, amount to a violation of *Section 2* of the Sherman Act.

1982) (Henley, J., dissenting). It is certainly not conduct that is "possible or effective only if taken by a firm that dominates its smaller rivals." Berkey Photo, 603 F.2d at 275.

In support of its claim of anti-competitive conduct, Trace X argues that CIL threatened to discontinue supplying it with TNT unless Trace X paid for the $ 160,000 worth of TNT received but not paid for **[**12]** by **[*267]** Trace X. [2] However, terminating or threatening to terminate deliveries to a purchaser who refuses to provide full payment is not predatory or unlawful anti-competitive conduct. Fairdale Farms, Inc. v. Yankee Milk, Inc., 715 F.2d 30, 34 (2d Cir. 1983), *cert. denied*, *464 U.S. 1043, 104 S. Ct. 711, 79 L. Ed. 2d 174 (1984)*.

This case does not involve a refusal to deal. CIL was willing to continue to supply Trace X with TNT; it merely refused to deal with Trace X on other than a cash basis. "***HN6***[] Section 2 of the Sherman Act does not give purchasers the exclusive right to dictate the terms on which they will deal," Fairdale Farms, 715 F.2d at 34, nor does it require a monopolist to accede to every demand of its competitors or customers. Glen Eden Hospital v. Blue Cross & Blue Shield, 555 F. Supp. 337, 345 (E.D. Mich. 1983).

A careful study of the evidence also reveals nothing from **[**13]** which a jury could reasonably conclude that CIL's refusal to replace the defective TNT was anything other than ordinary commercial ***HN7***[] conduct. As long as he is acting in good faith, a seller does not lose the right to contest a customer's claim simply by having monopoly power. Even though a jury in a breach of warranty action later found that the TNT was defective, [3] there is no evidence in the record to support Trace X's suggestion that CIL deliberately supplied Trace X with defective TNT. The evidence showed that CIL had tested the TNT before shipping it to Trace X and concluded that the TNT was satisfactory. Even Arens admitted that he had no proof that CIL knew that the TNT was defective when shipped to Trace X. Other than the statement made by Ingham, there is also no evidence indicating that CIL's refusal to replace the TNT was in bad faith. Although the report of Trace X's expert stated that the TNT was defective, CIL's experts disagreed. After analyzing some of the defective Trace X primers, CIL believed that the failures resulted from Trace X's manufacturing process rather than from the TNT used. It was not an abuse of its monopoly power for CIL to rely on the tests run by its **[**14]** own research department and, therefore, refuse to replace the TNT.

In its brief Trace X also lists CIL's alleged monopolistic pricing and the TNT shortages as further examples of anti-competitive, monopolistic conduct. A careful review of the record reveals that the evidence concerning pricing relates to price discrimination. The district court directed a verdict on Trace X's claim of price discrimination under the Robinson-Patman Act, 15 U.S.C. § 13(a) (1982), [4] and Trace X has not appealed from that ruling. Where its purpose or likely effect is to inhibit competition, discriminatory pricing may also constitute a violation of Section 2 of the Sherman Act. L. Sullivan, *Antitrust* 122 (1977). However, just as the district court found that there was insufficient evidence of a violation of the Robinson-Patman Act, [5] we conclude that there is insufficient evidence as a matter **[**15]** of law to sustain the jury's finding of a violation under the Sherman Act.

In addition to its allegations of price discrimination, Trace X contends that CIL's prices in the United States for TNT were too high, thus reflecting monopolistic **[*268]** pricing. ***HN8***[] However, setting a high price is not in itself anti-competitive. **[**16]** Berkey Photo, 603 F.2d at 294. *See* 3 P. Areeda & D. Turner, ***Antitrust Law*** 41-42, 148

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[2] In his testimony Arens admitted that Trace X did owe CIL the $ 160,000 for the TNT it had received.

[3] Trace X Chemical, Inc. v. Gulf Oil Chemical Co., 519 F. Supp. 826 (W. D. Ark. 1982), *aff'd*, 724 F.2d 68 (8th Cir. 1983).

[4] 15 U.S.C. § 13(a) provides as follows:

> It shall be unlawful for any person engaged in commerce, . . . to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly . . ., or to injure, destroy, or prevent competition. . . .

[5] Although the prohibitions of the Robinson-Patman Act are narrower than those contained in section 2 of the Sherman Act, the insufficiency of evidence precludes a finding of violation under both Acts.

(1978). *Section 2* does not forbid a monopolist to set profit-maximizing prices. L. Sullivan, *supra*, at 116. Such conduct is not the exclusionary conduct that violates the antitrust laws, but rather is "the normal, rational response of a business . . . seeking to maximize profits, sales or revenues." *Id. at 100*.

Trace X's claim that the TNT shortages were induced by CIL as a means of market control also must fail. There is insufficient evidence in the record from which a jury could reasonably conclude that the shortages were other than real. The documents relating to TNT shortages simply show that there were times when CIL was unable to supply all of its customers' demands.

IV.

To further support its claims, Trace X relied on CIL's anti-competitive intent. Trace X's evidence of CIL's intent is its evidence regarding statements made by representatives of CIL. According to Arens and Szaloczi of Trace X, in March, 1977, when they asked CIL to replace the defective TNT, Ingham of CIL responded, "Why would we do that? If we exchange the TNT, you will just use your profits to compete **[**17]** against us in the manufacture of TNT." Szaloczi also testified that Heddle, CIL's export sales manager, had told him that "Trace X would have a lot better time at the meeting tomorrow if CIL had some understanding that Trace X was going to be raising its prices and not going into the manufacture of TNT." Even if it is assumed that proof of these statements supports an inference of anti-competitive intent on the part of CIL, [6] this is not enough to transform CIL's otherwise legitimate business activities into anti-competitive, monopolistic conduct. *See* *Telex Corp., 510 F.2d at 925-28*. ***HN9***[] Evidence of anti-competitive intent alone is not enough; anti-competitive conduct or use of monopoly power must also be shown to prove a violation of *Section 2* of the Sherman Act. *See* *Cal. Computer Products v. IBM, 613 F.2d 727, 745 n.32 (9th Cir. 1979)* (regardless of intent, *Section 2* condemns only the monopolist's use of monopoly power); *Telex Corp., 510 F.2d at 925-26*; *Inglis, 668 F.2d at 1028* (direct evidence of intent alone, without corroborating evidence of conduct cannot sustain a claim of attempted monopolization); *Buffalo Courier-Exp. v. Buffalo Evening News, 601 F.2d 48,* ***[**18]*** *54 (2d Cir. 1979)*; *Hayes v. Solomon, 597 F.2d 958, 977 (5th Cir. 1979)*, *cert. denied*, *444 U.S. 1078, 62 L. Ed. 2d 761, 100 S. Ct. 1028 (1980)* (a manifestation of intent to triumph in the competitive market, in the abence of unfair, anti-competitive or predatory conduct is not enough to establish an antitrust violation).

Although we are reluctant to overturn a jury finding, we conclude that there was insufficient evidence as a matter of law to support the jury's verdict. [7] Therefore, we reverse the judgment of the district court.

[19]**

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[6] In *Agrashell, Inc. v. Hammons Products Co., 479 F.2d 269, 285* (8th Cir.), *cert. denied*, ***414 U.S. 1022, 38 L. Ed. 2d 313, 94 S. Ct. 445 (1973)***, this Court indicated a hesitancy to infer anti-competitive intent solely from the hearsay testimony of an interested witness.

[7] Due to our resolution of the case on the ground of insufficiency of evidence as a matter of law, we do not reach the other issues on which CIL appealed.

[Spartan Grain & Mill Co. v. Ayers]

United States Court of Appeals for the Eleventh Circuit

July 5, 1984

No. 83-8003

Reporter

735 F.2d 1284 *; 1984 U.S. App. LEXIS 20819 **; 1984-2 Trade Cas. (CCH) P66,090

SPARTAN GRAIN & MILL COMPANY, Plaintiff-Appellant, Cross-Appellee, v. Virgil AYERS, W. C. Meaders, Jr., Boyce Blackmon, and Joe Acker, Defendants-Appellees, Cross-Appellants

Subsequent History: **[**1]** Petition for Rehearing En Banc Denied August 9, 1984.

Prior History: Appeals from the United States District Court for the Middle District of Georgia.

Disposition: REVERSED and RENDERED.

Core Terms

producers, eggs, economic power, broiler, interrogatory, feed, integrated, economic advantage, hatcheries, chicken, antitrust, Grain, firms, tying product, competitors, breeding, flock, hatching, tying arrangement, seller

LexisNexis® Headnotes

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

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

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

HN1[] **Per Se Rule & Rule of Reason, Per Se Violations**

Tying arrangements are per se violations of section one of the Sherman Act if a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product.

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

HN2[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The inquiry into economic power in a tying case is defined as whether the seller has some advantage not shared by his competitors in the market for the tying product. The three types of advantages are: Legal, as in the case of patented and copyrighted products; physical, as when the product is land; or economic, as when competitors are simply unable to produce the distinctive product profitably. Economic advantage is not the product itself but rather the seller's cost advantage in producing it. Without a showing of cost advantage, according to the court, there could be no finding of economic power under a theory of economic advantage.

Counsel: John C. Butters, Atlanta, Georgia, for Appellant.

William O. Carter, Hartwell, Georgia, Jerre Swann, Atlanta, Georgia, for Appellee.

Judges: Godbold, Chief Judge, Roney and Kravitch, Circuit Judges.

Opinion by: RONEY

Opinion

[*1285] RONEY, Circuit Judge:

This antitrust suit involves several participants in the broiler chicken industry. Virgil Ayers, W. C. Meaders, Jr., Boyce Blackmon, and Joe Acker produce eggs from which the broiler chickens were hatched. Spartan Grain & Mill Company, supplies feed to chicken farmers. The broiler chicken producers claim that Spartan violated the antitrust laws by tying the sale of its feed to its guarantee of a market for the producers' eggs. Two trials have resulted in verdicts for the producers. The central question on this appeal is whether Spartan had sufficient economic power that its marketing program must be viewed as an antitrust violation. On the basis of jury answers to special interrogatories, the district ruled that Spartan had such power. We hold that **[**2]** the jury verdict does not support this finding and reverse the judgment.

Our earlier decision in this case gives a detailed history and explanation of the broiler chicken industry. *Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 420-22 (5th Cir. 1978)*, *cert. denied*, *444 U.S. 831, 100 S. Ct. 59, 62 L. Ed. 2d 39 (1979)*. Briefly restated, the raising of a broiler chicken involves five distinct steps: (1) *primary breeders* hatch breeding flock chicks; (2) *producers* raise the breeding flocks and then collect the eggs; (3) *hatcheries* receive the eggs to hatch the chicks; (4) *growers* raise the chicks to the age that they can be sold as broilers; and (5) *processors* slaughter the broiler chickens and prepare them for market. Another participant in this process is the *feed merchant* who supplies the grain for feeding the chickens during each of the first four steps. The parties to this suit are a *feed merchant*, Spartan, and *producers* of broiler eggs, Ayers, Meaders, Blackmon, and Acker.

As the industry originally evolved, separate individuals handled each step of the production process. A number of inefficiencies resulted from this arrangement. **[**3]** First, there was a duplication of management and accounting personnel. Second, the lack of coordination between the various stages in the industry combined with the natural time constraints of the product created a great risk that there would not be a buyer for every seller, or vice versa, along the production chain. This often resulted either in a waste of product or in capital facilities sitting idle. Third, collection problems occurred because money had to change hands between each stage.

To reduce these inefficiencies, the industry began to integrate the various steps in the production process. In north Georgia, the locale of the present controversy, well over 90% of the industry was integrated by the end of the 1960s. The evidence at trial showed two types of integrated firms. In one type all stages in the production process as well as a feed mill are owned and operated by a single entity. Other integrated firms are comprised only of a feed mill, hatchery, and processing plant. The tasks of producing broiler eggs and growing broilers are "contracted out".

A producer under a contract arrangement with an integrated firm faces substantially less risk than when functioning **[**4]** as an independent. The integrated firm **[*1286]** supplies the breeding flock and provides all medical care and feed required during the life of the bird. Title to the chickens remains in the integrated firm, and it takes the eggs at an agreed upon price. Under an independent arrangement, however, a producer purchases his own flock and administers his own medical care. The independent also shoulders the major cost in producing broiler eggs, feeding the breeding flock. At the time of this dispute, contract producers usually earned between $1.00 and $1.50 per breeding bird for the 30-40 week period in which the birds lay eggs. Independents had the possibility of earning $3.00 or more per breeding bird.

The antitrust claimants in this action are producers of broiler eggs. At the time this suit was filed, they resided in Franklin, Hart, and Elbert counties, which are located in northeastern Georgia. Their personal history mirrors that of the industry in general. The two who have been in the business the longest started out as independents but switched over to contract arrangements in the early 1960s. A third, who is a more recent entrant to the business, began as a contract **[**5]** producer in 1966. The reason the producers joined the integrated firms as contract producers was because they could find no hatcheries willing to guarantee them a market for the broiler eggs they produced. No producer would take on a breeding flock without a prior agreement from a hatchery because the risk of a catastrophic loss due to lack of an appropriate egg market was too great.

In 1967 and 1968, the poultry industry in the producers' area entered into a prolonged slump. Suddenly, contract arrangements were not available. This was the situation when Spartan, an independent feed merchant, offered the program which is the subject of the present litigation. Basically, Spartan offered producers breeding flocks and, most importantly, a guaranteed market for their eggs in return for the producer's promise to feed Spartan grain. Spartan assured producers its grain prices would be competitive. Spartan's program was popular with producers for two reasons: first, it gave them a chance to stay in business; and second, it was structured so that they could operate as independents instead of as contract producers.

Spartan was bucking industry trends by attempting to create by contract **[**6]** what other firms had accomplished by integration. Several large hatcheries in Pennsylvania, Ohio, and Maryland were recruited by Spartan as outlets for broiler eggs. In return for Spartan's promise to provide a fixed supply of eggs, the hatcheries promised to give Spartan a fixed price for the eggs. Spartan, in turn, wrote approximately the same price into the producers' contracts. Thus, Spartan served as essentially a costless middleman for the producers and hatcheries. Spartan instituted this arrangement to stem the erosion of its share of the feed market to the integrated firms.

By 1972, Spartan closed down this program. It claims that lack of profitability and difficulty in securing hatchery commitments caused the program's demise. In November, 1972, Spartan filed suit against producers, Ayers, Blackmon, and Meaders for the unpaid balances on their feed accounts. The producers counterclaimed asserting a violation of the antitrust laws. These claims were severed for a later trial. The fourth producer, Acker, filed an independent antitrust suit against Spartan. The two antitrust suits were consolidated for trial. At trial, the producers won a directed verdict on liability **[**7]** and only the issue of damages was sent to the jury.

Spartan appealed to the former Fifth Circuit. That Court defined the antitrust issue as whether Spartan's program constituted a *per se* illegal tying arrangement under section one of the Sherman Act, *15 U.S.C.A. § 1*. *Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 425, 428 (5th Cir. 1978)*, *cert. denied*, *444 U.S. 831, 100 S. Ct. 59, 62 L. Ed. 2d 39 (1979)* (*Spartan I*). In the typical tying arrangement, a seller conditions the sale of one product (the tying product) on the purchase of another product (the tied product). *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5,* ***[*1287]*** *78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958)*. Although the present situation is not typical in that Spartan tied a requirement to buy feed to its promise to purchase eggs, the court held that this arrangement was sufficiently analogous to a tie-in that it should be analyzed under tying doctrine. *Spartan I, 581 F.2d at 425*. That ruling is not in dispute. The central issue under tying doctrine analysis is the extent of Spartan's economic power. Controlling on this point is the Supreme Court decision in *United States* **[**8]** *Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 97 S. Ct. 861, 51 L. Ed. 2d 80 (1977)* (*Fortner II*), which was decided subsequent to the first trial. The *Spartan I* court held that the producers had not established economic power as a matter of law so that a directed verdict of liability was improper. The case was remanded for a second trial, however, to give the producers an opportunity to meet factually the *Fortner II* standards.

At the second trial, both sides relied on expert and industry witnesses to support their positions on economic power. All of the witnesses agreed that in the long run the integrated firms were the most efficient system for producing broiler chickens. The producers' expert asserted, however, that in the short run, an independent feed mill like

Spartan, would have a structural advantage over the integrated firms when the broiler industry as a whole was losing money. This advantage was derived from the relative lack of overhead an independent possessed as compared to an integrated firm. Evidence was produced that the broiler industry was in an economic slump during the period Spartan instituted its tying arrangement. The producers **[**9]** also brought out through testimony and stipulations evidence which showed that Spartan charged substantially above the market rate for its feed and that Spartan discriminated in its pricing policy between different producers.

Spartan's expert testified that any of the integrated firms in north Georgia could have offered a program similar to Spartan's and made a reasonable profit at it. Spartan produced numerous representatives from integrated firms in north Georgia who testified that not only could they have set up a program like Spartan's but they could have done it cheaper. They added that they had not followed that course because it was not economically attractive.

The trial court sent two special interrogatories to the jury on the issue of economic power. The court instructed the jury that an affirmative answer to either question represented a finding that Spartan possessed "appreciable economic power." The interrogatories read:

> (A) As to the (1) purchase and (2) sale or usage of hatching eggs [was] Spartan Grain & Mill Company's overall arrangement with eastern hatcheries to buy all hatching eggs at the same price Spartan Grain & Mill Company was paying producers, **[**10]** an economic advantage that Spartan Grain & Mill Company had over its competitors?
> (B) Was Spartan Grain & Mill Company in the Royston area able to offer a guaranteed price for hatching eggs during the life of the flock at a time when its competitors under conditions then existing could not have offered an equivalent guaranteed price if they had elected to do so?

Amplifying the second interrogatory, the court instructed the jury that the word "could" referred "to reality, to actuality, as compared to a theoretical possibility."

The jury answered "yes" to the first interrogatory and "no" to the second. Based on this finding of fact, the court entered judgment for the producers. Spartan appeals contesting the relevance of the first interrogatory to the issue of economic power and asserting that the jury's answer to the second interrogatory conclusively resolves the issue of economic power in its favor. We are asked today to decide what factors constitute proof of economic power. Spartan contends there is only one factor, cost advantage. The producers argue that cost advantage is only one of several factors. These other factors are price **[*1288]** discrimination, **[**11]** burdensome pricing, and production of an unmatchable differentiated product.

HN1[] Tying arrangements are *per se* violations of section one of the Sherman Act if "a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product. . . ." *Northern Pacific, 356 U.S. at 6, 78 S. Ct. at 518*; *see* *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 1558-1561, 80 L. Ed. 2d 2 (1984)*. The Supreme Court in *Fortner II* discussed the issue of economic power at length. The Court defined ***HN2***[] the inquiry into economic power in a tying case as "whether the seller has some advantage not shared by his competitors in the market for the tying product." *Fortner II, 429 U.S. at 620, 97 S. Ct. at 867*. Three types of advantages were noted by the Court: "legal, as in the case of patented and copyrighted products, . . . physical, as when the product is land, . . . [or] economic, as when competitors are simply unable to produce the distinctive product profitably. . . ." *Id. at 621, 97 S. Ct. at 868* (quoting *Fortner Enterprises, Inc. v. United States Steel, 394 U.S. 495, 505 n.2, 89* ***[**12]*** *S. Ct. 1252, 1259 n.2, 22 L. Ed. 2d 495 (1969))* (cites omitted). The Court explained that economic advantage "is not the product itself but rather the seller's cost advantage in producing it." *Id.* Without a showing of cost advantage, according to the Court, there could be no finding of economic power under a theory of economic advantage. *Id. 429 U.S. at 622, 97 S. Ct. at 868*.

Fortner II involved an asserted economic advantage, as does the instant case. The tie-in there was between homes and credit. U.S. Steel had tied credit arrangements to the sale of prefabricated houses. In evaluating the proof on the question of economic power, the Court's entire focus was on whether plaintiff, a disgruntled housing developer, had shown that the tying arrangement was predicated on a cost advantage U.S. Steel had in the tying product market. All of plaintiff's proof was rejected as not probative of cost advantage. The Court thought the most plaintiff had shown was that U.S. Steel had offered a highly competitive package deal.

The amalgam of factors asserted by the producers to be just as relevant as cost advantage to the question of economic advantage were mentioned by the Court **[**13]** in *Fortner II*. But it is clear that the Court thought them relevant only to the extent that they were probative of cost advantage. The producers have confused the evidentiary facts with the ultimate fact.

In the instant case, Spartan tied the purchase of grain to a guaranteed market for eggs. *Fortner II* dictates that the issue on which Spartan's antitrust liability turns is whether Spartan had a cost advantage in the tying product market. Since Spartan's tying product was a guaranteed market for eggs, the key factual inquiry should have been directed at Spartan's economic ability *vis-a-vis* its competitors to provide a market for eggs.

When the special interrogatories are examined in light of this analysis, the first must be rejected as irrelevant to the question of economic advantage. The first interrogatory asked whether Spartan's arrangement with the eastern hatcheries to purchase broiler eggs was an economic advantage. In phrasing the interrogatory in that manner, the district court focused attention on the economic advantage of the tying product instead of on Spartan's economic advantage in securing the tying product. The Supreme Court cautioned against exactly **[**14]** this misstep in *Fortner II*: economic power when measured strictly by economic advantage is "somewhat confusing since the real source of economic power is not the product itself but rather the seller's cost advantage in producing it." *Fortner II, 429 U.S. at 621, 97 S. Ct. at 868*. The district court's entry of judgment on the basis of the answer to the first interrogatory was error.

The question remains whether a third trial is appropriate. The answer in favor of Spartan on the second interrogatory is conclusive on the issue of economic power. **[*1289]** Judgment should be entered for Spartan. The second interrogatory asked whether Spartan was able to supply a guaranteed market for eggs at a price its competitors could not meet. The court instructed the jury that the word "could" must be viewed realistically. The second interrogatory read in light of this instruction is more than adequate on the issue of cost advantage. It actually is weighted strongly in the producers' favor. What the interrogatory required in order for the jury to find no cost advantage was that Spartan's competitors be able to make a reasonable profit using Spartan's program when in fact, Spartan **[**15]** should have been only required to show that its competitors would have made no less of a return or lost no more than Spartan. That the jury answered this interrogatory in Spartan's favor resolves the question of Spartan's economic power.

Since judgment should have been entered for Spartan, the producers' attorney's fees award must be reversed. *15 U.S.C.A. § 15*; *See* *De Filippo v. Ford Motor Co., 516 F.2d 1313, 1321 (3d Cir.1975)*, *cert. denied*, *423 U.S. 912, 96 S. Ct. 216, 46 L. Ed. 2d 141 (1975)*.

REVERSED and RENDERED.

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Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.

United States Court of Appeals for the Fifth Circuit

July 9, 1984

No. 83-1074

Reporter
735 F.2d 884 *; 1984 U.S. App. LEXIS 20711 **; 1984-2 Trade Cas. (CCH) P66,097

ADJUSTERS REPLACE-A-CAR, INC., Plaintiff-Appellant Cross-Appellee, v. AGENCY RENT-A-CAR, INC., Defendant-Appellee Cross Appellant; WAKELY & ASSOCIATES, INC., Plaintiff-Appellant Cross-Appellee, v. AGENCY RENT-A-CAR, INC., Defendant-Appellee Cross Appellant

Subsequent History: [**1] Petition for Rehearing En Banc Denied August 20, 1984.

Prior History: Appeals from the United States District Court for the Western District of Texas.

Disposition: Affirmed.

Core Terms

pricing, variable, predatory, Adjusters, costs, rental, replacement, monopolize, competitors, barriers, antitrust, exhibits, rental rate, monopolist, charging, monopoly, hiring, firms, anticompetitive, predation, output, anticompetitive conduct, trial judge, Sherman Act, plaintiffs', marginal, losses

LexisNexis® Headnotes

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

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN1[] Scope, Monopolization Offenses

The Sherman Act *§ 2*, *15 U.S.C.S. § 2* 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. A party injured by such anti-competitive conduct may sue to recover treble damages under the Clayton Act § 4, *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

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

HN2[] Antitrust & Trade Law, Sherman Act

The elements of an attempted monopolization under the Sherman Act *§ 2* are: (1) specific intent to accomplish the illegal result; and (2) a dangerous probability that the attempt will be successful. The intent must be to do more than compete vigorously; vigorous competition is precisely what the antitrust laws are designed to foster. Thus, a statement of intent to compete even if perceived as a threat is not unlawful. Such a manifestation of intent to triumph in the competitive market, in the absence of unfair, anticompetitive or predatory conduct, is not enough to establish an antitrust violation. Rather, the forbidden specific intent is that of acquiring and exercising the power to fix prices or to exclude competition.

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

HN3[] Actual Monopolization, Anticompetitive & Predatory Practices

The court defined "predatory" to mean that the defendant must have at least sacrificed present revenues for the purpose of driving plaintiff out of the market with the hope of recouping the losses through subsequent higher prices. A price above average cost is a fairly competitive price for it is profitable to the monopolist if not to its rivals; in effect, the price excludes only less efficient firms. By contrast, a firm's pricing behavior can be considered anticompetitive when it sells at a price below its average variable cost. One important exception to the principle that a price above average variable cost is presumed lawful occurs when there are substantial barriers to new entry into the relevant market.

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

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

HN4[] Actual Monopolization, Anticompetitive & Predatory Practices

As the barriers to entry increase, so does the degree to which the monopolist's price may exceed his average variable cost and yet still be deemed predatory.

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

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

HN5[] **Actual Monopolization, Anticompetitive & Predatory Practices**

In order to prevail as a matter of law, a plaintiff must at least show that either (1) a competitor is charging a price below his average variable cost in the competitive market or (2) the competitor is charging a price below its short-run, profit-maximizing price and barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible.

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

HN6[] **Actual Monopolization, Anticompetitive & Predatory Practices**

One seeking to establish predatory pricing must demonstrate that the defendant at least sacrificed present revenues for the purpose of driving the plaintiff out of the market with the hope of recouping losses through subsequent higher prices. Generally, in order to prove that the defendant has sacrificed present revenues, it is necessary to establish that the defendant's prices were below marginal or average variable cost.

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

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

HN7[] **Judgment as Matter of Law, Judgment Notwithstanding Verdict**

Judgment n.o.v. is appropriate when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question.

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

HN8[] **Monopolies & Monopolization, Attempts to Monopolize**

If the market structure will not allow a dominant firm to set its price above the competitive level, the strictures of the antitrust laws are not activated. The injury to plaintiffs' business is not cognizable under the antitrust laws if competition itself is not harmed.

Antitrust & Trade Law > Regulated Practices > Intellectual Property > General Overview

Trade Secrets Law > Federal Versus State Law > ***Antitrust Law***

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Misappropriation

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Trade Secrets Law > Misappropriation Actions > General Overview

HN9[] **Regulated Practices, Intellectual Property**

The mere hiring away of employees from a rival is lawful. The fact that the employee then uses her own skills and contacts, and not, for example, misappropriated trade secrets, to generate business for her new employer, even at the expense of her old employer, provides no basis for antitrust liability.

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Cox, Smith, Smith, Hale & Guenther, Inc., San Antonio, Texas, Terry S. Bickerton, San Antonio, Texas, Deborah D. Williamson, San Antonio, Texas, Alan Michael Ferrill, San Antonio, Texas, William R. Pakalka, Houston, Texas, for defendant-appellee cross-appellant.

Judges: Johnson, Higginbotham, and Davis, Circuit Judges.

Opinion by: HIGGINBOTHAM

Opinion

[*886] PATRICK E. HIGGINBOTHAM, Circuit Judge:

We review the granting of judgment n.o.v. to the defendant in this private antitrust suit brought by Adjusters Replace-A-Car and Wakely & Associates, two insurance replacement car rental firms, against their rival, Agency Rent-A-Car, Inc. The principal accusation is that Agency employed predatory pricing in the San Antonio and Austin markets as part of an attempt to monopolize in violation of section two of the Sherman Act. Adjusters also charges that Agency hired away **[**2]** an essential employee in an attempt to monopolize the Corpus Christi market. Because we agree with the district court that plaintiffs failed to present a jury question regarding any of these claims, we affirm the judgment for Agency.

I

Adjusters, Wakely, and Agency all operated in a segment of the rental car business, providing replacement cars to persons whose cars had been stolen or damaged in an accident. The replacement rental firm deals directly with insurance adjusters, and is able to offer a lower rate than the standard public rental firms because its rentals are often long-term and its operating and advertising costs are less. To the extent that firms specializing in insurance replacement rentals cannot satisfy the demand for such services, the public rental firms will also provide this service, though ordinarily at a higher cost to the insurer. The record indicates that a public rental firm wishing to compete directly in the insurance replacement segment of the market would be able to do so with relative ease.

In September 1973, Adjusters became the first insurance replacement rental firm to enter the San Antonio market. Wakely and Agency entered that market in **[**3]** October 1974, each charging a daily rental of $9.50; Adjusters' rate was then $8.50. Dissatisfied with its unprofitably small portion of the insurance replacement rental market in San Antonio, Agency cut its rental rate there to $8.00 per day in March 1975. When this tactic failed to increase its market share significantly, Agency in November 1975 reduced its rental rate to $7.00 per day.

At $7.00, Agency began to make substantial inroads into the San Antonio market. After four months it began increasing its price, first to $7.50, then to $8.00, and by July 1976 to $8.50. Agency admits that in San Antonio it suffered a net operating loss during the sixteen month period that its rental rate was set at $8.00 and below, and Adjusters and Wakely charge that Agency continued losing money until it raised its rental rate to $9.50 in February 1977.

In the Austin market, which Adjusters entered in December 1974 and Agency entered in November 1975, the $7.00 rental rate again proved a powerful tool with which Agency carved out a substantial **[*887]** share of the market. Agency's pricing in Austin evidently paralleled its pricing in San Antonio, and it again appears that Agency suffered **[**4]** net operating losses while offering the cheaper rate.

In December 1977, Adjusters left the Austin market and was replaced by Wakely, which charged first $10.00 and then $11.00; Agency was apparently charging $10.45 when Wakely entered that market. Agency cut its Austin rental rate to $9.00 in January 1979. Wakely initially responded with an $8.50 rate, but closed its Austin office after April 1979.

Adjusters opened its Corpus Christi office in January 1975, and held the great percentage of that market by the time Agency opened there in May 1976. Agency came to prominence, however, after it hired away Adjusters' office manager, Patty Manges, who brought many of Adjusters' clients with her to Agency. So successful was Agency that Adjusters left Corpus Christi by March 1977.

Adjusters went out of business in March 1978, closing its San Antonio office. Adjusters' Dallas office, not involved in this litigation, had closed in July 1977. Wakely continues to operate in San Antonio. Both companies argue that their business reversals were due to anticompetitive conduct by Agency, which was allegedly attempting to monopolize the insurance replacement rental market in San Antonio, **[**5]** Austin, and Corpus Christi.

II

HN1[] *Section 2* of the Sherman Act, *15 U.S.C. § 2*, 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." A party injured by such anti-competitive conduct may sue to recover treble damages under section 4 of the Clayton Act, *15 U.S.C. § 15*. Here the claim is one of attempted monopolization by Agency, and the burden on the plaintiffs is to prove the elements of this offense and a causal relationship between the Agency's anticompetitive conduct and the plaintiffs' proven damages. *J.T. Gibbons, Inc. v. Crawford Fitting Co., 704 F.2d 787, 795 (5th Cir.1983)*.

HN2[] The elements of an attempted monopolization under *§ 2* of the Sherman Act are: "(1) specific intent to accomplish the illegal result; and (2) a dangerous probability that the attempt will be successful." *Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 276 (5th Cir.1978)*, *cert. denied*, *440 U.S. 939, 99 S. Ct. 1289, 59 L. Ed. 2d 499 (1979)*. The intent must be to do more than compete vigorously; vigorous competition is precisely **[**6]** what the antitrust laws are designed to foster. Thus, "[a] statement of intent to compete . . . even if perceived as a threat is not unlawful. Such a manifestation of intent to triumph in the competitive market, in the absence of unfair, anticompetitive or predatory conduct, is not enough to establish an antitrust violation." *Hayes v. Solomon, 597 F.2d 958, 977 (5th Cir.1979)*, *cert. denied*, *444 U.S. 1078, 100 S. Ct. 1028, 62 L. Ed. 2d 761 (1980)*. Rather, the forbidden specific intent is that of acquiring and exercising "the power to fix prices or to exclude competition." *United States v. du Pont & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 1005, 100 L. Ed. 1264 (1956)*; *American Tobacco Co. v. United States, 328 U.S. 781, 811, 66 S. Ct. 1125, 1140, 90 L. Ed. 1575 (1946)*; *Spectrofuge, 575 F.2d at 276*.

Adjusters and Wakely argue that the jury was entitled to infer that Agency had the requisite intent and was dangerously likely to succeed at monopolizing the insurance rental market in the relevant geographical area from evidence that Agency's pricing and operational strategies drove competitors from the marketplace when market conditions prevented other firms from **[**7]** entering the market to compete with Agency. The specific conduct which plaintiffs allege was anticompetitive is Agency's use of predatory pricing regimen in San Antonio and Austin, and Agency's deliberate efforts to "steal" Adjusters' Corpus Christi customers by hiring away Adjusters' office manager in that city. Adjusters **[*888]** and Wakely claim that this anticompetitive conduct caused them injury in their trade or business.

Responding to interrogatories, the jury found that Agency had attempted to monopolize the insurance replacement car market in San Antonio and Austin by means of its pricing in 1975 and 1976, in Austin by means of its pricing in 1978 and 1979, and in Corpus Christi by means of hiring Patricia Manges. Total damages, without trebling, were set at $800,000. [1]

Defendants **[**8]** moved for judgment notwithstanding the verdict, and filed a brief supporting the motion. On this basis, the trial judge granted a judgment n.o.v. and dismissed the case. [2] **[**9]** Adjusters and Wakely appeal. [3]

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[1] The damage award was broken down as follows:

San Antonio

Adjusters:

$ 271,000

Wakely:

88,000

Austin

Adjusters:

182,000

Wakely:

162,000

Corpus Christi

Adjusters:

97,000

[2] The court's order reads: "Having considered Defendant's Motion for Judgment Notwithstanding the Verdict, Plaintiffs' response thereto and the argument of counsel, as well as the evidence presented at trial hereof, the Court finds that said motion should be granted for the reasons set forth in Defendant's brief in support thereof."

We have many times disapproved the use of such brief, unilluminating orders granting judgment in complex cases. Most recently, in *Myers v. Gulf Oil Corp., 731 F.2d 281, 283 (5th Cir.1984)*, we described an order almost identical to this one as being

[10]** III

There is obviously a tension inherent in the legal assignment to protect competition but not competitors. Fighting hard but fair, avoiding ruinous competition and avoiding predation are often-used catch-words that fail in their central normative purpose -- they do not segregate desired and undesired conduct in the marketplace. As a seeming precursor to the current willingness of courts to be informed by economics, Professors Areeda and Turner, **[*889]** lawyer and economist, undertook to suggest measures with content. Their effort was sufficiently successful that the starting point for an analysis of a predatory pricing claim is now their influential article, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697 (1975), in which they analyze a firm's pricing in terms of that firm's average total cost, average total cost, average variable cost, and marginal cost of production.

Basic economic theory subscribed to by Areeda and Turner teaches that in a perfectly competitive market a small manufacturer's price is dictated by the marketplace, and his production will be at the level where the marginal cost of producing another unit **[**11]** of output exactly equals the price that he will receive for this unit. A manufacturer's costs are divided between fixed costs, which do not vary with the level of production shrinks to zero, and variable costs, which do vary with production and roughly equal the cost of the resources necessary to produce additional units of output. Because marginal cost is an economic concept with no exact counterpart in account, Areeda and Turner employ average variable cost as a surrogate for marginal cost. [4]

According to Areeda and Turner, a firm is always acting reasonably if it charges a price for its output that enables it to recover at least its average variable costs, because at that price the company is recovering the costs associated **[**12]** with producing each individual unit of output. The firm will, of course, prefer to recover its average

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"pithy to the point of being incomplete," and we vacated a summary judgment so that the district judge could provide us with an adequate statement of reasons for his action. Such a statement by the trial court is essential to effective review. *Id. at 284*; *Jot-Em-Down Store (JEDS) Inc. v. Cotter & Co., 651 F.2d 245, 247 (5th Cir.1981)*.

Here, though practical concerns persuade us to review and decide this case, we are left guessing about the district court's reason for granting judgment n.o.v. Did the district court conclude that plaintiffs failed to prove *prima facie* unlawful pricing? that they failed to prove dangerous likelihood of success? that they failed to prove fact of injury, or amount of damages, or causation? Perhaps Agency prevailed on all these issues; because the district court has said only that it adopts the arguments in Agency's post-verdict brief, we are effectively forced to assume that such is the case.

We are, of course, sympathetic to the trial court's limited resources -- especially time -- in the face of a heavy caseload. A lengthy opinion is not always required, and arguments may be incorporated from the parties' briefs if they are specifically recited rather than adopted *en masse*. In the final analysis, however, it is the trial court's exercise of judgment that we review, and in a case such as this one we must see more evidence of that judgment than a boilerplate order if we in turn are to perform our function effectively.

[3] In their initial appellate brief, plaintiffs argued that Agency's motion for judgment n.o.v. should not have been entertained by the trial judge because Agency allegedly did not make an adequate motion for directed verdict at the close of all the evidence as prescribed by *Fed.R.Civ.P. 50(b)*. Agency, moved for directed verdict at the close of the plaintiffs' evidence, laying out the various grounds on which it thought it was then entitled to judgment. At the close of the defendant's case, Agency briefly reurged its motion for directed verdict, incorporating the grounds urged in its initial motion.

Since plaintiffs' original brief was filed, this court has decided two cases involving similar contentions about allegedly insufficient motions for directed verdicts. *Bohrer v. Hanes Corp., 715 F.2d 213 (5th Cir.1983)*, *cert. denied*, *__U.S.__, 104 S. Ct. 1284, 79 L. Ed. 2d 687 (1984)*; *Elliott v. Group Medical & Surgical Service, 714 F.2d 556 (5th Cir.1983)*. In both cases we rejected a rigid application of *Rule 50(b)*, holding that if the court and counsel were adequately informed of the defendant's challenge to the sufficiency of plaintiff's evidence a motion for judgment n.o.v. could thereafter be entertained. *Bohrer* and *Elliott* control this case; the trial judge properly considered Agency's motion for judgment n.o.v.

[4] Although variable costs and marginal costs will differ at some points along the production possibilities curve, we note simply that, so long as marginal cost did not significantly exceed average variable cost during the relevant time, any difference is not germane to our analysis.

total cost, but if it is unable to do so it will minimize its losses if it produces those units of output for which it can recover at least its variable costs. This is so because, in the short run at least, a firm cannot escape paying its fixed costs even if it reduces its production to zero.

Areeda and Turner argue that predatory pricing occurs only when a firm sets its price at a level below its average variable cost. At this price, the firm is suffering a loss on every unit of output it produces and sells, and its behavior is rational only if it hopes by engaging in this conduct to drive its competitors from the market and thereby gain monopoly powers that will enable it to charge a monopoly price in the future. This sort of pricing conduct is economically undesirable because the monopoly profits garnered by the monopolist over the long term will more than offset the short term benefit to consumers of the low predatory price. Competitors, of course, are harmed also, either by being driven from the market or by being disciplined into following the price leadership of the **[**13]** monopolist.

In this court's first major statement on predatory pricing following publication of the Areeda-Turner article, we adopted much of its analysis. *International Air Industries, Inc. v. American Excelsior Co., 517 F.2d 714 (5th Cir.1975)*, *cert. denied*, *424 U.S. 943, 96 S. Ct. 1411, 47 L. Ed. 2d 349 (1976)*. ***HN3***[] We defined "predatory" to mean that the defendant "must have at least sacrificed present revenues for the purpose of driving [plaintiff] out of the market with the hope of recouping the losses through subsequent higher prices." *Id. at 723*. We agreed with Areeda and Turner that "a price above average cost is a fairly competitive price for it is profitable to the monopolist if not to its rivals; in effect, the price excludes only less efficient firms." *Id.* By contrast, "a firm's pricing behavior can be considered anticompetitive when it sells at a price below its average variable cost." *Id. at 724*.

One important exception to the principle that a price above average variable cost is presumed lawful occurs when there are substantial barriers to new entry into the relevant market. In such a case, we expressed concern that even a price above average **[**14]** variable cost might enable a monopolist to drive an existing competitor out of the market, whereafter the entry barriers **[*890]** would enable the monopolist to realize substantial monopoly profits. ***HN4***[] As the barriers to entry increase, so does the degree to which the monopolist's price may exceed his average variable cost and yet still be deemed predatory. *Id. at 724-25* & n. 31. ***HN5***[] In sum:

> In order to prevail as a matter of law, a plaintiff must at least show that either (1) a competitor is charging a price below his average variable cost in the competitive market or (2) the competitor is charging a price below its short-run, profit-maximizing price and barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible.

Id. at 724 (footnotes omitted). Finally, we cautioned that it is "important to look to the price discriminator's costs, rather than his competitor's cost, to determine whether the price discrimination was anti-competitive." *Id. at 724-25*.

The objective economic approach to predation that we adopted in *American Excelsior* is still the law of this circuit. At the same time, **[**15]** however, we declined to adopt Areeda and Turner's proposed *per se* test for predatory pricing whereby a price above average variable cost would be *per se* non-predatory and a price below average variable cost *per se* predatory. We were unwilling, in an attempted monopolization case, to relegate the intent element to the status of an automatic and irrebuttable inference.

That interest in the defendant's intent surfaced in *Malcolm v. Marathon Oil Co., 642 F.2d 845 (5th Cir.)*, *cert. denied*, *454 U.S. 1125, 102 S. Ct. 975, 71 L. Ed. 2d 113 (1981)*, where we declared that "predatory pricing differs from healthy competitive pricing in its motive: a predator by his pricing practices seeks 'to impose losses on other firms, not garner gains for itself. '" *Id. at 853-54*, *quoting* L. Sullivan, *Handbook of the Law of Antitrust* 111 (1977). While the *Malcolm* panel noted the ongoing debate between partisans of an economic test for predation -- the Areeda-Turner approach -- and partisans of an intent test -- the Sullivan approach -- and disclaimed any view of the merits of these alternative analytical frameworks, *id. at 854 n. 17*, this court had already joined **[**16]** the economic camp in *American Excelsior*, and that decision bound the panel deciding *Malcolm* as it binds this panel. *See White v. Estelle, 720 F.2d 415, 417 (5th Cir.1983)*.

Our latest statement on predatory pricing briefly iterates the teaching of *American Excelsior*:***HN6***[]

> One seeking to establish predatory pricing must demonstrate that the defendant "at least sacrificed present revenues for the purpose of driving [the plaintiff] out of the market with the hope of recouping losses through subsequent higher prices." *International Air Industries v. American Excelsior Co., 517 F.2d 714, 723 (5th Cir.1975)*, *cert. denied*, *424 U.S. 943, 96 S. Ct. 1411, 47 L. Ed. 2d 349 (1976)*. Generally, in order to prove that the defendant has sacrificed present revenues, it is necessary to establish that the defendant's prices were below marginal or average variable cost.

Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300, 305 (5th Cir.1984). [5] **[**18]** In sum, **[*891]** although we follow with interest the continuing debate over theories of predation, the law in this circuit is that where barriers to entry are not pronounced predatory pricing is not established unless **[**17]** the defendant has set his price below his average variable cost. [6]

IV

We review then the evidence to determine if it can sustain a finding that Agency charged a price below its average variable cost. If the evidence cannot support this finding, we must next determine if there is evidence that barriers to entry existed which could render even a price above average variable cost predatory. Related particularly to this latter inquiry, we must then query whether market conditions generated a dangerous probability that defendant would succeed in attaining a market position which **[**19]** would enable it to control the market price. We conclude as a matter of law that plaintiffs here failed on all three counts.

Before trial, plaintiffs filed requests for admissions under *Fed.R.Civ.P. 36*. The first request was: "During the period of time that Agency charged $7.00 per day for a rental unit in San Antonio, its San Antonio rental office experienced a net loss from operations." The second request substituted "Austin" for "San Antonio." The third request dealt with Agency's $8.00 price in San Antonio, and the fourth request dealt with Agency's $8.00 price in Austin. Agency admitted that all four propositions were true.

At trial, plaintiffs relied almost exclusively on these admissions as evidence that Agency had engaged in predatory pricing. Plaintiffs did not offer any evidence respecting Agency's variable and fixed costs of operation. Rather, plaintiffs interpreted Agency's admission that it had suffered "a net loss from operations" to be effectively an admission of predatory pricing. This was a costly error.

Plaintiffs fought admission of exhibits showing that Agency operations in San Antonio and Austin earned revenues greater than their costs during some of **[**20]** the months covered by the admissions and less than their costs during some others of these months. Plaintiffs argued that the exhibits conflicted with the admissions, but the

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[5] Sister circuits have also weighed the merits of Areeda and Turner's economic analysis of predation. Although all have accepted the basic premises of the Areeda and Turner formulation, most have expressed some reservations about supplanting entirely the intent-based test, and none have adopted a *per se* cost-based test. Of particular interest are the discussions in *MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir.)*, *cert. denied*, ***__U.S.__, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)***; ***William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014 (9th Cir.1981)***, *cert. denied*, ***459 U.S. 825, 103 S. Ct. 57, 74 L. Ed. 2d 61 (1982)***; and *Northeastern Tel. Co. v. American Tel. & Tel. Co., 651 F.2d 76 (2d Cir.1981)*, *cert. denied*, ***455 U.S. 943, 102 S. Ct. 1483, 71 L. Ed. 2d 654 (1982)***. A helpful overview of the caselaw in this area is Vawter & Zuch, *A Critical Analysis of Recent Federal Appellate Decisions on Predatory Pricing*, 51 Antitrust L.J. 401 (1983). A less comprehensive discussion of the caselaw accompanies an interesting and thought-provoking synopsis of the principal alternative theories of predatory pricing advanced in the legal and economic literature in Calvani & Lynch, *Predatory Pricing under the Robinson-Patman and Sherman Acts: An Introduction*, 51 Antitrust L.J. 375 (1983).

[6] We recognize that a cost which is regarded as fixed in the short-run may become variable in the long-run, as, for example, when durable goods wear out and are either replaced or not. In most cases, however, we think it will be obvious to judges and juries which costs are appropriately viewed as fixed and which as variable over the relevant time period. When a legitimate dispute arises as to the characterization of certain costs, the question is one of fact to be resolved by the jury. *See* ***William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d at 1036-38***.

exhibits were admitted when the trial judge concluded that the admissions related only to total costs and total revenues; when a portion of Agency's headquarters overhead was allocated to the individual offices, each showed a net loss throughout the period covered by the admissions. The defense exhibits, which made no provision for an allocation of centralized operating costs, were not inconsistent.

Admission of these exhibits afforded Agency an opportunity to demonstrate that the price it charged for a rental car never dropped below its average variable costs. Agency's expert testified, based on these documents, that Agency's average variable costs in San Antonio and Austin during the relevant time periods fluctuated between approximately $3.65 and approximately $5.00. Thus, Agency's price was always at least 40% greater than its average variable cost. The expert also testified that Agency's average variable costs in Austin were $5.23 when Agency went to a $9.00 price there in January 1979; the price was **[**21]** thus 72% above average variable cost. This testimony cut to the quick of plaintiffs' predatory pricing claim, and Adjusters and Wakely urge that admission of the defense exhibits upon which defendant's expert wholly relied was reversible error.

[*892] First, Adjusters and Wakely contend that the exhibits conflict with Agency's admissions that it operated at a net loss, but we reject this argument for the same reason as the trial judge: The admissions and the exhibits do not conflict. This is apparent when one has in mind what costs are reflected in each.

Second, plaintiffs charge that they were never given access to the underlying documents summarized in the profit and loss statements. The trial judge found, however, that plaintiffs bore most of the blame if they were surprised by the testimony of Agency's expert, for they had turned down an opportunity to take his deposition before trial. The underlying documents were in fact made available to plaintiffs, and they would have known which ones were important to their case if they had taken the deposition of Agency's expert. Plaintiffs, however, erroneously assumed that Agency's admissions gave them all the ammunition they **[**22]** needed, and were surprised to discover at trial that their big gun was not loaded.

Plaintiffs cry foul. Agency, they charge, took advantage of their misapprehension concerning the importance of the admissions. Even assuming this to be true, [7] **[**23]** nothing in our adversary system prevents Agency from exploiting plaintiffs' error by watching silently as plaintiffs failed to carry their burden of proof. Agency was under no obligation to teach Adjusters and Wakely about the rudiments of predatory pricing or to point out the difference between a net operating loss and a price below average variable cost. Instead, this distinction was brought out at trial to rebut any impression that plaintiffs had established a prima facie case of predatory pricing. [8]

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[7] The record does suggest that Agency did not share plaintiffs' misapprehension:

> THE COURT: * * * Mr. Tondre [plaintiffs' counsel] says they relied on these admissions and even after this [defense] expert was tendered, I mean, the expert negated the admissions at least insofar as certain months were concerned. He came up and said the average variable cost was exceeded by these prices.
>
> MR. BICKERTON [defendant's counsel]: Which was never any response -- there was never any interrogatory. They have never asked us about costs, your Honor. I think that is the point in this case, and if you look at American Excelsior, it is not whether you make a profit or loss. It is the cost. Cost is the test in a predatory price increase [*sic*] case.

Agency made the same point in another exchange:

> MR. BICKERTON: We are not changing the admission.
>
> THE COURT: You are modifying it or explaining it, right? You are saying it ain't so.
>
> MR. BICKERTON: We are saying we agree that we lost money -- you know, frankly, he didn't couch the question properly: Did you have a net loss? Net loss is not even a relevant issue in a predatory pricing case. Below cost or above cost, that is the issue . . . .

[8] Thus, the following exchange occurred on direct examination of Agency's expert:

> Q. Can a firm charge a price still above its average variable cost and still sustain a net loss in the period that you mentioned?

[24]** Adjusters and Wakely seek now to convince us that Agency's price was below its average variable costs when it charged a $7.00 and $8.00 rental rate for its automobiles. Such evidence, however, had to be set before the jury, and the record shows that plaintiffs failed to carry their burden even of proving a prima facie case of below-cost pricing. Although plaintiffs challenged **[*893]** many of the assumptions shaping the opinion of Agency's expert, the record is devoid of any positive evidence that Agency's average variable cost ever exceeded its prices. ***HN7***[] Judgment n.o.v. is appropriate when "there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question." *Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir.1969)* (en banc). This record will not support a finding that Agency's price was ever inadequate to cover its average variable costs. [9]

[25]** Under the *American Excelsior* rule, plaintiffs might still prevail if they were able to establish that the barriers to entry were sufficiently high to render even a price above average cost predatory. The insurance replacement car market is neither a natural monopoly nor a heavily regulated industry. Plaintiffs argue, however, that barriers existed in the form of high start-up costs and the need for contacts within the insurance industry. We find that the only conclusion permitted by the record is that the barriers to entry into this market were slight -- not negligible, perhaps, but assuredly not so great as to permit a monopoly born of predatory pricing to be exploited before new competition would scotch the potential for extra-normal profits. [10]

A. Can a firm charge a price above the average variable price [*sic*] and yet still maintain a net loss?

Q. For the period?

A. Yes.

Q. Is it true, that the term "average variable cost" and whether you are above or below average variable cost doesn't necessarily have anything to do with whether or not you are making a net profit or loss?

A. I would expect that if you are above average variable cost but below average total cost, you might be sustaining a loss.

Q. Talking about different concepts?

A. That's right.

Earlier in the trial Agency's chairman had also revealed a businessman's instinctive grasp of this concept:

Q. Pursuant to court procedures, pursuant to what is called a request for admissions, [Agency] has admitted that during the time Agency was charging $7.00 and $8.00 in San Antonio and Austin, it was losing money in those offices. That is the state of the record.

A. Sir, we could be charging $50 per car when we first open and still lose money.

[9] Nor, given the essentially fungible character of the product and the relatively low plant investment, is it surprising that there is no suggestion that marginal cost ever exceeded average variable cost.

[10] Sensitive to the stricture that when a judgment n.o.v. is sought the evidence must be viewed "in the light and with all reasonable inferences most favorable to the party opposed to the motion," *Boeing Co. v. Shipman, 411 F.2d at 374*, we set out some of the exchanges at trial that underlie our conclusion. Most direct was the testimony of Agency's expert:

Q. Do you have an opinion as to whether or not any company could have charged a monopoly [price] in the replacement car rental business?

* * * * * *

A. In my opinion no company could have established a monopoly in San Antonio in the auto replacement rental business at that time.

Q. Why is that?

A. Primarily, there are no barriers to entry. Should a company be able to, even for a short period of time, exclude competition and raise their prices to an unusual profit, the market would be flooded by competitors to compete away any monopoly profits. There are so low barriers to entry into the business from what I can learn that there could be no monopoly in that industry.

[26]** **[*894]** This last conclusion dooms not only plaintiffs' claim of predatory pricing, but also another necessary element of their case -- the dangerous probability of success. ***HN8***[] If the market structure will not allow a dominant firm to set its price above the competitive level, the strictures of the antitrust laws are not activated. The injury to plaintiffs' business is not cognizable under the antitrust laws if competition itself is not harmed. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488-89, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)*; *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*.

Only Adjusters, during its first year of operations, had the luxury of being the sole firm in San Antonio specializing in insurance replacement rentals. Significantly, Adjusters' founder testified that during this period he was able neither to set a monopolist's price nor to prevent competitors from entering the market.

A jury question would have been presented, of course, if plaintiffs' evidence had been to the contrary. Instead, plaintiffs' expert effectively endorsed the defense expert's assessment:

> Q. Do you remember we had some discussion about replacement[?] Didn't you tell me in the deposition it was your perception that it would be easy for the daily car companies, the Hertz and Avises to get into the business whether or not they are in it at this time? You said that?
>
> A. I think it would be easy for me to get in it. I guess it obviously would be easy for them.
>
> Q. I think you also indicated it would be easy for the new car dealers to get into the business whether or not they were in it at this time?
>
> A. That is correct.

Even more damaging to plaintiffs' case were the admissions made by the founder and president of Adjusters:

> Q. Essentially, all it takes to be in the replacement car business or the insurance rental business is cars and an office and a decision to be involved in that business, isn't that true?
>
> A. And some knowledge.
>
> Q. Some knowledge. Wouldn't you assume that Hertz or Avis or any existing car rental company would have at least as much about the replacement car rental business as you did when you started the business?
>
> A. Yes, but they would want to specialize.
>
> Q. So, you would agree with me, then, would you not, that there is a possible ready transition by the Hertzes and the Avises into the insurance rental business even to a larger extent than they are now?
>
> A. Yes.
>
> Q. And isn't there also another source of competition in the replacement car insurance rental business, that being the car dealers?
>
> A. Some car dealers.
>
> * * * * * *
>
> Q. If the new car dealer made the decision to get into the replacement car business in San Antonio, all it would take would be the decision to do it and acquiring the knowledge?
>
> A. It is the same as in any business.
>
> Q. Is there any reason to think they couldn't develop a fantastic business within a year just like you did?
>
> A. No.
>
> * * * * * *
>
> Q. And we also know that regardless of how many actual competitors there are for this business, there are a whole lot of potential competitors, isn't that true[?]
>
> A. There is a lot of potential, yes.

On this record, the trial judge concluded that, as a matter of law, plaintiffs failed to establish that Agency engaged in anticompetitive conduct in San Antonio and Austin which created a dangerous probability **[**27]** that Agency would come to wield monopoly powers in those markets. We agree with this conclusion, and accordingly affirm the granting of judgment n.o.v. on these claims.

V

In Corpus Christi, Adjusters' complaint rests on the fact that Agency hired Adjusters' former office manager, Patty Manges, and that many of Adjusters' customers followed her to Agency. Adjusters charges that Manges was lured away from her job with that company, and that she was specifically induced to draw away Adjusters' customers.

The case principally relied upon by both parties is *Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342 (5th Cir.1980)*, *cert. denied*, *450 U.S. 1030, 101 S. Ct. 1740, 68 L. Ed. 2d 226 (1981)*. *Page* must be read on its facts. Within a narrowly framed market, we found an antitrust violation on the basis of evidence that the defendant had induced the plaintiff's employees to act disloyally in steering business toward the defendant while they were evidently still in the employ of the plaintiff. Here there was no evidence that Manges acted inimically to Adjusters' interests until she had already left their employ for Agency.

HN9[] *Page* supports the view that **[**28]** "the mere hiring away of employees from a rival" is lawful. *624 F.2d at 1354*. The fact that the employee then uses her own skills and contacts -- and not, for example, misappropriated trade secrets -- to generate business for her new employer, even at the expense of her old employer, provides no basis for antitrust liability. The record here contained nothing more, and we hold accordingly that judgment n.o.v. was properly granted to Agency on this claim.

VI

In sum, plaintiffs have failed to establish that any injury caused their businesses as a result of Agency's participation in the insurance replacement car rental market in San Antonio, Austin, and Corpus Christi stemmed from anticompetitive conduct comprehended by *section 2* of the Sherman Act. Predatory pricing was not shown in San Antonio and Austin; anticompetitive hiring practices were not shown in Corpus Christi. Plaintiffs likewise failed to establish a dangerous probability that Agency could have come to monopolize any of these markets. As the evidence was insufficient to support a jury verdict for the plaintiffs, entry of judgment n.o.v. was appropriate.

AFFIRMED.

End of Document

Bio-Rad Labs., Inc. v. Nicolet Instrument Corp.

United States Court of Appeals for the Federal Circuit

July 12, 1984

Appeal Nos. 83-829, 83-864

Reporter

739 F.2d 604 *; 1984 U.S. App. LEXIS 15064 **; 222 U.S.P.Q. (BNA) 654 ***

BIO-RAD LABORATORIES, INC., a Delaware Corporation, Plaintiff-Appellee, Cross-Appellant, v. NICOLET INSTRUMENT CORPORATION, a Wisconsin Corporation, Defendant-Appellant, Cross-Appellee

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

Disposition: Affirmed-in-Part, Vacated-in-Part, and Remanded.

Core Terms

invention, infringement, specimen, interferometer, measuring, mirror, patent, surface, thickness, travel, distance, beam, film, peak, radiation, radiation-reflective, instruments, misuse, scan, prejudgment interest, new trial, interferogram, emanating, duPont, argues, lost profits, trial judge, presumed, invalid, optical

LexisNexis® Headnotes

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

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Jury Trials, Jury Instructions**

On appeal after denial of a motion for judgment notwithstanding the verdict, appellant must show either: 1) that the jury's presumed or express findings are not supported by substantial evidence or, 2) if the jury's findings were supported by substantial evidence, that the legal conclusions implied from the verdict cannot be supported by those findings.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN2[] Standards of Review, Abuse of Discretion

A district court's denial of a motion for a new trial is reviewed on an abuse of discretion standard.

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

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

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

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

Civil Procedure > Appeals > Standards of Review > General Overview

HN3[] Jury Trials, Jury Instructions

There is no error inherent in submitting questions of law to a jury so long as the jury is adequately instructed.

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

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

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

HN4[] Jury Instructions, Objections

A party must object to an instruction in time to give the trial judge an opportunity to correct the alleged error before the jury returns its verdict. If no objection is raised, the instructions cannot be challenged on appeal unless great injustice would result.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN5[] Standards of Review, Abuse of Discretion

Questions regarding abuse of the discovery process are within the trial judge's province and denial of a motion for new trial based on such abuse will be overturned only if the denial of a new trial is shown to be an abuse of discretion.

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

Patent Law > Infringement Actions > Burdens of Proof

Patent Law > Infringement Actions > General Overview

Patent Law > Remedies > Damages > General Overview

Patent Law > Remedies > Damages > Patentholder Losses

HN6[] Jury Trials, Jury Instructions

To obtain lost profits, a patent owner must prove that he would have made the sales but for the infringing activity. The patent owner need not prove causation as a certainty, evidence showing a reasonable probability that the patent owner would have made the sales made by the infringer will suffice.

Patent Law > Infringement Actions > General Overview

Patent Law > Remedies > Damages > General Overview

Patent Law > Remedies > Damages > Measure of Damages

Patent Law > Remedies > Damages > Patentholder Losses

HN7[] Patent Law, Infringement Actions

The amount of lost profits awarded for patent infringement cannot be speculative but the amount need not be proven with unerring precision.

Patent Law > Remedies > Damages > General Overview

HN8[] Remedies, Damages

Though established royalty rates are normally applicable, they do not necessarily establish a ceiling for the royalty that may be assessed after an infringement trial.

Antitrust & Trade Law > ... > Intellectual Property > Misuse of Rights > Patent Misuse Defense

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

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Misuse

HN9[] Misuse of Rights, Patent Misuse Defense

Patent misuse is an affirmative defense that must be pleaded and proved.

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

Patent Law > Remedies > Damages > General Overview

Civil Procedure > Remedies > Judgment Interest > General Overview

Patent Law > ... > Damages > Collateral Assessments > Prejudgment Interest

HN10[] **Judgment Interest, Prejudgment Interest**

Prejudgment interest is compensatory, not punitive, and should be awarded under *35 U.S.C.S. § 284* absent some justification for withholding such award.

Counsel: Harold C. Hohback, of San Francisco, California, argued for Appellant. With him on the brief were William J. Egan, III, and William A. Cammett.

Robert J. Sherman and David A. Allgeyer, of Minneapolis, Minnesota, were on the brief for Appellant.

Roger L. Cook, of San Francisco, California, argued for Appellee. With him on the brief were J. Georg Seka, David N. Slone and John W. Schlicker of Counsel.

Judges: Friedman, Circuit Judge, Nichols, Senior Circuit Judge, and Baldwin, Circuit Judge.

Opinion by: BALDWIN

Opinion

[*656]** **[*606]** BALDWIN, Circuit Judge.

This is an appeal from an unpublished decision of the United States District Court for the Northern District of California holding claims 1-7 of U.S. Patent No. 3,319,515 (hereinafter '515 patent or Flournoy patent) for an "Interferometric Optical Phase Discrimination Apparatus" valid and infringed. Judgment was entered on a jury verdict rendered after forty-four days of trial. We vacate the District Court's denial of prejudgment interest and remand for an award of prejudgment interest or a determination that some **[**2]** reason exists for denying prejudgment interest. In all other respects, the judgment is affirmed.

The Parties

Bio-Rad Laboratories, Inc. (Bio-Rad) is a Delaware corporation with its principal office in Richmond, California. Between 1978 and 1979, Bio-Rad acquired two divisions, Digilab, Inc. (Digilab) and Block Engineering, Inc. (Block Engineering). Digilab was formed as a subsidiary of Block Engineering in 1969 to produce and sell instruments that rapidly measure the crystalline surface layer on semiconductors, known as the epitaxial layer. Since 1970, Digilab has manufactured and sold an epitaxial measuring instrument known as the FTG-12 under an exclusive license from E. I. du Pont de Nemours and Company (du Pont), owner of the '515 patent. When Bio-Rad acquired Block Engineering and Digilab, it also acquired the exclusive license under the '515 patent which included the right to enforce the patent against infringers. The name Bio-Rad will be used throughout this opinion to refer to the conduct of Digilab, and Block Engineering, as well as the conduct of Bio-Rad.

Nicolet Instrument Corporation (Nicolet) is a Wisconsin corporation engaged in the production and **[**3]** sale of electronic instruments. In 1979, Nicolet began selling an epitaxial thickness measuring instrument known as the MX-ECO.

Procedural Background

In 1981, Bio-Rad sued Nicolet for willful infringement of the '515 patent by Nicolet's production and sale of the MX-ECO measuring instrument. Nicolet counterclaimed for a declaratory judgment that the '515 patent is invalid and not infringed, and for alleged violations of the antitrust laws.

Both Bio-Rad and Nicolet demanded a jury trial and agreed to submit the case to the jury on general verdicts without special interrogatories. The jury declared all seven claims of the '515 patent valid and infringed, but not willfully infringed. The jury also concluded that Bio-Rad did not violate sections 1 or 2 of the Sherman Antitrust Act. The jury awarded Bio-Rad $3,078,000 in money damages for the infringement.

[*607] Nicolet moved for judgment notwithstanding the verdict (JNOV) and, in the alternative, for a new trial. Nicolet also moved to deny enforcement of the '515 patent for misuse. The district court denied all three motions and denied Bio-Rad's separate request for prejudgment interest. The trial judge entered **[**4]** judgment on the jury verdicts without comment and permanently enjoined Nicolet from infringing the '515 patent in any way, including by the production, use or sale of the MX-ECO epitaxial thickness gauge. Interest was awarded from the date judgment was entered.

Nicolet appeals from the judgment entered by the District Court, and from the court's refusal to declare the '515 patent unenforceable for patent misuse. Bio-Rad cross-appeals from the lower court's denial of prejudgment interest. Although this appeal is from the judgment entered on the jury verdict, the District Court's denial of Nicolet's motions guides our analysis. Accordingly, we consider the issues raised by the parties in the following order:

I. Grounds For JNOV.
II. Grounds For New Trial.
III. Patent Misuse.
IV. Prejudgment Interest.

Standard of Review

Several cases have issued from this court describing the analysis trial judges should follow when they entertain motions for JNOV or new trial. *Connell v. Sears, Roebuck & Co., 722 F.2d 1542, 1546, 220 U.S.P.Q. (BNA) 193, 197 (Fed. Cir. 1983)*; *Railroad Dynamics, Inc. v. A. Stucki Co., 727 F.2d 1506, 1512-13, 220 U.S.P.Q.* ***[**5]*** *(BNA) 929, 936 (Fed. Cir. 1984)*; *Perkin-Elmer Corp. v. Computervision Corp., 732 F.2d 888, 221 U.S.P.Q. (BNA) 669, 672-673 (Fed. Cir. 1984)*. That analysis need not be repeated here, but description of our appellate review process is useful.

Nicolet has urged that we review the record *de novo*, in part because no interrogatories were submitted to the jury and because the trial judge did not produce a written opinion discussing reasons for denying Nicolet's motions or describing the facts supporting **[***657]** the jury verdict. Nicolet mistakes our role. The presence of special interrogatories or a written opinion by the trial court certainly makes our task easier but the absence of these aids does not alter our standard of review. In the absence of special interrogatories we presume the existence of factual findings and legal conclusions necessary to support the verdict reached by the jury. The findings and conclusions are controlled by the court's instructions to the jury. *Perkin-Elmer, 732 F.2d at 893, 221 U.S.P.Q. (BNA) at 673*. ***HN1***[] On appeal after denial of a motion for JNOV, appellant must show either: 1) that the jury's presumed or express findings are not supported by substantial **[**6]** evidence or, 2) if the jury's findings were supported by substantial evidence, that the legal conclusions implied from the verdict cannot be supported by those findings. *Perkin-Elmer, 732 F.2d at 893, 221 U.S.P.Q. (BNA) at 673*. In sum, appellant must show either that reasonable jurors could not have made the presumed findings or that the conclusions necessary to the general verdict were not supported. ***HN2***[] The District Court's denial of Nicolet's Motion for a new trial is reviewed on an abuse of discretion standard. *Railroad Dynamics, Inc. v. A. Stucki Co., 727 F.2d at 1512, 220 U.S.P.Q. (BNA) at 935*. As this description of our approach demonstrates, our role as a reviewing court is circumscribed by standards that place a difficult burden on appellant.

Analysis

I. *Grounds For JNOV*

To overturn the District Court's denial of the Motion For JNOV, Nicolet presents several grounds for declaring the '515 patent invalid. The various grounds for invalidity will be discussed under the following lettered sections:

A. Anticipation and Obviousness.
B. Fraud.

C. Compliance With The Requirements Of *35 U.S.C. § 112*.
D. Infringement.

[7]** **[*608]** A. *Anticipation and Obviousness*

1. *Description of the Invention*

The '515 patent claims a method and apparatus for determining the thickness of a film or a surface layer on a substrate. The apparatus, known as an interferometer, may be used to measure the thin crystalline surface layer of semiconductors, known as the epitaxial layer. The claimed method is represented by claim 1 of the '515 patent, reproduced below:

> 1. A method for determining a physical property of a specimen on the basis of interferometric optical phase discrimination comprising, in sequence, directing analytical radiation upon said specimen along a course such that there is developed an optical phase difference between radiation emanating from a first radiation-reflective surface of said specimen and from a second radiation-reflective surface of said specimen, cyclically varying at a predetermined time rate the length of the path of travel of said radiation emanating from a given one of the pair consisting of said first radiation-reflective surface of said specimen and said second radiation-reflective surface of said specimen, with respect to the length of the path of travel of the **[**8]** radiation emanating from the other of said pair over a span inclusive of a zero-order peak at **[***658]** which there exists constructive interference between said radiation emanating from said first radiation-reflective surface of said specimen and from said second radiation-reflective surface of said specimen, measuring the elapsed time existing between the scan traverse of said zero-order peak at which there exists said constructive interference and a pre-selected reference point synchronized in time with the cycle of said scan traverse, said pre-selected reference point being originally established in location by scanning said specimen through a span inclusive of a central zero-order peak, and determining said physical property of said specimen as a function of said elapsed time.

The apparatus claims correspond to the method claims as illustrated by claim 5, reproduced below:

> 5. Apparatus for determining a physical property of a specimen on the basis of interferometric optical phase discrimination comprising, in combination, a source directing radiation upon said specimen of a wavelength adapted to develop an optical phase difference between radiation emanating from a first **[**9]** radiation-reflective surface of said specimen and from a second radiation-reflective surface of said specimen, means cyclically varying at a predetermined time rate the length of the path of travel of said radiation emanating from a given one of the pair consisting of said first radiation-reflective surface of said specimen and said second radiation-reflective surface of said specimen with respect to the length of the path of travel of the radiation emanating from the other of said pair over a span inclusive of a zero-order peak at which there exists constructive interference between said radiation emanating from said first radiation-reflective surface of said specimen and from said second radiation-reflective surface of said specimen, means sensing the occurrence of said zero-order peak, means measuring the elapsed time existing between the scan traverse of said zero-order peak and a preselected reference point synchronized in time with the cycle of said scan traverse, said preselected reference point being originally established in location by scanning said specimen throughout a span inclusive of a central zero-order peak, and means indicating said physical property of said specimen **[**10]** as a function of said elapsed time.

Operation of a preferred embodiment of the claimed invention is illustrated with reference to Figure 1 from the patent in suit.

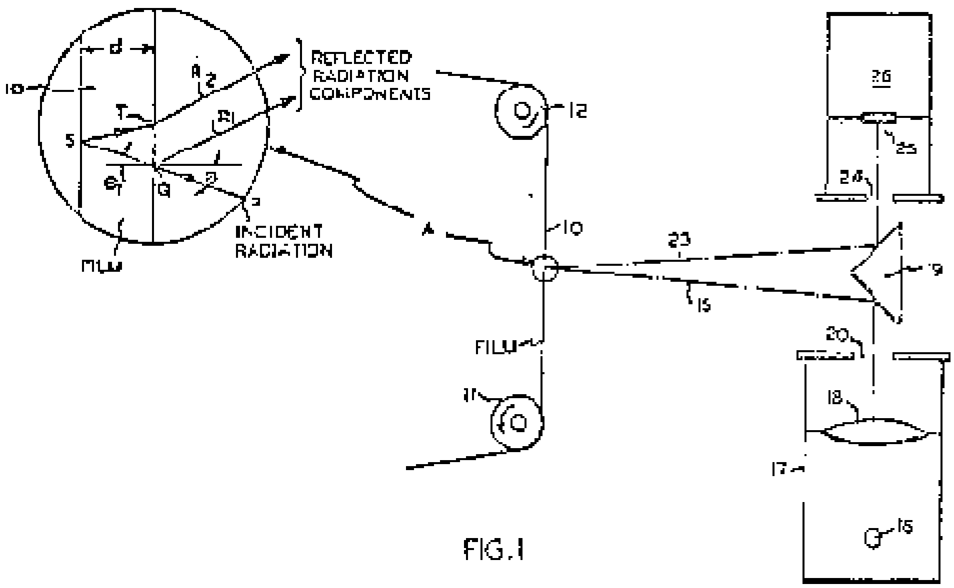


FIG.1

[*609]

Film or specimen 10 moves over guide rolls 11 and 12 as it is produced. A beam of light emanates from a light source 16 mounted within housing 17. Light 15 travels through convex lens 18 and is projected as a single beam onto the film 10 by a silvered prism 19.

Enlarged inset A shows light 15 impinging upon a front refractive surface of film 10 at Q. A first component of the light is reflected away from the film along R[1], while a second component of the light is transmitted through the film to a back radiation-reflective surface at S. The transmitted component is reflected back along path R[2]. Both components of light moving along paths R[1] and R[2] are identified in Figure 1 as 23. The reflected light components traveling along paths R[1] and R[2] are out of phase because of the difference in distance traveled by the first and second components after refraction and reflection. The phase difference results in interference that can be **[**11]** measured by an interferometer.

An interferometer used in appellee's claimed invention, known as a Michelson interferometer, is illustrated in Figure 2 of the '515 patent:

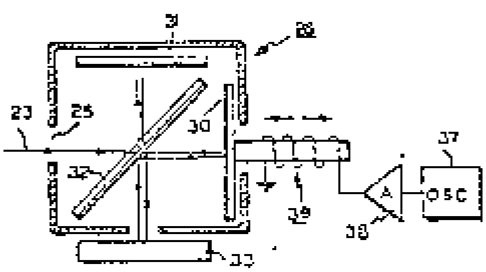
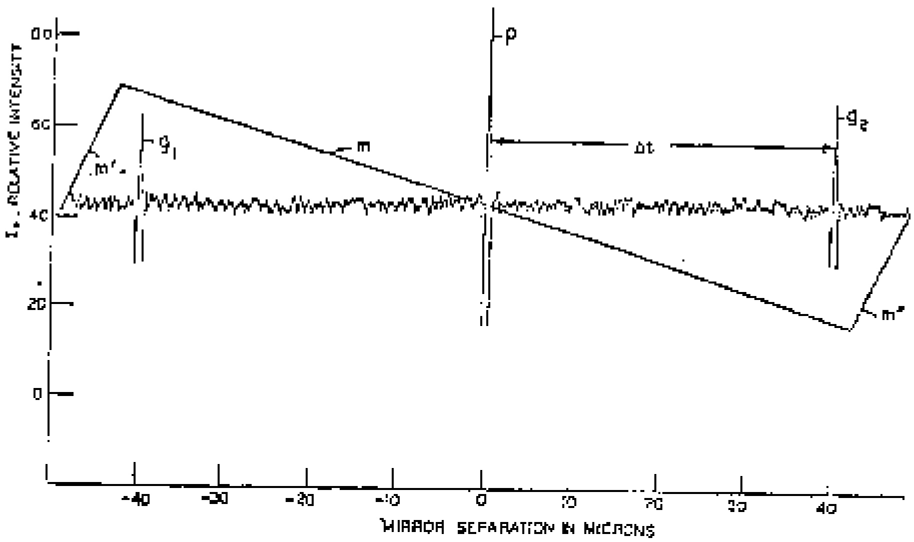


FIG.2

As in conventional interferometers, the light 23 strikes an inclined beam-splitter 32 which delivers light to mirrors 30 and 31. The mirrors reflect the light back to beam splitter 32 which in turn directs the beams towards a photoelectric detector 33. The detector measures the interference between the beams of light. During operation, mirror 30 is reciprocated cyclically over a known distance. The reciprocal motion, or oscillation, is effected by a saw-tooth oscillator 37 and associated electronic power amplifier 38. The mirror 30 oscillates at about 50 cycles/second.

As explained above, the light making up beam 15 is in phase when it reaches the surface of film 10. However, after reflection and refraction, the light traveling along paths R[1] and R[2] are out of phase **[*610]** because of the difference in distance traveled. The differences in distance traveled is related to the thickness of film 10. In the interferometer, a beam splitter divides each of **[**12]** the two components of the light 23 in half, yielding four beams. Two beams are directed to a stationary mirror and the other two to the reciprocating mirror. The mirrors reflect the beam components back to the beam splitter which directs the light to the detector. As the beams emerge from the interferometer together, they interfere with each other. This interference is measured and an interferogram may be produced. The interferogram may look like the interferogram illustrated in Figure 3 of the '515 patent, reproduced below:



[*659]** FIG.3

Central peak P is generated when all four beam components interfere constructively. This occurs when the mirrors 30 and 31 are the same distance from the beam splitter 32. Side peaks g[1] and g[2] occur when the difference in the distances between the beam splitter and the two mirrors corresponds to the optical retardation caused by the film. The side peaks are of lesser intensity than the central peak because only two of the beam components are constructively interfering.

The invention claimed in the '515 patent uses the distance between peaks to determine the thickness of the film. Figure 3 shows the "mirror **[**13]** separation in microns." This is the distance the mirror has traveled from the position where the four beams interfere constructively, known as the zero position. The time between the occurrence of two reference peaks may be measured directly from the interferogram to determine the thickness of the film.

2. *Anticipation*

Nicolet argues that the claims, except claim 6, read on a publication by Lowenstein and are therefore invalid under *35 U.S.C. § 102*. Lowenstein used infrared radiation and a lamellar grating interferometer which does not use mirrors that oscillate like those of a Michelson interferometer. Lamellar grating interferometers were used when light in the far infrared was employed because, at the time, there were no efficient beam splitters for light in the far infrared. One measurement or run of the interferometer used by Lowenstein could take six to eight hours. Nicolet's argument is that the substitution of a Michelson interferometer would have been obvious to one of ordinary skill in the art when not working with far infrared radiation. **[*611]** There was also evidence that the Lowenstein article differs from the claimed invention because Lowenstein does **[**14]** not teach the measurement of thin films from peaks of an interferogram. Because of these substantial differences between the claimed invention and the Lowenstein reference, the appropriate analysis is under *35 U.S.C. § 103*.

3. *Obviousness*

The parties agreed that a person of ordinary skill in the art would be an instrument designer with a college degree in physics or engineering and some practical experience in the design of optical instruments. Each party proffered expert testimony on the factual question of the scope and content of the prior art. It is notable that Bio-Rad's expert, Gebbie, was the only expert capable of testifying on the basis of first-hand experience with the level of skill in the relevant time period. One of Nicolet's experts, Lowenstein, whose article was relied on to assert invalidity, said:

> As far as the designers of commercial or industrial interferometers were concerned, I think I don't know anybody or, at least not well enough to be able to form an opinion about his level of skill.

This excerpt from the testimony is produced to illustrate the importance of the jury's role in ascertaining the content of the prior art. The **[**15]** jurors must discern how a person of ordinary skill in the art would have interpreted available art at the time the invention was made. The factfinder's interpretation of prior art references is necessarily guided by the credibility given the testimony of the experts. Here, the jury presumably credited the testimony of Gebbie rather than the testimony of Lowenstein in deciding what the Lowenstein article would have meant to one of ordinary skill in the art. Given the different familiarity of the experts with those skilled in the art at the relevant time, that evaluation by the jury was reasonable and cannot be successfully challenged on appeal. The only question for this court, therefore, is whether, on the facts testified to by Gebbie and presented by Bio-Rad, reasonable jurors could conclude that the invention would not have been obvious to one of ordinary skill in the art at the time it was made.

Nicolet argues the claimed invention would have been obvious in view of the Lowenstein publication. The Lowenstein publication used a lamellar grating interferometer to measure refractive properties of sapphire. The interferometer used by Lowenstein had a set of stationary plates **[**16]** and a set of moveable plates. To analyze the sample being studied, the moveable plates were run in one direction by a motor until the motor was shut off. One run, or scan, typically took 6 to 8 hours. After one scan was completed a motor drove the interferometer back to begin a new scan. The claimed invention requires cyclical mirror movement. Lowenstein did not disclose or suggest the mirror oscillation required by the claimed invention.

Dr. Gebbie testified that those of *ordinary* skill in the art were skeptical of Michelson rapid scan interferometers, which provide cyclical mirror movement, and would not have interpreted the Lowenstein article to suggest using a Michelson interferometer as required by the claimed invention. It appears from Gebbie's testimony that a person of ordinary **[***660]** skill in the relevant art would not have arrived at the claimed invention after reading the Lowenstein article. Nicolet has not shown that reasonable jurors could not agree with Gebbie that one of ordinary skill in the art would not have derived the claimed invention after reading the Lowenstein publication.

Further, there was evidence that the claimed invention enjoyed commercial success **[**17]** in the measurement of electrically conductive film and epitaxial layers of semiconductors. The claimed invention permitted simple accurate measurement of substrates moving at high speeds. It reduced labor costs and increased productivity. The savings were in some instances so great that one witness said the $65,000 instrument had paid for itself in about two weeks. The jury had to consider this success **[*612]** in reaching its presumed conclusion that the claimed invention would not have been obvious.

We have no doubt that conflicting evidence was presented at trial by Nicolet on the appropriate interpretation of the Lowenstein publication and commercial success. That, however, does not carry Nicolet's burden on appeal.

B. *Fraud*

Nicolet argues the '515 patent is invalid because Flournoy, the named inventor, did not actually invent the claimed subject matter. Nicolet contends that Myron Block, not Flourney, was the inventor. According to Nicolet, Myron Block permitted Flournoy, a duPont engineer, to claim inventorship to induce duPont to invest in Block Associates (a predecessor of Block Engineering founded by Myron Block). There is conflicting testimony in **[**18]** the record with regard to how the invention was developed. Nicolet's case on fraud principally hinges on the credibility of Myron Block. However, the development of the claimed invention described by Bio-Rad during the trial adequately supports the finding that Flourney invented the claimed subject matter.

Dr. Philip Flournoy joined duPont in 1960 as a research engineer in the Engineering Physics Laboratory at the duPont Experimental Station. A group of scientists at duPont, including Dr. Flournoy, were engaged in developing instruments for monitoring and controlling a wide variety of industrial manufacturing processes. Dr. Flournoy wanted to develop an instrument that could provide rapid information on the thickness of epitaxial layers on semiconductors of electrically conductive film, known as Mylar, during the production process. Previous techniques were undesirably slow because the spectrometers used required a relatively long period of time to produce one spectrum. Flournoy hoped that a rapid scan interferometer could provide desired spectral information rapidly in a short period of time.

In the course of investigations on measuring Mylar film and epitaxial layers, Dr. **[**19]** Flournoy observed the presence of small peaks ("side bursts") on either side of the main peak of an interferogram. To determine whether these small peaks were associated with the equipment or with the sample, Dr. Flournoy took interferograms of samples having different thicknesses and observed that the spacing between these peaks varied directly with the thickness of the sample. This determination led him to conclude that, with an adequate interferometer, he could construct an instrument for measuring film thickness, utilizing a rapid scan interferometer.

In March, 1961, Flournoy and his supervisor visited Block Associates to evaluate Block Associates as a vendor of rapid scan interferometers for DuPont's process control equipment needs. That trip satisfied Flournoy that Block Associates could produce sufficiently high quality equipment to satisfy DuPont's requirements.

By December 1961, Flournoy had obtained a suitable interferometer. With that instrument, he performed a series of experiments whereby he took interferograms from samples of Mylar, detected distinguishable side bursts in the interferogram, and utilized the distance between those side bursts to calculate the thickness **[**20]** of the Mylar samples. The accuracy of these experimentally obtained thickness readings was verified by comparing them to the actual thickness of the film, measured with a micrometer. By July 1962, Flournoy further refined the specifications for the various operational parameters for a thickness measuring instrument.

In July 1962, there were discussions between DuPont and Block Associates concerning the possibility of Block's manufacturing the thickness measuring instrument for DuPont. In the course of these discussions, the parties recognized that Block Associates and DuPont had possibly conflicting claims to inventorship of the process and apparatus embodied in the thickness gauge. It was agreed that the parties would collect and exchange documentation **[*613]** of their inventions. On the basis of the exchanged documentation, the patent attorneys would determine which party was entitled to any of the invention(s) that might reside in the thickness gauge under development.

After the documents were exchanged, Block Associate's patent attorney and DuPont's **[***661]** patent attorney determined that Flournoy was the inventor. Specifically, they found that Flournoy could prove he had **[**21]** conceived the invention of measuring film thickness with reference to the side burst spacing on the interferogram at least as early as March 23, 1961 and that he could prove a reduction to practice of that invention in December 1961. Block, on the other hand, could not prove that he or his employees had conceived the invention any earlier than May 4, 1961, nor could Block prove a reduction to practice of the invention any earlier than June 29, 1962. A memorandum was produced, and signed by both attorneys, wherein Myron Block recognized Flournoy as the inventor of the subject matter ultimately claimed in the '515 patent.

These facts adequately support the jury's presumed finding that Dr. Flournoy invented the claimed subject matter. Whether a different conclusion could have been reached on the basis of conflicting testimony presented by Nicolet at trial is not the issue before this court.

C. *Compliance With The Requirements Of 35 U.S.C. § 112*

Nicolet argues that the '515 patent is invalid for failure to disclose the best mode and because the disclosed invention is inoperative. Both arguments are premised on the omission of Automatic Gain Control circuitry (AGC) from **[**22]** the specification. On appeal, Bio-Rad identifies specific testimony establishing that the disclosed invention is fully operative and that at the time the patent application was filed, the AGC was not considered a necessary part of the invention or of the best mode for practicing the claimed invention. Nicolet's arguments on these issues amount to little more than bald assertions by counsel. As appellant, Nicolet has not satisfied this court that reasonable jurors could not find that the best mode requirement was satisfied or that the claimed invention was operative.

Nicolet also asserts that the claims are vague and indefinite. Here again the argument amounts to little more than a statement by counsel supported by some evidence in the record that the language "scanning said specimen" does not have a definite, understandable meaning. Bio-Rad presented testimony showing that a person of ordinary skill in the art would understand the phrase "scanning said specimen" to mean that a movable mirror of the interferometer must reciprocate when the phrase is read in light of the specification. Nicolet has not presented a basis for overturning the jury's presumed resolution of this issue **[**23]** in Bio-Rad's favor.

D. *Infringement*

Nicolet contends its MX-ECO machines do not infringe any claims of the '515 patent for two reasons. According to Nicolet, the method claims require light to be directed from a source onto a sample, then reflected from the sample to an interferometer and then onto a detector. Both parties agree that the MX-ECO does not follow this sequence. During operation of the MX-ECO, light moves from a source into an interferometer, then onto the sample, and from the sample to a detector. The issue here is whether reasonable jurors, after reviewing all the evidence, could have interpreted the claims to include the sequence of events followed by the MX-ECO. *Envirotech Corp. v. Al George, Inc., 730 F.2d 753, 758, 221 U.S.P.Q. (BNA) 473, 477 (Fed. Cir. 1984)*. The contested language of claim 1 is reproduced below:

> 1. A method for determining a physical property of a specimen on the basis of interferometric optical phase discrimination comprising,
> in sequence,
> directing analytical radiation upon said specimen,
>
> **[*614]** along a course such that there is developed an optical phase difference between radiation emanating from a **[**24]** first radiation-reflective surface of said specimen, second radiation reflective surface of said specimen cyclically varying at a predetermined time rate the length of the path of travel of said radiation emanating from a given one of the pair consisting of said first radiation-reflective surface of said specimen, and said second radiation-reflective surface of said specimen with respect to the length of the path of travel of the radiation emanating from the other of said pair, * * *.

At trial, Bio-Rad presented testimony of Mr. Johnston, a patent attorney, on the subject of claim interpretation. The witness testified that to clearly require performance of one step after another in the order listed, he would add the words "and thereafter" or similar language between the listed steps. Certainly such language in claim 1 would remove any ambiguity. Because the claim could have been more clearly written to require a specific sequence, but was not, there is room for reasonable people to interpret the claim as urged by Bio-Rad. We emphasize that our task is not to interpret the claims as though no trial had occurred. Both parties submitted testimony in support of their interpretation **[**25]** before the jury. Bio-Rad's interpretation prevailed and was not overturned by the trial judge. On appeal, we consider only whether reasonable jurors could have interpreted **[***662]** the claim in the manner presumed. *Envirotech Corp. v. Al George, Inc., 730 F.2d at 758, 221 U.S.P.Q. (BNA) at 477*. We conclude that reasonable jurors could conclude the claims simply require light to travel from a source to a detector in a manner that develops an optical phase difference.

Nicolet's second theory for overturning the judgment of infringement is that the '515 patent requires determining a sample's thickness by measuring time directly from an interferogram. In contrast, the MX-ECO measures thickness of a sample by measuring the distance traveled by the reciprocating mirror between occurrences of constructive interference.

The jury presumably concluded that one of ordinary skill in the art would understand that the MX-ECO's mirror time of travel is functionally equivalent to the mirror distance traveled. The patent specification uses "time" to encompass alternative approaches for determining the distance traveled by the mirror between the occurrence of a sideburst and a reference point. When **[**26]** the patent claims speak of "measuring the elapsed time" they also refer to the measurement of the distance the mirror traveled from a reference point to the position where a sideburst occurs.

For instance, Figure 3 of the '515 patent shows both distance of mirror travel as well as time. Both distance and time may be used to determine the distance traveled by the mirror. The jury could also reasonably have drawn the presumed conclusion from other evidence produced by Bio-Rad such as Nicolet's sales brochure which described a Michelson interferometer used in the MX-ECO and stated that the mirror velocity must be constant during the scan. The evidence produced by Bio-Rad shows that although time and distance are different, they are related in this technological setting. Because of the close relationship between time and distance in this case, we cannot conclude that the jury's finding of infringement must be reversed.

Nicolet's argument that the MX-ECO applies mathematical formulas known as fourier transforms to the data of an interferogram does not avoid infringement. Steps or features added to a claimed invention do not necessarily avoid infringement. *Radio Steel Mfg. Co. **[**27]** v. MTD Products, Inc., 731 F.2d 840, 221 U.S.P.Q. (BNA) 657 (Fed. Cir. 1984)*.

II. *Grounds For New Trial*

A. *Form Of Verdict*

Nicolet argues that a new trial is required because the form of verdict used in this case was improper. Nicolet contends that the general verdict form permitted the jury to decide questions of law. **[*615]** This court has already held that ***HN3***[] there is no error inherent in submitting questions of law to a jury so long as the jury is adequately instructed. *Railroad Dynamics, Inc. v. A. Stucki Co., 727 F.2d at 1514-15, 220 U.S.P.Q. (BNA) at 937-38*. Nicolet's argument for a new trial therefore has no merit absent some harmful error in the instructions.

The instructions in this case were jointly submitted by the parties to the court. When the instructions were given to the jury, Nicolet raised no objection to any of them. Ordinarily, ***HN4***[] a party must object to an instruction in time to give the trial judge an opportunity to correct the alleged error before the jury returns its verdict. If no objection is raised, the instructions cannot be challenged on appeal unless great injustice would result. *See* *American Hoist & Derrick Co. v. **[**28]** Sowa & Sons, Inc., 725 F.2d 1350, 1364, 220 U.S.P.Q. (BNA) 763, 774 (Fed. Cir. 1984)*.

B. *Instruction On Burden Of Proof*

Nicolet also argues that the trial judge failed to properly instruct the jury on Nicolet's burden for proving invalidity. The jury was instructed that the patent must be presumed valid and that the burden of proving invalidity rests upon Nicolet. The trial judge also told the jury that "the presumption of validity is rebuttable only by clear and convincing evidence." Nicolet contends that the jury should have been told that the presumption of validity may be weakened or destroyed when prior art more pertinent than that considered by the examiner is presented at trial. Because prior art presented at trial was more pertinent than art before the examiner, Nicolet says the jury should have been instructed that Nicolet only had to carry its burden of proof by a preponderance of the evidence.

Nicolet cannot possibly show that great injustice was caused by the challenged instruction since this court has repeatedly held that the party asserting invalidity must prove facts capable of overcoming the presumption by clear and convincing evidence. The introduction **[**29]** of prior art not considered by the PTO does not change the burden of proof or the requirement that evidence establish the presumption-defeating facts clearly and convincingly. *Connell v. Sears, Roebuck & Co., 722 F.2d at 1549, 220 U.S.P.Q. (BNA) at 199*. Nicolet's challenge to the burden of proof instruction is therefore without merit.

C. *Abuse Of Discovery*

Here, Nicolet says that Bio-Rad abused the discovery process to such an extent that a new **[***663]** trial is required. The argument is not premised on failure to disclose documents but on the production of certain documents during the trial. The documents involved opinions from attorneys on validity questions.

HN5[] Questions regarding abuse of the discovery process are within the trial judge's province and denial of a motion for new trial based on such abuse will be overturned only if the denial of a new trial is shown to be an abuse of discretion. *Edgar v. Finley, 312 F.2d 533 (8th Cir. 1963)*. The disputed evidence was discovered during trial and the documents were entered as evidence in the case. The record indicates Nicolet had an adequate opportunity to examine witnesses necessary to explain the significance of these **[**30]** documents and to present arguments regarding their importance on the validity issues. Under these circumstances, we cannot say that an abuse of discretion occurred when Nicolet's request for new trial was denied.

D. *Damages*

Finally, to obtain a new trial, Nicolet argues the damages award is excessive. In attacking the jury award of $3,078,000, Nicolet assumes that lost profits were awarded on 91 MX-ECO instruments sold by Nicolet and that a reasonable royalty of $18,000 per instrument was assessed on each sale of 19 other MX-ECO instruments. Bio-Rad does not challenge this presumed analysis of the jury's award, as it appears to follow Bio-Rad's arguments to the jury on the damages issue. Although **[*616]** we are not required to follow the analysis presumed by the parties, we do so in this case and affirm the jury award.

HN6[] To obtain lost profits, a patent owner must prove that he would have made the sales but for the infringing activity. The patent owner need not prove causation as a certainty, evidence showing a reasonable probability that Bio-Rad would have made the infringing sales Nicolet made will suffice. *Gyromat Corp. v. Champion Spark Plug Co., 735* ***[**31]*** *F.2d 549, slip op. at 9 (Fed. Cir. 1984)*; *Lam, Inc. v. Johns-Manville Corp., 718 F.2d 1056, 1065, 219 U.S.P.Q. (BNA) 670, 675 (Fed. Cir. 1983)*. The jury was instructed that Bio-Rad is entitled to lost profits on sales Bio-Rad would have made but for Nicolet's infringement and that several factors should be considered, including:

> whether plaintiff had the existing or at least potential manufacturing and marketing capabilities to obtain the infringing sales, whether plaintiff's FTG-12C and defendant's MX-ECO compete with one another, whether plaintiff's and defendant's marketing efforts were aimed at the same geographical markets and categories of customers, and whether there were any particularly close substitutes for the FTG-12C and the MX-ECO.

The instruction on lost profits is not challenged on appeal. We conclude that sufficient evidence was proffered by Bio-Rad to establish a reasonable probability that in the absence of Nicolet's infringement, Bio-Rad would have sold an additional 91 thickness measuring instruments. For instance, Bio-Rad showed demand for the claimed invention by proving Nicolet's sales of infringing instruments and licenses for the production **[**32]** and use of instruments embodying the claimed invention by two other corporations. Bio-Rad is the only company licensed to sell instruments embodying the invention of the '515 patent, with one inconsequential exception. Texas Instruments was licensed to sell five instruments embodying the claimed invention after Texas Instruments had used them for one year. This fact alone does not preclude the award of lost profits by the jury. In addition, Bio-Rad's witnesses testified that Bio-Rad's facilities were adequate or could have been made adequate to meet the additional demand for the claimed invention.

Nicolet argues that Bio-Rad is not entitled to lost profits because Bio-Rad did not establish the absence of acceptable noninfringing substitutes, one of the factors required by *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc., 575 F.2d 1152, 1156 (6th Cir. 1978)*, to justify an award of lost profits. [*] We conclude there is sufficient evidence of record for a reasonable jury to find the absence of acceptable substitutes. Bio-Rad's market survey expert testified that in surveying purchasers of the Nicolet device, 70-90% of the interviewees would have purchased Bio-Rad's FTG-12 device **[**33]** had Nicolet not been present in the market. Bio-Rad also points to admissions by Nicolet that Bio-Rad was Nicolet's sole competitor. We are also satisfied that the jury could reasonably conclude from the evidence that there were no other devices which could be deemed acceptable substitutes, especially in **[***664]** view of the fact that Nicolet did not offer any evidence to the contrary. Indeed, it is Nicolet's burden on appeal to

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[*] Although this court has accepted the *Panduit* standard as a permissible way to establish entitlement to lost profits, we have not made that standard the exclusive one for determining entitlement to lost profits. *Central Soya Co. v. Geo. A. Hormel & Co., 723 F.2d 1573, 1579, n. 5, 220 U.S.P.Q. (BNA) 490 (Fed. Cir. 1983)*; *Gyromat Corp. v. Champion Spark Plug Co., 735 F.2d 549, slip op. at 5 (Fed. Cir. 1984)*.

show that reasonable jurors could not have concluded that but for Nicolet's infringement, Bio-Rad would have sold 91 additional instruments. Nicolet has failed to carry that burden here.

[34]** Nicolet also contends that the amount of lost profits awarded is so large that the jury verdict must be overturned or a new trial ordered. ***HN7***[] The amount of lost profits awarded cannot be speculative but the amount need not be proven with unerring precision. See *Lam, Inc. v. Johns-Manville **[*617]** Corp., 718 F.2d at 1065, 219 U.S.P.Q. (BNA) at 675*; *Livesay Window v. Livesay Industries, Inc., 251 F.2d 469, 472, 116 U.S.P.Q. (BNA) 167, 169 (5th Cir. 1958)*.

To support its contention, Nicolet describes the testimony of Bio-Rad's accounting expert as speculative and without any reasonable basis. Bio-Rad's expert relied on an incremental cost accounting method that resulted in a profit of about $39,650 for each domestic sale and $34,313 for each foreign sale. This calculation included all of Bio-Rad's costs, except for direct selling expenses, labor and materials. We cannot conclude that the size of the award for lost profits was too speculative simply because the jury was guided by an incremental cost accounting method.

Nicolet also argues that the reasonable royalty, presumed to be part of the damages award, is too high. They point out that the industry royalty rate **[**35]** runs from three to ten percent of sales while the royalty awarded by the jury approaches one third of the selling price of the MX-ECO. ***HN8***[] Though established royalty rates are normally applicable, *Hanson v. Alpine Valley Ski Area, Inc., 718 F.2d 1075, 1078, 219 U.S.P.Q. (BNA) 679, 682 (Fed. Cir. 1983)*, they do not necessarily establish a ceiling for the royalty that may be assessed after an infringement trial. *Cf. Tektronix, Inc. v. United States, 213 Ct. Cl. 257, 552 F.2d 343 at 347 n.5, 193 U.S.P.Q. (BNA) 385 at 390 n.5 (1977)*, *cert. den., 439 U.S. 1048, 58 L. Ed. 2d 707, 99 S. Ct. 724 (1978)*. Appellant has not met its burden of showing that use of a higher rate was inappropriate under the circumstances of this case.

E. *Antitrust Counterclaim*

Finally, Nicolet argues it is entitled to a new trial on its antitrust counterclaims because the jury's incorrect analysis of validity and infringement necessarily resulted in their rejection of Nicolet's antitrust claims. In view of our affirmance of the decisions on validity and infringement, Nicolet's argument is without merit.

III. *Patent Misuse*

Nicolet's answer to Bio-Rad's complaint alleged patent misuse **[**36]** because of bad faith threats of patent infringement suits. Nicolet's answer said: "Plaintiff is estopped from enforcing said patent No. 3,319,515 by reason of misuse thereof in the form of bad faith threats of patent infringement suits based thereon." This was the only misuse theory presented to the jury. After the jury verdict was returned, Nicolet argued two different misuse theories to the trial judge in a motion to deny enforcement of the '515 patent. The trial judge denied the motion without comment. On appeal, Nicolet relies on the same two misuse theories that were presented only to the trial judge after the jury rendered its verdict. Nicolet would have this court declare the patent in suit unenforceable.

First, Nicolet argues that Bio-Rad misused its patent in 1969-1970 when Digilab refused to sell unpatented interferometers to Texas Instruments unless Texas Instruments took a license under the '515 patent. Second, Nicolet contends that misuse occurred when Bio-Rad and DuPont agreed to jointly enforce the '515 patent against Nicolet and created a joint litigation fund for that purpose. We do not address the merits of these contentions because Nicolet has waived the **[**37]** right to raise these misuse issues.

HN9[] Misuse is an affirmative defense that must be pleaded and proved. *35 U.S.C. § 282 (1976)*; *Trio Process Corp. v. L. Goldstein's Sons, Inc., 461 F.2d 66, 74, 174 U.S.P.Q. (BNA) 129, 135 (3d Cir. 1972)*, *cert. denied, 409 U.S. 997, 34 L. Ed. 2d 262, 93 S. Ct. 319 (1972)*. Nicolet and Bio-Rad both asked for a jury trial on all the issues. No issues were reserved for trial to the court only. In fact, in its Joint Pretrial Statement, Nicolet said "Bifurcation or separate trials of any issues is neither desired nor feasible." Because the affirmative defenses argued on appeal were not pleaded in Nicolet's answer or presented to the jury, we hold these defenses were waived and we need **[*618]** not consider them further. *See id.* at *461 F.2d at 74, 174 U.S.P.Q. (BNA) at 135*.

Nicolet relies on *In re Yarn Processing Patent Validity Litigation, 472 F. Supp. 170, 205 U.S.P.Q. (BNA) 758 (S.D. Fla. 1979)* (*Yarn Processing*) for the proposition that misuse *must* be decided by the court and not the jury. Nicolet's reliance on this case is unfounded. The plaintiff in *Yarn Processing* sued for infringement occurring after misuse had **[**38]** been purged and demanded a jury trial. The District Court granted a motion for separate trial to the court of the purged issues because they were separable from the infringement issues and their separate adjudication would expedite **[***665]** the litigation. The court concluded that trying the equitable misuse defense before a judge did not violate plaintiff's right to a jury trial. The decision in *Yarn Processing*, therefore, has no bearing on this case where all issues were to be tried to the jury.

IV. *Prejudgment Interest*

The trial court denied Bio-Rad's request for prejudgment interest before the United States Supreme Court decision in *Devex Corp. v. General Motors Corp., 461 U.S. 648, 103 S. Ct. 2058, 76 L. Ed. 2d 211, 51 U.S.L.W. 4613 (1983)* was available. In that case, the Supreme Court said that ***HN10***[] prejudgment interest is compensatory, not punitive, and should be awarded under *35 U.S.C. § 284* absent some justification for withholding such award. Here the district court denied prejudgment interest but did not indicate that there was any reason for denying prejudgment interest. The determination of whether such a reason is present is for the trial court to ascertain **[**39]** in the first instance. We therefore *vacate* the trial court's denial of prejudgment interest and *remand* for an award of prejudgment interest or a determination that some specific justification exists for denying prejudgment interest. In all other respects, the judgment is *affirmed*.

AFFIRMED-IN-PART, VACATED-IN-PART, AND REMANDED.

Aspen Highlands Skiing Corp. v. Aspen Skiing Co.

United States Court of Appeals for the Tenth Circuit

July 13, 1984

Nos. 82-1407, 82-1424

Reporter

738 F.2d 1509 *; 1984 U.S. App. LEXIS 20557 **; 1984-2 Trade Cas. (CCH) P66,101; 17 Fed. R. Evid. Serv. (Callaghan) 600

Aspen Highlands Skiing Corporation, a Delaware Corporation, Plaintiff-Appellee, Cross-Appellant, v. Aspen Skiing Company, a Colorado General Partnership, Substituted Defendant-Appellant, Cross-Appellee

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

Core Terms

ticket, skiing, sub-market, instructions, relevant market, district court, geographic, products, monopolization, grounds, season, mountains, damages, attorney's fees, matter of law, downhill, estimate, four-mountain, assumptions, facilities, antitrust, four-area, multi-day, objected, costs, directed verdict, circumstances, destination, Reply, actual use

LexisNexis® Headnotes

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

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

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

HN1[] **Jury Instructions, Objections**

Fed. R. Civ. P. 51 provides that no party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. The purpose of this rule is to prevent a litigant from taking advantage of an error which could be rectified by the court if called to its attention by timely and specific objection.

Civil Procedure > Attorneys > General Overview

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

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

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

HN2[] **Civil Procedure, Attorneys**

Fed. R. Civ. P. 51 requires counsel to make abundantly clear to the trial court the objecting party's position. The grounds stated in the objection must be obvious, plain, or unmistakable.

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

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

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

HN3[] **Jury Instructions, Objections**

The offering of a proposed instruction does not preserve a challenge to the court's instructions under *Fed. R. Civ. P. 51*, absent a specific objection.

Civil Procedure > Trials > Jury Trials > Jury Deliberations

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

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

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

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

HN4[] **Jury Trials, Jury Deliberations**

Where an objection to an instruction is not made before the jury retires for deliberation, the court only reviews an instruction that is patently plainly erroneous and prejudicial.

Civil Procedure > ... > Standards of Review > Plain Error > General Overview

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

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

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

HN5[] **Standards of Review, Plain Error**

In a civil case, only rarely will the court review an error in the jury instructions when no specific objection was made.

Civil Procedure > ... > Standards of Review > Plain Error > General Overview

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

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

HN6[] Standards of Review, Plain Error

A new trial is ordered in the absence of an objection below if an error in the instructions resulted in a miscarriage of justice, and the court reviews instructions to which proper objection was not made only if they are patently plainly erroneous and prejudicial.

Civil Procedure > ... > Standards of Review > Plain Error > General Overview

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

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

HN7[] Standards of Review, Plain Error

The plain error exception is limited to exceptional cases where the error has seriously affected the fairness, integrity or public reputation of judicial proceedings.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Failure to Object

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

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

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

Criminal Law & Procedure > Trials > Motions for Acquittal

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Jury Instructions

HN8[] Trials, Judgment as Matter of Law

A proper motion for a directed verdict and its denial will always preserve for review the question whether under the law truly applicable to the case there was an adequate evidentiary basis for the submission of the case to the jury.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review

HN9[] Trials, Judgment as Matter of Law

In determining whether a trial court has erred in denying a motion for a directed verdict, it is the applicable law that is controlling, and not what the trial court announces the law to be in his or her instructions.

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

HN10[] **Monopolies & Monopolization, Actual Monopolization**

Regarding the duty to cooperate, under the so-called essential facilities or bottleneck doctrine, a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it.

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN11[] **Private Actions, Remedies**

There are two elements to the offense of monopolization under the Sherman Act, *15 U.S.C.S. § 18*. The first is the possession of monopoly power in the relevant market. The second is the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. The fact of injury and damages suffered by reason of a violation of the antitrust laws must also be shown for a private litigant to recover on a claim of monopolization.

Antitrust & Trade Law > Sherman Act > General Overview

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

Regarding the duty to cooperate, under the intent test, a business is free to deal with whomever it pleases so long as it has no purpose to create or maintain a monopoly.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] **Monopolies & Monopolization, Actual Monopolization**

The presence of four elements is necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability to duplicate the facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.

Civil Procedure > Appeals > Standards of Review > General Overview

Criminal Law & Procedure > Trials > Motions for Acquittal

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN14[] **Appeals, Standards of Review**

Where an issue is raised by a claim of error in the denial of defendant's motion for a directed verdict and for judgment notwithstanding the verdict, the court must view the evidence most favorably to the party against whom the motion is made, and give that party the benefit of all reasonable inferences.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Expert Witnesses

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

HN15[] **Standards of Review, Abuse of Discretion**

The court reviews a district court's admission or exclusion of expert testimony for abuse of discretion only.

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

HN16[] **Private Actions, Remedies**

The trier of fact can determine the amount of antitrust damages from a just and reasonable estimate of the damage based on relevant data. The damage award, however, may not be based on speculation or conjecture.

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN17[] **Appeals, Standards of Review**

The court must afford the district court's refusal to grant a new trial on the excessive damages claim considerable deference on appeal.

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > ... > Jury Trials > Jurors > Misconduct

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Civil Procedure > Remedies > Damages > General Overview

HN18[] **Appeals, Standards of Review**

Absent an award so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the damages is considered inviolate.

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

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Statutory Awards

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

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

HN19[] **Costs & Attorney Fees, Clayton Act**

The Clayton Act, *15 U.S.C.S. § 15(a)* provides that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws shall recover the cost of suit, including a reasonable attorney's fee.

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

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

HN20[] **Costs & Attorney Fees, Clayton Act**

The Clayton Act, *15 U.S.C.S. § 15(a)* authorizes the award of counsel fees for legal services performed at the appellate stages of a successfully prosecuted private antitrust action. The amount of the award for such services should, as a general rule, be fixed in the first instance by the district court, after hearing evidence as to the extent and nature of the services rendered.

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Richard M. Cooper, (Edward Bennett Williams and Harold Ungar of Williams & Connolly, Washington, D.C., and David G. Palmer and William W. Maywhort of Holland & Hart, Denver, Colorado), for substituted Defendant-Appellant, Cross-Appellee.

Judges: Holloway, Doyle, and Seymour, Circuit Judges.

Opinion by: HOLLOWAY

Opinion

[*1512] HOLLOWAY, Circuit Judge.

Defendant Aspen Skiing Company operates skiing facilities at three of the four skiing mountains in the Aspen, Colorado area, Ajax Mountain, Buttermilk and Snowmass. Plaintiff Aspen Highlands Skiing Corporation operates skiing facilities at the fourth mountain, Aspen Highlands.

For many years, plaintiff and defendant individually offered a wide variety of ski-lift tickets. Defendant's ski-lift tickets were interchangeable among its three Aspen facilities. From the 1962-63 ski-season through the 1971-72 season, plaintiff and defendant offered a joint multi-day ski-lift ticket which could be used at any of the **[**2]** four Aspen mountains. Revenues from the joint ticket were divided through coupons used to measure actual use at the four mountains. II App. 488-49. [1] After a one-year discontinuance of the joint ticket during 1972-73, the joint ticket was reinstituted in 1973-74 through 1976-77. Profits were divided on the basis of surveys of actual use. Plaintiff received 17.5% of the net revenues from the sale of four-area tickets during 1973-74, 18.5% in 1974-75, 16.8% in 1975-76, and 13.2% in 1976-77.

[1] Citations to "App." refer to the joint appendix on appeal prepared by the parties. Citations to "R." refer to the original record.

Defendant offered to continue the joint ticket for 1977-78 if plaintiff would accept a 13.2% fixed percentage of the revenues. I App. 90-91. Plaintiff objected to this percentage because it was based on the survey for 1976-77, which plaintiff contended was a ski-season marked by below average amounts of snowfall and an unusually low number of skiers visiting the Aspen area. *Id.* **[**3]** at 91. Although plaintiff wanted revenues to be divided on the basis of actual usage, it eventually accepted a fixed 15% of revenues for 1977-78. *Id.* at 92-93.

[*1513] Defendant offered to continue the joint ticket for 1978-79 if plaintiff would accept 12.5% of revenues. *Id.* at 145-46. Plaintiff again urged a return to a system of sharing revenues on the basis of actual usage. *Id.* at 73, 77-78. The parties were unable to agree and no joint tickets were offered thereafter.

Plaintiff brought suit against defendant under § 4 of the Clayton Act, *15 U.S.C. § 15*. Plaintiff alleged that defendant violated *§§ 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*, by monopolizing, attempting to monopolize, and conspiring to monopolize the sale of downhill skiing services in Aspen, and by conspiring to restrain trade.

After the close of the evidence at trial, the district court granted defendant's motion for a directed verdict with respect to all of plaintiff's claims except the claims of unlawful monopolization and conspiracy to restrain trade between defendant and nonparties.

The jury found for plaintiff on the monopolization claim and for defendant on the conspiracy **[**4]** claim. II App. 603; I App. 31-32. The jury by special interrogatories found that the relevant product market was downhill skiing at destination ski resorts and that the relevant product submarket was downhill skiing services in the Aspen area, including multi-area and multi-day lift tickets. The jury also found that the relevant geographic market was North America and that the relevant geographic submarket was the Aspen area. I App. 30-31, II App. 601-02. The jury found that plaintiff had suffered $2.5 million in damages by defendant's unlawful monopolization. I R. 33, II App. 603. [2]

[5]** The district court thereupon trebled the verdict and entered judgment of $7.5 million plus attorneys' fees and costs. I App. 35, II App. 607. The court also issued an injunction requiring defendant to participate with plaintiff in offering a joint four-area six-day ski lift ticket for a period not exceeding three years. I App. 36-40. The district court denied motions for judgment notwithstanding the verdict, for a new trial, and for remittitur filed by defendant both after trial and seven months later. I R. 294, 296. The district court issued an order fixing the amount of costs and attorney's fees. *Id.* at 244. Defendant appeals, and plaintiff cross-appeals. [3]

[6]** I

The relevant market

On appeal, defendant contends that the district court erred in instructing the jury on the relevant market. The trial court's instructions on the market and submarket are reproduced in the Appendix to this opinion. Defendant argues that the instructions on the relevant product submarket and geographic submarket were inadequate, and that the court erred in instructing the jury that "there can be both a relevant market and a relevant submarket." II App. 584-

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[2] On December 22, 1975, the Attorney General of Colorado brought an antitrust suit under federal law against both plaintiff and defendant challenging, among other things, the joint ticket offered by the parties. Exhibit X, III App. The suit was settled by entry of a consent decree on August 19, 1977, which permitted the continued marketing of the joint ticket for a period of five years subject to certain restrictions. Exhibit 26, III App.

Defendant argued that apprehension over continued scrutiny by the Attorney General of Colorado under the consent decree was one of the factors which led it to discontinue the joint ticket after plaintiff refused to accept 12.5% as its share of revenues. I App. 121. On appeal, defendant's position is that "even if it abandoned the joint ticket as a conscious and unequivocal refusal to cooperate with [plaintiff] in the marketing of their respective facilities, it committed no antitrust violation." Brief of Defendant-Appellant, Cross-Appellee, at 7-8.

[3] Plaintiff does not seek a new trial. It asserts that the issues raised in its cross-appeal are "pertinent only if defendants are successful on their appeal." Opening Brief of Plaintiff-Appellee, Cross-Appellant, at 1. Because we affirm the trial court's judgment, we need not reach the arguments plaintiff advances in its cross-appeal.

85. *See* Brief of Defendant-Appellant, Cross-Appellee, at 22-40. Plaintiff says that at trial, however, defendant did not object to the instructions on these grounds. Instead, defendant objected on the ground that the relevant market **[*1514]** issue should be decided by the court as a matter of law and should not be submitted to the jury. II App. 580-81.

Rule 51 of the Federal Rules of Civil Procedure ***HN1***[] provides that "no party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." *Fed. R. Civ. P. 51*. The purpose of this **[**7]** rule is to "prevent a litigant from taking advantage of an error which could be rectified by the court if called to its attention by timely and specific objection." *Corriz v. Naranjo, 667 F.2d 892, 896 (10th Cir. 1981)*, *cert. granted*, *456 U.S. 971, 102 S. Ct. 2233, 72 L. Ed. 2d 844 (1982)*, *cert. dismissed*, *458 U.S. 1123, 103 S. Ct. 5, 73 L. Ed. 2d 1394 (1983)* (by stipulation); *see also* *Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 924 (10th Cir. 1984)*; *Taylor v. Denver and Rio Grande Western Railroad Co., 438 F.2d 351, 353 (10th Cir. 1971)*; 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2551 (1971).

Accordingly, *Rule 51* ***HN2***[] requires counsel "to make abundantly clear to the trial court the objecting party's position." *Rogers v. Northern Rio Arriba Electric Cooperative, Inc., 580 F.2d 1039, 1042 (10th Cir. 1978)*; *see also* *Palmer v. Hoffman, 318 U.S. 109, 119, 87 L. Ed. 645, 63 S. Ct. 477 (1943)*("In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error."); *Community National Life Insurance Co. v. Porter Square Savings & **[**8]** Loan Association, 406 F.2d 603, 606 (10th Cir. 1969)* (objection to instruction "not sufficient because it was not distinct in explaining the grounds for objection as required by *Rule 51*"); 9 C. Wright & A. Miller, *supra*, § 2554, at 643 ("grounds must be stated with sufficient clarity"). We have indicated that the grounds stated in the objection must be obvious, plain, or unmistakable. *Corriz, supra, 667 F.2d at 896* (objections on grounds that elements of cause of action were not proven as a matter of law and that there was no evidence to support submission of claim to jury "are shotgun objections which do not meet *Rule 51*'s specificity requirement").

Defendant argues that it did object to the charge on relevant submarket and contends that it took action at trial to sufficiently apprise the district court of these grounds. Defendant points to (1) its objection at the conference on instructions, set out below, where it objected to any submission of the market question to the jury; (2) its proposed instruction on market definition, which did not include instructions relating to submarkets; and (3) the argument made both in its trial memorandum and in its motion for a directed **[**9]** verdict that the relevant market, as a matter of law, could not be limited to Aspen, "and, *implicitly*, that there can be only one *relevant* market." Reply Brief of Defendant-Appellant, Cross-Appellee, at 2-3 (earlier emphasis added, later emphasis in original).

We note that at the conference in the district judge's chambers, during which both sides made their objections to the trial court's proposed instructions, counsel for the defendant made only the following objection to the relevant market instruction:

> Your Honor, Defendants would object to the instruction concerning relevant market contained on pages 16 through 18 of the instructions. While the defendants recognize that there is case authority supporting the submission of the relevant market -- the relevant market question to the jury, we believe that on the record established in this case that the market definition of both the product market and the geographic market should be decided as a matter of law and should not be submitted to the jury.

XIV R. 2290. [4]

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[4] The determination of the relevant market is generally a question of fact. *See* *Telex Corp. v. IBM, 510 F.2d 894, 915* (10th Cir.) (per curiam), *cert. dismissed*, ***423 U.S. 802, 96 S. Ct. 8, 46 L. Ed. 2d 244 (1975)***; *see also* *Borough of Lansdale v. Philadelphia Electric Co., 692 F.2d 307, 311 (3d Cir. 1982)*; *Pinder v. Hudgins Fish Co., 570 F.2d 1209, 1220-21 (5th Cir. 1978)*; *Sulmeyer v. Coca Cola Co., 515 F.2d 835, 839 (5th Cir. 1975)*, *cert. denied*, ***424 U.S. 934, 47 L. Ed. 2d 341, 96 S. Ct. 1148 (1976)***; ABA Antitrust Section, ***Antitrust Law*** *Developments* 110-11 (2d ed. 1984). On that fact question, the defendant raises no issue in this appeal. Defendant concedes that "the evidence supporting the jury's findings on market definition is irrelevant because this appeal does not present any issue as to the sufficiency of that evidence." Reply Brief of Defendant-Appellant, Cross-Appellee, at 7 n.3 (citation omitted).

[10]** A few pages later in the record of the conference on instructions, the judge **[*1515]** said she would make one other comment concerning the defendant's request that the court rule as a matter of law on the question of the relevant market; that if she were to rule as a matter of law on the relevant market, she would rule that "the relevant market was Aspen and that the relevant product market was down-hill skiing services;" that after hearing defendant's witnesses she thought there was enough factual contest for the question to go to the jury; and that her not ruling as a matter of law was actually better for the defendant. XIV R. 2292. At that point defendant's counsel said: "Just so the record is clear, *our argument is that you should rule as a matter of law in our favor on that issue*." *Id. at 2292* (emphasis added). We feel this part of the record shows the intent of the defendant's objection to the market instructions and that it was not an objection directed to the form of the market and submarket portion of the charge, but was rather that the issue was for the court alone to decide.

Further, as noted the defendant did argue for a directed verdict on the theory **[**11]** that the evidence showed a larger market than just this Aspen area. IX R. 1450. And defendant says that its proposed instructions 13 through 16 "excluded any instruction on submarkets." Reply Brief of Defendant-Appellant, Cross-Appellee, at 2. The proposed instructions on product and geographic market are general statements on the tests for the jury to follow, they state detailed tests on both product and geographic market, and make no reference to any submarkets. I Supp. R. 87-90.

We cannot agree that these statements and objections relied on stated "distinctly the matter to which [defendant] objects and the grounds of [its] objection," *Fed.R.Civ.P. 51*, so as to amount to a proper objection to the market and submarket formulation in the charge. We long have held that ***HN3***[] the offering of a proposed instruction does not preserve a challenge to the court's instructions under *Rule 51*, absent a specific objection. *See, e.g., Western Transmission Corp. v. Colorado Mainline, Inc., 376 F.2d 470, 474 (10th Cir. 1967)*; *Justheim Petroleum Co. v. Hammond, 227 F.2d 629, 635 (10th Cir. 1955)*; *Jones v. Koma, 218 F.2d 530, 531-32 (10th Cir. 1955)*; *see also Johnson v. Houser* ***[**12]*** *, 704 F.2d 1049, 1051 (8th Cir. 1983)* ("The mere tender of an alternative instruction without objecting to some specific error in the trial court's charge or explaining why the proferred instruction better states the law does not preserve the error for appeal."). In the instant case, we cannot agree that defendant adequately apprised the district court of the grounds on which it now challenges the instructions given. As we stated in a similar context, "the trial judge cannot be held to the standard of omniscience apparently envisioned by defendant[]." *Corriz, supra, 667 F.2d at 896*; *cf.* *Sunkist v. Winckler & Smith Co., 370 U.S. 19, 26-27, 8 L. Ed. 2d 305, 82 S. Ct. 1130 (1962)* (when counsel made objections at conference on instructions before charge was given and requested instructions on basis of objections, and after charge counsel was told all prior objections would be preserved, waiver did not occur in light of that assurance and prior objections and requests). We are persuaded that the record shows no proper and timely objection on the ground that the market and submarket part of the charge was erroneous.

Defendant says that if we do not agree that a proper objection **[**13]** was made on this ground, then we should consider the point as plain error that generated a miscarriage **[*1516]** of justice. Reply Brief of Defendant-Appellant, Cross-Appellee, at 3-4. However, ***HN4***[] where an objection to an instruction is not made before the jury retires for deliberation, we only review an instruction that is "patently plainly erroneous and prejudicial." *See Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 925 (10th Cir. 1984)*; *Fiedler v. McKea Corp., 605 F.2d 542, 548 n.1 (10th Cir. 1979)*. ***HN5***[] In a civil case only rarely will we review an error in the instructions when no specific objection was made. *E.g., Glasscock v. Wilson Constructors, Inc., 627 F.2d 1065, 1067-68 (10th Cir. 1980)*; *Fabian v. E.W. Bliss Co., 582 F.2d 1257, 1260 (10th Cir. 1978)*; 9 C. Wright & A. Miller, *supra*, § 2558, at 672 ("actual reversals on basis of plain error are rare"). We have said that ***HN6***[] a new trial should be ordered in the absence of an objection below if an error in the instructions resulted in a "miscarriage of justice," [5] and we

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[5] *See* *Brown v. McGraw-Edison Co., 736 F.2d 609 n.6 (10th Cir. 1984)*; *Fox v. Ford Motor Co., 575 F.2d 774, 786 (10th Cir. 1978)*.

review instructions to which proper objection was not made only if they are "patently plainly erroneous and prejudicial." [6] **[**14]**

[15]** We cannot say that the district court's instructions on the relevant market resulted in a "miscarriage of justice" or were "patently plainly erroneous and prejudicial." Courts repeatedly have cautioned that ***HN7***[] the plain error exception is limited to exceptional cases where the error "has seriously affected the fairness, integrity or public reputation of judicial proceedings." *Rowe International, Inc. v. J-B Enterprises, Inc., 647 F.2d 830, 835 (8th Cir. 1981)*; *see also* *Morris v. Getscher, 708 F.2d 1306, 1309 (8th Cir. 1983)*; *Dunn v. Sears, Roebuck & Co., 639 F.2d 1171, 1176* (5th Cir.), *modified on other grounds*, *645 F.2d 511, 513 (5th Cir. 1981)*; *Whiting v. Jackson State University, 616 F.2d 116, 126 (5th Cir. 1980)*; 9 C. Wright & A. Miller, *supra*, § 2558, at 675 ("If there is to be a plain error exception to *Rule 51* at all, it should be confined to the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings."). The instructions here were not "hopelessly confusing" [7] and did not fail "to provide even the barest legal guideposts to aid the jury in rationally reaching a decision." [8] Accordingly, **[**16]** the plain error exception to *Rule 51* should not be applied to upset the verdict here.

In sum, we hold that defendant's attack on the relevant market instruction is not premised on a proper objection and that the circumstances do not justify setting aside the verdict and judgment on grounds not raised below.

II

Monopolization

Defendant **[**17]** argues that "there was insufficient evidence to present a jury issue of monopolization because, as a matter of law, **[*1517]** the conduct at issue was pro-competitive conduct that a monopolist could lawfully engage in." Brief of Defendant-Appellant, Cross-Appellee, at 40. Defendant essentially reasons that plaintiff articulated six ways in which defendant's conduct allegedly constituted monopolization, and that none of these created an issue for the jury because none were anti-competitive.

In closing argument, plaintiff's counsel argued that defendant used its power "to deliberately exclude [plaintiff] from a substantial portion of the destination skier visits beginning in the 1977-'78 season, by doing six things:" (1) forcing plaintiff out of the four-area ticket by requiring that revenues be divided below plaintiff's market share; (2) substituting defendant's three area ticket for a four area ticket; (3) marketing and advertising its three mountains in a manner designed to convince consumers that Aspen had only three mountains, not mentioning Aspen Highlands; (4) making an agreement with a tour operator to sell defendant's tickets to the exclusion of plaintiffs; (5)

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[6] See *Brown v. McGraw-Edison Co., 736 F.2d 609 n.6 (10th Cir. 1984)*; *Moe v. Avions Marcel Dassault-Breguet Aviation, 727 F.2d 917, 924 (10th Cir. 1984)*; *cf.* *Scholz Homes, Inc. v. Wallace, 590 F.2d 860, 864 (10th Cir. 1979)* ("plain and fundamental error").

We have also said that an error in an instruction to which there was no objection may be plain error if it was a "generating factor which culminated in a verdict not warranted under the law." *Herndon v. Seven Bar Flying Service, Inc., 716 F.2d 1322, 1330 (10th Cir. 1983)*, *cert. denied*, ***466 U.S. 958, 80 L. Ed. 2d 553, 104 S. Ct. 2170, 52 U.S.L.W. 3791 (1984)***; *see also* *Fox v. Ford Motor Co., 575 F.2d 774, 786 (10th Cir. 1978)*; *Pridgin v. Wilkinson, 296 F.2d 74, 76 (10th Cir. 1961)*. We understand this to be merely a component of the inquiry whether the instruction was "patently plainly erroneous and prejudicial," or to have caused a "miscarriage of justice."

[7] *Frederic P. Wiedersum Associates v. National Homes Construction Corp., 540 F.2d 62, 66 (2d Cir. 1976)*.

[8] *McNello v. John B. Kelly, Inc., 283 F.2d 96, 102 (3d Cir. 1960)* (*quoted in* *Frederic P. Wiedersum Associates, supra, 540 F.2d at 66*); *see also* *Morris v. Getscher, 708 F.2d 1306, 1309-10 (8th Cir. 1983)* (instruction constituted plain error when it "provided the jury with virtually no guidance" and "essentially allowed the jury to arrive at a verdict through speculation or conjecture"); *Cruthirds v. RCI, Inc., 624 F.2d 632, 636 (5th Cir. 1980)* (instruction that left "jury to speculate as to an essential point of law" was plain error).

refusing **[**18]** to accept plaintiff's coupons during the 1978-79 season; and (6) raising ticket prices for a single-day lift ticket thus eliminating plaintiff's ability to offer a multi-area ticket. [9]

[19]** A. *Waiver*

In response to defendant's attack on plaintiff's six theories, plaintiff contends that defendant's argument "is largely a legal one," and because defendant failed to object to the instruction on monopolization, it is the law of the case. The thrust of plaintiff's argument is that defendant has waived its opportunity to challenge the sufficiency of the evidence under legal principles different from those announced in the instructions.

Defendant challenges the first, second, fifth and sixth theories reasoning that their validity hinges on whether defendant had a duty to cooperate with plaintiff, and that as a matter of law no such duty could have existed. *See* Brief of Defendant-Appellant, Cross-Appellee, at 42, 47, 56, 58. We agree that the validity of the above four theories is premised on the theory of a duty to cooperate. And we agree that defendant has preserved the right to challenge the sufficiency of the evidence of this theory to support the verdict.

Defendant moved for a directed verdict on two occasions. Each time it urged that there was no duty to cooperate. II App. 427-29; *id. at 561-63* (renewed motion for directed verdict incorporating **[**20]** arguments made at close of plaintiff's case). This preserved defendant's opportunity to challenge the sufficiency of the evidence on that issue under the truly controlling law, regardless of defendant's failure to object to the jury instructions concerning a duty to cooperate. The Fifth, Seventh and Eighth Circuits have held that **[*1518]** ***HN8***[] "[a] proper motion for a directed verdict and its denial will always preserve for review the question whether *under the law truly applicable to the case* there was an adequate evidentiary basis for the submission of the case to the jury." *Coca-Cola Bottling Co. v. Hubbard, 203 F.2d 859, 862 (8th Cir. 1953)* (emphasis added); *see also* *Dual Manufacturing & Engineering, Inc. v. Burris Industries, Inc., 619 F.2d 660, 662-63* (7th Cir.) (en banc), *cert. denied*, *449 U.S. 870, 66 L. Ed. 2d 90, 101 S. Ct. 208 (1980)*; *Mid-America Food Service v. ARA Services, Inc., 578 F.2d 691, 696 n.4 (8th Cir. 1978)*; *House of Koscot Development Corp. v. American Line Cosmetics, Inc., 468 F.2d 64, 65-66 (5th Cir. 1972)*; *Johnson v. United States, 434 F.2d 340, 343 (8th Cir. 1970)*; *Gorsalitz v. Olin Mathieson Chemical Corp., 429 F.2d 1033, **[**21]** 1040 n.5 (5th Cir. 1970)*; *Hanson v. Ford Motor Co., 278 F.2d 586, 593 (8th Cir. 1960)*. Thus, ***HN9***[] "in determining whether a trial court has erred in denying a motion for a directed verdict . . ., it is the applicable law that is controlling, and not what the trial court announces the law to be in his [or her] instructions." *Dual Manufacturing & Engineering, Inc. v. Burris Industries, Inc., 619 F.2d 660, 663* (7th Cir.) (en banc) (quoting *Coca-Cola Bottling v. Hubbard, supra, 203 F.2d at 862*), *cert. denied*, *449 U.S. 870, 66 L. Ed. 2d 90, 101 S. Ct. 208 (1980)*. Therefore we will consider the validity of the theory that defendant had a duty to cooperate or deal with plaintiff in these circumstances.

B. *Duty to cooperate or duty to deal*

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[9] In its brief, defendant quotes the following passage from plaintiff's closing argument:

> The evidence has also shown that the Aspen Skiing Corporation, Buttermilk Skiing Corporation, and Snowmass Skiing Corporation together used that power to deliberately exclude Highlands from a substantial portion of the destination skier visits beginning in the 1977-'78 season by doing six things: (1) Imposing a condition that revenue must be divided on the four-area ticket based upon a fixed percentage substantially below the Aspen Highlands' market share previously realized, and to do so, to force Aspen Highlands out of the four area ticket; [2] as part of that, substituting their own three-area, six-day ticket which was provided in place of the four-area ticket and also provided for revenues being divided on the basis of usage; (3) marketing and advertising the Aspen resort in such a manner as to convince the newcomer to Aspen that Aspen only had three mountains rather than four mountains; (4) entering into special agreements with ARI, Aspen Reservations, Inc., the tour operator, for the purpose of inducing ARI, to sell Aspen Skiing Corporation tickets to the exclusion of Aspen Highlands' tickets; (5) refusing to accept Aspen Highlands Adventure Pack coupons during the '78-'79 season, again making it more difficult for Aspen Highlands to compete in the Aspen market; and (6) using their power to raise the individual daily lift ticket price this last year to $22, to completely eliminate Aspen Highlands' ability to offer a multi-area ticket in the Aspen market.

See Brief of Defendant-Appellant, Cross-Appellee, at 41; XIII R. 2214-15.

We must decide whether under the truly applicable law there was sufficient evidence for the jury to conclude that defendant's refusal to market a four-mountain ticket, together with defendant's other conduct, constituted monopolization in violation of *§ 2* as a refusal to cooperate, sometimes referred to as a refusal to deal. [10] Defendant replies that this case is not one where any such duty exists, arguing that such a duty can **[**22]** arise only in different circumstances where, through vertical integration, one firm has come to monopolize or control the supply of a component necessary for production, distribution or sale of a rival's product or service. [11] **[*1519]** Brief of Defendant-Appellant, Cross-Appellee, at 44 n.32; Reply Brief of Defendant-Appellant, Cross-Appellee, at 13-14.

[23]** The instances in which a monopolist has a duty to cooperate or deal is one of the most "unsettled and vexatious" issues in ***antitrust law***. *Byars v. Bluff City News Co., Inc., 609 F.2d 843, 846 (6th Cir. 1980)*. "There exist two conceptually similar lines of cases which impose a duty to deal upon a monopolist." *Id. at 855*; *see also MCI Communications v. AT & T, 708 F.2d 1081, 1148* (7th Cir.) *cert. denied*, *464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)*. [12] First, there is ***HN10***[] the so-called essential facilities or bottleneck doctrine. "Under this

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[10] We are mindful that one of the damage years was 1977-78, and that a four-area ticket was offered in that year. We discuss the antitrust injury attributable to this year in *infra* Part III.

[11] Defendant relies on Areeda & Turner, who state that "in general, the monopolist is under no duty to help his rivals enter, survive, or expand." 3 P. Areeda & D. Turner, ***Antitrust Law*** para. 738m, at 286 (1978). Defendant says that while an exception must be made for bottleneck cases where through vertical integration a firm has come to monopolize or control a component essential for a rival's survival, the "so-called 'bottleneck' cases are inapplicable here, however, because there is no claim that [defendant] is vertically integrated, or that it is the sole supplier of some component without which [plaintiff] absolutely cannot bring its product (here, service) to the market." Brief of Defendant-Appellant, Cross-Appellee, at 44-45 n.32. We reject defendant's argument.

We are not convinced that the essential touchstone of bottleneck cases is vertical integration. *See, e.g.*, P. Areeda & D. Turner, ***Antitrust Law*** para. 728b4, at 231 (1978) ("Of course, the nonintegrated monopolist. An integrated monopolist cannot engage in refusals to deal tending unreasonably to exclude actual or potential rivals from his monopoly market."); L. Sullivan, *Handbook of the Law of Antitrust* § 48, at 131 (1977) ("As a matter of policy, to require the monopolist [with a natural advantage monopoly, but without a vertical link to the customer level] to treat all like firms in the same way -- to have, one might say, a rational and relevant basis for any distinctions it may make -- is to protect vertically related and adjacent markets from being distorted because of arbitrary decisions by the monopolist.").

We decline to adopt a narrow rule that would immunize an unintegrated monopolist from antitrust liability for refusing a competitor access to an essential facility in these circumstances. Vertical integration is not essential to finding a violation of the antitrust laws for a refusal to deal under the intent test. *See, e.g., Lorain Journal Co. v. United States, 342 U.S. 143, 96 L. Ed. 162, 72 S. Ct. 181 (1951)*. We believe that it is also apparent that no bright line can be drawn between the bottleneck and intent cases. *See infra* note 13. Given this, and the need for a fact sensitive inquiry in this area, *e.g., Byars v. Bluff City News, Inc., 609 F.2d 843, 860 (6th Cir. 1980)* (courts should "carefully analyze[] the fact situation before them to see whether defendants' conduct was anti-competitive . . . in a case where there is a unilateral refusal-to-deal by a monopolist"), we conclude in the circumstances of this case that the bottleneck doctrine is applicable.

[12] ***HN11***[] There are two elements to the offense of monopolization under *§ 2* of the Sherman Act. The first is "the possession of monopoly power in the relevant market." The second is "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell, Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; *see also MCI Communications v. AT & T, 708 F.2d 1081, 1106* (7th Cir.), *cert. denied*, ***464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)***; *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979)*, *cert. denied*, ***444 U.S. 1093, 100 S. Ct. 1061, 62 L. Ed. 2d 783 (1980)***. Of course, the fact of injury and damages suffered by reason of a violation of the antitrust laws must also be shown for a private litigant to recover on a claim of monopolization. *E.g., Central National Bank v. Rainbolt, 720 F.2d 1183, 1187 (10th Cir. 1983)*. The essentials of these elements were covered by the trial court's instructions. XIV R. 2304.

Defendant's challenge to the sufficiency of the evidence assumes, *arguendo*, that Aspen is the relevant market and that defendant had monopoly power in that market. *See* Brief of Defendant-Appellant, Cross-Appellee, at 40. Reply Brief of Defendant-Appellant, Cross-Appellee, at 7 n.3 (defendant's "appeal does not present any issue as to the sufficiency of [the] approach, a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it." Byars, supra, 609 F.2d at 856 & n.34 (citing Associated Press v. United States, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945) (Associated Press enjoined from continuing its practice of refusing to furnish its service to its members' competitors); United States v. Terminal Railroad Association, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 (1912) (railroad companies jointly owning a terminal facility that was only feasible facility when coming to city from west must make **[**24]** facility available to non-proprietor railroads on non-discriminatory reasonable terms); Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir.) (fruit wholesalers who jointly own a warehouse may not exclude competing wholesaler, absent some justification), *cert. denied*, *344 U.S. 817, 73 S. Ct. 11, 97 L. Ed. 636 (1952))*.

[25]** Second, in various contexts courts have employed ***HN12***[] an intent test under which a "business is free to deal with whomever it pleases so long as it has no 'purpose to create or maintain a monopoly.'" Byars, supra, 609 F.2d at 855 (quoting United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 (1919)); *see also* MCI, supra, 708 F.2d at 1148. "These cases focus on the intent and competitive effect of the refusal to deal; not on whether the facility itself is 'essential.'" MCI, supra, 708 F.2d at 1148 (citing Lorain Journal Co. v. United States, 342 U.S. 143, 96 L. Ed. 162, 72 S. Ct. 181 (1951) (newspaper publisher enjoined from refusing to accept advertisements from customers who advertised with competing radio station); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 71 L. Ed. 684, 47 S. Ct. 400 (1927) (permissible for jury to infer that defendant's refusal to sell to plaintiffs was in pursuance of purpose to monopolize); United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919) (absent any purpose to create or maintain monopoly, Sherman Act does not restrict manufacturer's right to refuse to deal)). **[**26]**

We recognize that the cases do not fit neatly into these two categories. There **[*1520]** is a significant amount of overlap between them. [13] **[**27]** Nevertheless the dichotomy, though in part illusory, is a useful analytical tool. [14] On this record we conclude that both groups of cases apply and support the judgment here. [15]

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evidence" on "the jury's findings on market definition"). Thus, the first element under *Grinnell* necessary to establish a § 2 violation is not at issue.

[13] The overlap of the essential facilities doctrine and the intent test is "apparent upon examination of Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)." Byars, supra, 609 F.2d at 857. In *Otter Tail*, the defendant was a vertically integrated power company. It had the capacity to produce power and transmit it over its own lines to municipalities, where it could sell the power at retail prices. When municipalities sought to replace the defendant at the retail level, defendant refused to sell power to the municipalities.

Relying on both the intent test and the bottleneck theory, the district court found that this refusal to deal violated the antitrust laws. United States v. Otter Tail Power Co., 331 F. Supp. 54, 61 (D. Minn. 1971). The Supreme Court in its brief analysis did not distinguish between the two theories. Otter Tail, supra, 410 U.S. at 377-79; *see also* Byars, supra, 609 F.2d at 857. The Court held that the district court's finding "that Otter Tail's refusal to sell at wholesale or to wheel were solely to prevent municipal power systems from eroding its monopolistic position" was supported. Otter Tail, supra, 410 U.S. at 378.

For other cases discussing a duty to deal but not distinguishing between the essential facilities doctrine and the intent test, see, e.g., Home Placement Service v. Providence Journal Co., 682 F.2d 274, 281 (1st Cir. 1982), *cert. denied*, *460 U.S. 1028, 103 S. Ct. 1279, 75 L. Ed. 2d 500 (1983)*; Mid-Texas Communications, Inc. v. AT & T, 615 F.2d 1372, 1387-88 & n.12 (5th Cir.) ("While in theory there exist differences between the two approaches, in practice the theories are similar."), *cert. denied*, ***449 U.S. 912, 101 S. Ct. 286, 66 L. Ed. 2d 140 (1980)***.

[14] Only general intent, not specific intent, is necessary to a finding of a § 2 violation of monopolization. *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626, 97 L. Ed. 1277, 73 S. Ct. 872 (1953); United States v. Griffith, 334 U.S. 100, 105-06, 92 L. Ed. 1236, 68 S. Ct. 941 (1948). *But see* Byars v. Bluff City News Co., Inc., supra, 609 F.2d at 859. "While the completed offense of monopolization under § 2 demands only a general intent to do the act, 'for no monopolist monopolizes unconscious of what he is doing,' a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt now charged." Times-Picayune Co., supra, 345 U.S. at 626.

[28]** (1). *Essential facilities (or bottleneck)*

The essential facilities or bottleneck doctrine has been applied in a variety of circumstances. In *Terminal Railroad*, the defendant railroads jointly owned the only feasible terminal for rail traffic coming to St. Louis from the west. The Court decreed that in the special circumstances of the terminal and bridge facilities, the railroad companies and terminal company should provide reasonable access to the facility for competing railroads. *Terminal Railroad, supra, 224 U.S. at 411*. In *MCI Communications v. AT & T, supra, 708 F.2d at 1133*, the doctrine was applied where the competing defendant system controlled access to the communications facility essential to operation of its competitor. The Seventh Circuit identified ***HN13***[] four elements necessary to establish liability under the essential facilities doctrine: (1) control of the essential facility by a monopolist; (2) a competitor's inability to duplicate the facility; (3) denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *MCI, supra, 708 F.2d at 1132-33*. Evidence was presented on these factors here.

First, there **[**29]** is no dispute that defendant controlled three of the four skiing mountains in the Aspen area. If defendant refuses to market a multi-day multi-mountain ticket with plaintiff, plaintiff cannot compete in the market for such tickets. Yet, defendant through its control of three of the four mountains can continue to offer such a ticket. We believe this is sufficiently analogous to *Terminal Railroad* to satisfy **[*1521]** the element of control of an essential facility. Second, there was evidence concerning the difficulty of developing another ski area in Aspen due to regulatory restrictions, and delays, and the expense and time required to develop new mountains. *E.g.*, IV R. 377-79; VI R. 790-91; XII R. 2079-82. Third, there is no dispute that defendant denied the use of the "facility" to plaintiff. Defendant admits that it refused to continue to market a joint ticket with plaintiff. *See* Brief of Defendant-Appellant, Cross-Appellee, at 42-48. Fourth, there was evidence that it was feasible for defendant to provide access to the "facility." Prior to this litigation, plaintiff and defendant had marketed a joint multi-day multi-mountain ticket. There was testimony that **[**30]** defendant refused to accept coupons from plaintiff's Adventure Pack, although the coupons were at least as convenient as checks and credit cards. III R. 330-31.

We are not convinced by defendant's arguments based on its restrictive analysis that this is not a case of a vertical integration bottleneck. The substance of an essential facilities case was made. We must remember that ***HN14***[] this issue is raised by a claim of error in the denial of defendant's motion for a directed verdict and for judgment n.o.v. In that connection we must view the evidence most favorably to the party against whom the motion is made, and give that party the benefit of all reasonable inferences. *See, e.g., Hurd v. American Hoist and Derrick Co., 734 F.2d 495 (10th Cir. 1984)*; *Yazzie v. Sullivent, 561 F.2d 183, 188 (10th Cir. 1977)*. We hold that in these circumstances there was sufficient proof to sustain the verdict on the basis of a duty to deal or cooperate, and wrongful refusal to deal.

(2). *Intent*

We likewise feel there was sufficient evidence for a finding against defendant on the basis that defendant's intent in refusing to market a multi-day multi-mountain ticket with plaintiff **[**31]** was to "create or maintain a monopoly." *Colgate, supra, 250 U.S. at 307*. [16] By refusing to cooperate with plaintiff, defendant became the only business in

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[15] Defendant relies on *Telex Corp. v. IBM, 510 F.2d 894, 926* (10th Cir.) (per curiam), *cert. dismissed*, ***423 U.S. 802, 96 S. Ct. 8, 46 L. Ed. 2d 244 (1975)***, for the proposition that its marketing of a three-mountain ticket was one of the "ordinary marketing methods available to all in the market," and therefore could not violate *§ 2* of the Sherman Act. Brief of Defendant-Appellant, Cross-Appellee, at 48.

We need not decide that it was or would be illegal to offer a three-mountain ticket in competition with the four-mountain ticket. We believe that all of the evidence should be examined together, and we do not consider defendant's marketing of a three-area ticket in isolation from its other conduct. *See infra* note 18.

[16] Defendant argues that "the verdict cannot be construed as based on a finding that [defendant's] refusal to cooperate was intended, or was motivated by a purpose or desire, to achieve or maintain monopoly power" because the trial court "instructed the jury that no such finding was necessary." Brief of Defendant-Appellant, Cross-Appellee, at 47 n.34. We must reject defendant's argument.

Aspen that could offer a multi-day multi-mountain skiing experience. This is an important factor to attract Aspen skiers who seek variety. I App. 191, 243. There was evidence that defendant refused to offer a four mountain ticket, despite skiers' frustration over its unavailability. II App. 525-33.

[32]** To compete with defendant's three-mountain ticket, plaintiff developed an "Adventure Pack." This was a six day ticket designed to permit skiers to ski three of the six days at defendant's mountains. To do this, plaintiff included vouchers in the packet that theoretically were negotiable at defendant's ticket windows. Although there was evidence that these vouchers were guaranteed by a bank, and easier to **[*1522]** accept than checks or charge cards, defendant refused to accept them. III R. 328-35. After plaintiff modified its Adventure Pack to eliminate any of defendant's objections, IV R. 504-05, defendant raised the price of its single-day ticket to $22.00, thereby making it unprofitable for plaintiff to market its Adventure Pack. IV R. 534-35; IX R. 1424-25.

We hold that there was sufficient evidence for the jury to conclude that defendant's refusal to market a four-mountain ticket, [17] **[**33]** considered together with its other conduct, showed its intent to create or maintain a monopoly and thus a violation of *§ 2*. [18]

There was no proper or timely objection to the formulation of the intent instruction, as required by *Rule 51*. *Fed. R. Civ. P. 51*. Moreover, the charge correctly stated that "willfully as used in these instructions means acting knowingly and deliberately, but it does not mean that [defendant] must have specifically intended to achieve or maintain monopoly power." XIV R. 2310. Under *§ 2* general intent is all that is required to support a monopolization claim; only for a mere attempt to monopolize is specific intent required to be shown. *E.g., Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*; *United States v. Griffith, 334 U.S. 100, 105-06, 92 L. Ed. 1236, 68 S. Ct. 941 (1948)*; *Home Placement Service v. Providence Journal Co., 682 F.2d 274, 281 (1st Cir. 1982)*, *cert. denied*, ***460 U.S. 1028, 103 S. Ct. 1279, 75 L. Ed. 2d 500 (1983)***; *see also Bank of Utah v. Commercial Security Bank, 369 F.2d 19, 26 (10th Cir. 1966)*, *cert. denied*, ***386 U.S. 1018, 18 L. Ed. 2d 456, 87 S. Ct. 1374 (1967)***. *But see Byars v. Bluff City News Co., 609 F.2d 843, 859 (6th Cir. 1980)*. The trial judge was instructing the jury as to the elements of the offense of monopolization, not an attempt to monopolize, and she properly instructed that specific intent was not an element of that offense.

[17] The trial judge's charge referred to the duty to cooperate with a business rival and said that a refusal to deal with a competitor "does not violate *Section 2* if valid business reasons exist for that refusal." XIV R. 2311.

[18] Defendant argues that each of the "six things" on which plaintiff relied to demonstrate that it was deliberately excluded from the destination skier market must be supported by sufficient evidence to support a *§ 2* verdict. *See supra* note 9. Defendant reasons that if we "uphold[] the legal sufficiency and proof of one or more, but not all, of [plaintiff's] theories, then [defendant] is entitled to a new trial." Brief of Defendant-Appellant, Cross-Appellee, at 59-60.

Defendant relies on *Northeastern Telephone Co. v. AT & T, 651 F.2d 76 (2d Cir. 1981)*, *cert. denied*, ***455 U.S. 943, 102 S. Ct. 1438, 71 L. Ed. 2d 654 (1982)*** for the above proposition. In *Northeastern*, the Second Circuit reversed and held that plaintiff failed to prove five of the six types of conduct it alleged were anti-competitive. Because the interrogatories submitted to the jury did not permit the court to determine whether the jury based its damage award on any of the five types of conduct that plaintiff had failed to prove were anti-competitive, the Second Circuit remanded for a new trial. We cannot agree that each one of the "six things" which plaintiff argued demonstrated abuse of monopoly power, taken alone, must be supported by sufficient evidence to find a *§ 2* violation. We reach this conclusion for two reasons.

First, defendant's argument would require that we view each of the "six things" in isolation. To do this, however, would be contrary to the Supreme Court's admonition that an antitrust plaintiff "should be given the full benefit of [its] proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*; *see also Associated Press v. United States, supra, 326 U.S. at 14*; *Northeastern Telephone v. AT & T, supra, 651 F.2d at 95 n.28* (recognizing rule in *Continental Ore* but distinguishing it where proof was "utterly lacking" in "numerous critical respects"); *Case- Swayne Co. v. Sunkist Growers, Inc., 369 F.2d 449, 459 (9th Cir. 1966)*, *cert. denied*, *387 U.S. 932, 18 L. Ed. 2d 994, 87 S. Ct. 2056*, *rev'd on other grounds*, *389 U.S. 384, 19 L. Ed. 2d 621, 88 S. Ct. 528 (1967)*; *GVF Cannery, Inc. v. California Tomato Growers Association, Inc., 511 F. Supp. 711, 716 (N.D. Cal. 1981)*. Plaintiff's evidence should be viewed as a whole. Each of the "six things" viewed in isolation need not be supported by sufficient evidence to amount to a *§ 2* violation. It is enough that taken together they are sufficient to prove the monopolization claim.

[34]** III

Injury

Defendant argues that even assuming that it abused its monopoly power, plaintiff cannot recover because it has failed to establish that defendant's unlawful conduct **[*1523]** caused plaintiff injury in its business or property. Such injury is an essential element that plaintiff must prove to recover under the antitrust laws. *E.g.,* *Central National Bank v. Rainbolt, 720 F.2d 1183, 1187 (10th Cir. 1983)*; *Mountain View Pharmacy v. Abbott Laboratories, 630 F.2d 1383, 1389 (10th Cir. 1980)*; *World of Sleep, Inc. v. Stearns & Foster Co., 525 F.2d 40, 43-44 (10th Cir. 1975)*. Plaintiff's damage evidence covered four skiing seasons -- 1977-78 through 1980-81 -- and included expert testimony on such damages with estimates ranging from $3,162,100 to $4,708,600. *See, e.g.*, Plaintiff's Exhibit 101.

Defendant reasons that plaintiff sought to show that its business would have been more profitable if defendant had agreed to market a four-mountain ticket and had not marketed its own three-mountain ticket; that the only evidence that plaintiff relied on to show this was that of its expert, Mr. Farwell; and that this testimony should have been excluded because **[**35]** it was grounded on two false assumptions. *See* Brief of Defendant-Appellant, Cross-Appellee, at 60-62; Reply Brief of Defendant-Appellant, Cross-Appellee, at 15-16. We reject defendant's argument for two independent reasons.

First, there was sufficient evidence of injury, other than Farwell's testimony, to sustain the jury verdict. For example, plaintiff's president and owner, II R. 149, testified that plaintiff was "severly damaged" by defendant's refusal to market a four-mountain ticket. III R. 197; *see also id. at 195*. Plaintiff's financial vice president, IX R. 1374, testified that elimination of the four-mountain ticket had the effect of a loss of revenues during the 1978-79, 1979-80, and 1980-81 skiing seasons; he made projections assuming that plaintiff's "slice of the pie" would stay the same and made a rough estimation of a 50-60% loss attributable to the marketing practices of defendant. IX R. 1386-91, 95. He also testified that as a result of eliminating the four-mountain ticket, plaintiff became "a day ski area in a destination market." IX R. 1425. Moreover, there was testimony that because of the elimination of the four-mountain ticket plaintiff had to **[**36]** decrease the number of its ski patrolmen. IV R. 477. There was sufficient evidence for the jury to conclude that plaintiff proved that it was injured by defendant's unlawful conduct.

Second, we reject defendant's argument that the testimony and exhibits of plaintiff's expert [19] were grounded on two false assumptions, and therefore were inadmissible. Defendant says that the validity of the expert testimony "depended explicitly on two indispensable assumptions: (1) that [plaintiff's] ski areas and those of [defendant] 'are equally desirable in the mind of the consumer,' and, (2) that [defendant] would not offer its own 3-area 6-day ticket

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Second, defendant never objected to the instructions that required the jury to consider the evidence as a whole. XIV R. 2295 (jury instruction); XIV R. 2290-92 (defendant's objections to instructions). In fact, the trial judge instructed that the plaintiff is "not required to prove every one of its allegations about anti-competitive conduct. Once again, you have a problem for judgment, for thorough and sensitive weighing of the evidence." XIV R. 2213-14. Moreover, defendant did not submit more specific interrogatories that would have required the jury to make the grounds for its decision clear. I R. 143-45 (defendant's special interrogatories on monopolization). In these circumstances, we should uphold the general verdict if the proof on various theories is sufficient to sustain the general verdict. *See, e.g.,* *Union Pacific Railroad Co. v. Lumbert, 401 F.2d 699, 701 (10th Cir. 1968)* (absent pertinent objection to charge or request for specific interrogatory, a general verdict is upheld where there is substantial evidence supporting any ground of recovery in favor of an appellee); *see also* ***Malandris v. Merrill Lynch, Pierce, Fenner & Smith Inc., 703 F.2d 1152, 1176-77 n.20 (10th Cir. 1981)***, (en banc) (plurality opinion), *cert. denied*, ***464 U.S. 824, 104 S. Ct. 92, 78 L. Ed. 2d 99 (1983)***; *Comins v. Scrivener, 214 F.2d 810, 814 (10th Cir. 1954)*. In the instant case, we hold that there is sufficient evidence to find that defendant had a duty to cooperate in marketing a four-mountain ticket, and that its refusal to do so, considered together with its other acts, supported the finding of monopolization.

[19] Plaintiff's expert was Ted Farwell of Boulder, Colorado. Mr. Farwell was a ski area planner, consultant and appraiser, with a bachelor's and master's degree in business administration, and 20 years' experience in his field. VIII R. 1163. He was a former competitive skier himself, skiing for the University of Denver, and on three United States Olympic teams. ***Id. at 1170***.

during the damage period to attract customers away from the jointly-offered 4-area ticket." Brief of Defendant-Appellant, Cross-Appellee, at 62 (citations omitted) (footnote omitted).

[37]** Although Farwell's assumptions may have been open to question, they were not so unsupported that the trial court abused its discretion in permitting admission of the testimony and exhibits. We begin with the general rule that ***HN15***[] we review a district court's admission or exclusion of expert testimony for abuse of discretion only. *E.g., Scholz Homes, Inc. v. Wallace, 590 F.2d 860, 863 (10th Cir. 1979)* ("Trial courts have broad discretion in determining the extent to which expert testimony is admissible."); *see also Garwood v. International Paper Co., 666 F.2d 217, 223 (5th Cir. 1982)* ("the district court's admission or exclusion of expert testimony under *Fed.R.Evid. 702* is reviewable only for abuse of discretion").

[*1524] We cannot say that the admission of this expert testimony was an abuse of discretion. Although there may have been considerable evidence contradicting the expert's assumptions, his assumptions were not without support. [20] **[**39]** *See also Litton Systems, Inc. v. AT & T, 700 F.2d 785, 822-25 (2d Cir. 1983)* (expert's damage projections admissible because assumptions on which they were based were supported in record), *cert. denied*, *464 U.S. 1073, 104* ***[**38]*** *S. Ct. 984, 79 L. Ed. 2d 220 (1984)*. Moreover, "the full burden of exploration of the facts *and assumptions* underlying the testimony of an expert witness [is] squarely on the shoulders of opposing counsel's cross-examination." *Smith v. Ford Motor Co., 626 F.2d 784, 793 (10th Cir. 1980)* (emphasis added), *cert. denied*, *450 U.S. 918, 67 L. Ed. 2d 344, 101 S. Ct. 1363 (1981)*. [21] **[**40]** We therefore conclude that permitting the jury to consider the testimony from plaintiff's expert was not an abuse of discretion. [22]

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[20] There was evidence that plaintiff's mountain was of equivalent desirability to defendant's mountains. There was testimony that plaintiff's mountain was "the finest, well-balanced mountain in the Aspen area." IV R. 502. One witness testified that he "prefer[ed] [plaintiff's mountain] as a ski area," and that he recommended plaintiff's ski school over the others because it is a "friendly area." VII R. 983; *see also* ***id. at 985-86***. There was also testimony from a member of defendant's board of directors that if a four-mountain ticket had been offered in 1978-79, defendant would *not* have marketed its three-mountain ticket at the same time. Exhibit 33, III App.; V R. 585.

[21] Defendant also argues that Farwell's projections "were attributed at least in part to what the trial court found to be [defendant's] *lawful* competition -- its offering of its own 3-area ticket." Brief of Defendant-Appellant, Cross-Appellee, at 66 (emphasis in original). Defendant argues that the judgment must be reversed because, as in *Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338 (3d Cir. 1975)*, plaintiff's expert relied on defendant's lawful conduct in projecting damages. We disagree for two reasons.

First, we have explained above that we must look at the evidence as a whole in determining whether defendant violated *§ 2*. Whatever the propriety of marketing its own three-day ticket in other circumstances, we must conclude that defendant cannot complain of Farwell's reliance on its offering of the three-day ticket in conjunction with the other evidence of monopolization in this case, especially where defendant has acquiesced in the jury's return of a general verdict. "But however innocent such agreements might be, standing alone, they would assume quite a different aspect if utilized as essential features of a program to hamper or destroy competition." *Associated Press, supra, 326 U.S. at 14*.

Second, Farwell's projections do not assume that the three-day ticket is illegal. Instead, the projections merely assume that defendant would refrain from offering the three-day ticket. As we have explained earlier, there is support in the record for this assumption. *See supra* note 20.

[22] Defendant makes a broad challenge to the admission of the testimony of plaintiff's expert. In addition to the challenge that the testimony was inadmissible because grounded on false assumptions, which we have rejected, defendant also argues that even if the expert evidence was otherwise admissible it should have been excluded as misleading and confusing. *See Fed.R.Evid. 403*. Brief of Defendant-Appellant Cross-Appellee at 68. We note that under *Rule 403, Fed.R.Evid.*, the "task of balancing the probative value of evidence against danger of confusion of the issues is one for which the trial judge because of his [or her] familiarity with the full array of evidence in the case, is particularly suited." *Rigby v. Beech Aircraft Co., 548 F.2d 288, 293 (10th Cir. 1977)*. We will not disturb the trial court's decision on this issue unless it is an abuse of discretion. *See, e.g., Whiteley v. OKC Corp., 719 F.2d 1051, 1057 (10th Cir. 1983)*; *Texas Eastern Transmission Corp. v. Marine Office-Appleton & Cox Corp., 579 F.2d 561, 567 (10th Cir. 1978)*; *Rigby v. Beech Aircraft Co., 548 F.2d 288, 293 (10th Cir. 1977)*. We cannot say it was an abuse of discretion to refuse to exclude the expert's testimony under *Rule 403*.

[41]** Defendant also argues that plaintiff failed to show that it was injured by reason of an antitrust violation for the 1977-78 ski season. Defendant contends that a four-mountain ticket was offered in 1977-78 and therefore any injury suffered by plaintiff during this season was based on defendant's lawful offering of its own three-area ticket. Brief of Defendant-Appellant, Cross-Appellee, at 76-78; Reply Brief of Defendant-Appellant, Cross-Appellee, at 19-21.

This argument ignores the evidence before the jury of antitrust injury suffered by plaintiff in having to accept 15% as its share of net revenues from the sale of four-area tickets during 1977-78. Plaintiff's **[*1525]** counsel contended in closing argument that defendant had used its market "power to deliberately exclude [plaintiff] from a substantial portion of the destination skier visits beginning in the 1977-'78 season by [, among other things,] imposing a condition that revenue must be devided on the four-area ticket based upon a fixed percentage substantially below [plaintiff's] market share previously realized, and to do so, to force [plaintiff] out of the four-area ticket." II App. 574.

In years preceding **[**42]** 1977-78, revenues from the sale of the joint four-area tickets were divided on the basis of actual use. In all but one of these seasons, plaintiff received between 16.8% and 18.5% of the revenues based on actual use of its facility. Only during 1976-77, a season that plaintiff contended was marked by below average amounts of snowfall and an unusually low number of skiers visiting the Aspen area, did plaintiff's share of the revenues based on actual use fall below 16.8%. Its share during this season was 13.2%. Defendant offered to continue the joint ticket for 1977-78 if plaintiff would accept a 13.2% fixed percentage of the revenues. III R. 270-71. Plaintiff objected to this percentage because it was based on the survey for 1976-77. *Id. at 271*. Plaintiff's vice president testified that "it looked pretty obvious to us that [defendant] had no intention of really having a four-area, six-day ticket with us, and we felt that our own [sic] chance of keeping this thing alive was to accept some type of a fixed percentage, because [defendant was not] going to go along with a survey [of actual use]." *Id. at 273*. As a result, plaintiff offered a "compromise" deal in which **[**43]** it would accept the average of its previous three years as its share of the revenue for 1977-78. *Id.* The parties eventually settled on 15% as plaintiff's share of the revenues for the 1977-78 season.

We conclude that there was sufficient evidence for the jury to conclude that plaintiff was injured through the exercise of monopoly power by defendant's acts in compelling plaintiff to accept 15% as its share of the profits from the joint four-area ticket during the 1977-78 season, rather than dividing revenues on the basis of actual use. And of course, with respect to the 1978-79, 1979-80, and 1980-81 years defendant did refuse to deal with plaintiff in the marketing of a four-mountain ticket, in addition to its other acts.

The expert tesimony thus supported the jury inference of injury in fact resulting from defendant's violation of *§ 2*, and the testimony of other witnesses as well. In sum, the requirement of proof of injury as an element of plaintiff's case was met. *King & King Enterprises v. Champlin Petroleum Co., 657 F.2d 1147, 1156, 1160 (10th Cir. 1981)*, *cert. denied*, *454 U.S. 1164, 71 L. Ed. 2d 320, 102 S. Ct. 1038 (1982)*.

IV

Damages

Lastly, defendant **[**44]** takes issue with the proof supporting the jury's award of $ 2.5 million in damages, which the district court trebled to $ 7.5 million. Defendant again challenges the testimony and exhibits of plaintiff's expert Farwell. Defendant contends that Farwell's damage estimates of $ 4,708,600 under his "Method A" and $ 3,162,100 under "Method B" are an inadequate foundation for the jury's damage award. Farwell's "Method A" estimate of damages was based on the assumption of a trend of the market share continuing in favor of plaintiff through the damage years projected. Farwell estimated the before tax profit that would have been produced if the defendant's marketing practices had not changed; this method produced the $ 4,708,600 estimate of damages. Farwell's "Method B" was more conservative and assumed that the plaintiff would only continue to have the average market share of recent prior years through the damage years projected; this method produced the $ 3,162,100 estimate of loss resulting from defendant's change in marketing practices.

The Supreme Court has recognized that an antitrust plaintiff is rarely able to prove its damages with mathematical precision. **[*1526]** *See,* **[**45]** *e.g., J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 566, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)* ("The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of defendant's antitrust violation."); *Zenith Corp. v. Hazeltine, 395 U.S. 100, 123, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1962)* ("damages issue in [cases where plaintiff was partially or totally excluded from a market] are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts"); *see also King & King Enterprises v. Champlin Petroleum Co., 657 F.2d 1147, 1158 (10th Cir. 1981)*, *cert. denied*, *454 U.S. 1164, 71 L. Ed. 2d 320, 102 S. Ct. 1038 (1982)*; *Cackling Acres, Inc. v. Olson Farms, Inc., 541 F.2d 242, 246 (10th Cir. 1976)*, *cert. denied*, *429 U.S. 1122, 51 L. Ed. 2d 572, 97 S. Ct. 1158 (1977)*. The Court has emphasized that ***HN16***[] the trier of fact can determine the amount of damages from "a just and reasonable estimate of the damage based on relevant data." *Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264, 90 L. Ed. 652, 66 S. Ct. 574 (1946)*. The damage award, however, may not be based **[**46]** on "speculation or conjecture." *Id.*

In Part IV, *supra*, we rejected defendant's challenge to the testimony and exhibits of plaintiff's expert Farwell in the context of proving injury. We similarly must reject defendant's argument concerning the inadequacy of the proof concerning damages, particularly in light of the general rule that "the burden of proving the amount of damages is less than that required for proving the fact of damage." ABA Antitrust Section, ***Antitrust Law*** *Developments* 409 (2d ed. 1984); *see also Story Parchment Co. v. Paterson Parchment Co., 282 U.S. 555, 562, 75 L. Ed. 544, 51 S. Ct. 248 (1931)*. As we stated in a similar context:

> If the calculations upon which the loss of profits are based are *estimated in any reasonable way* and the underlying assumptions on which the [expert] relied *are not without support in the record*, the calculations may be upheld as a valid means of measuring loss of profits.

King & King Enterprises, supra, 657 F.2d at 1158. (emphasis added). In light of Farwell's testimony and exhibits, we cannot say that the jury's $2.5 million damage award was based on "speculation or conjecture." *See* **[**47]** *id. at 1162-63* ("The weight and probative value of [experts'] testimony was for the jury to decide. . . . 'Even though we may not agree with each step in the [fact finder's] reasoning process, we must affirm . . . unless the findings are beyond the pale of sane judgment. '") (quoting *Trabert & Hoeffer, Inc. v. Piaget Watch Corp., 633 F.2d 477, 484 (7th Cir. 1980)*); *see also Midwest Underground Storage v. Porter, 717 F.2d 493, 501 (10th Cir. 1983)* (upholding jury damages award that was "within the range of the evidence," even though exact amount of award was open to question).

Defendant also argues that the $2.5 million damage award is excessive. The district court rejected defendant's motion for a new trial based, in part, on the claim that the damage award was "grossly excessive." I R. 212; I App. xviii. ***HN17***[] We must afford the district court's refusal to grant a new trial on the excessive damages claim "considerable deference on appeal." *Blevins v. Cessna Air Craft Co., 728 F.2d 1576, 1579 (10th Cir. 1984)*; *see also Midwest Underground Storage Inc., 717 F.2d at 502* ("The decision whether to grant a new trial is committed to the informed discretion of the district **[**48]** court, which is generally in a better position to evaluate claims of jury confusion or other error in the verdict."). "Moreover, ***HN18***[] 'absent an award so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the damages is considered inviolate. '" *Blevins, supra, 728 F.2d at 1579* (quoting *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 703 F.2d 1152, 1168 (10th Cir. 1981)* (en banc) (plurality opinion), *cert. denied*, *464 U.S. 824, 104 S. Ct. 92, 78 L. Ed. 2d 99 (1983)*); *see also* ***[*1527]*** *Hurd v. American Hoist and Derrick Co., 734 F.2d 495 (10th Cir. 1984)*.

We cannot say that the district court abused its discretion in denying defendant's motion for a new trial on the basis of the alleged excessiveness of the verdict or that the $2.5 million award is so excessive as to shock the judicial conscience. Indeed, the jury's award was below the estimates of plaintiff's expert Farwell, whose testimony we held to be admissible in *supra* Part III. [23] Defendant's other challenges to certain aspects of the exhibits on which Farwell **[**49]** relied, *see* Brief of Defendant-Appellant, Cross-Appellee, at 79-80, do not convince us that overturning the jury's damage award is appropriate here.

[50]** V

Attorneys' fees and costs on appeal

Plaintiff asks that we award it "costs, including reasonable attorneys' fees, on appeal." Reply and Answer Brief of Plaintiff-Appellee, Cross-Appellant, at 84. Section 4 of the Clayton Act ***HN19***[] 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. § 15(a)*.

In *Perkins v. Standard Oil Co., 399 U.S. 222, 26 L. Ed. 2d 534, 90 S. Ct. 1989 (1970)*, the Supreme Court held that § 4 of the Clayton Act ***HN20***[] "authorize[s] the award of counsel fees for legal services performed at the appellate stages of a successfully prosecuted private antitrust action." *Id. at 223*; *see also* *Alexander v. National Farmers Organization, 696 F.2d 1210, 1211-12 (8th Cir. 1982)*, *cert. denied*, *461 U.S. 937, 103 S. Ct. 2108, 2110, 77 L. Ed. 2d 313 (1983)*; *Moore v. Jas. H. Matthews & Co., 682 F.2d 830, 839 & n.11 (9th Cir. 1982)*; *Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 55-56 (5th Cir. 1976)*; *see generally* 2 S. Speiser, *Attorneys' Fees* § 14:6 (1973). The Supreme Court in **[**51]** *Perkins* indicated that "the amount of the award for such services should, as a general rule, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of the services rendered." *399 U.S. at 223*.

Accordingly we remand to the district court to hold a hearing on the appropriate amount of attorneys' fees and costs incurred by plaintiff which are attributable to the appeal in No. 82-1407. With respect to the cross-appeal in No. 82-1424, the issues raised were only to be considered if defendant Aspen Skiing Company was successful in its appeal. *See* note 3, *supra*. In view of these circumstances, we conclude that each side should bear its own appellate costs and attorneys' fees which are attributable to the cross-appeal. On remand the district court should thus determine the appellate costs and attorneys' fees attributable to the appeal in No. 82-1407 and award those costs and attorneys' fees to plaintiff.

VI

Conclusion

We are satisfied that the trial was fairly conducted, that the instructions were balanced and fair to both sides, and that no error is demonstrated. Accordingly in all **[*1528]** respects the judgment **[**52]** of the district court is affirmed, and the case is remanded to the district court for further proceedings concerning appellate attorneys' fees and costs as provided in Part V.

APPENDIX

The district court's relevant market instruction was as follows:

A relevant market has two components: One is the product market and the other is the geographic market.

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[23] Defendant criticizes Farwell's damage estimate for 1977-78 on the ground that the four-mountain ticket *was* actually offered during this year, contrary to the apparent assumption of Exhibit 101. However, this defect is not fatal to the verdict when we consider the amount of damages attributed to this year in comparison with the other damage years. Under his more conservative Method B, Farwell attributed between $884,400 and $991,300 in damages for each of the years 1978-79 through 1980-81, during which the four-mountain ticket was not offered. The total damages attributed by Farwell to these three years was over $2.8 million, which was greater than the jury's damage award for the four damage years in question. Farwell's estimate of $354,300 in damages for 1977-78, during which the four-mountain ticket was offered, therefore should be viewed in light of Farwell's estimated damages for 1978-79 through 1980-81 and the actual damages awarded by the jury. *See* *Midwest Underground Storage, Inc., supra, 717 F.2d at 501* (upholding jury damages award that was "within the range of the evidence").

Product market: The parties are in disagreement as to what the relevant product market is. Aspen Highlands claims that downhill skiing services in Aspen, including multi-area, multi-day lift tickets is the relevant product market. Aspen Skiing Corporation and its subsidiaries claim that the relevant product market is downhill skiing at destination ski resorts.

Like many issues of fact, this one calls upon you to apply your collective common sense and experience to the record of evidence before you.

The basic idea of a relevant product market is that the product or services within it can be substituted for each other as a practical matter from the buyer's point of view. Two products need not be identical to be in the same market, but they must be as a matter of practical fact in the actual behavior of consumers substantially **[**53]** or reasonably interchangeable to fill the same consumer needs or purposes. Two products are within a single market if one item could suit buyers' needs substantially as well as the other.

One way you can tell whether products are reasonable substitutes for each other is to consider whether changes in the price of one have fairly direct and substantial effects upon the sales of the other. If so, the products are probably in the same market. You can also consider how people in the industry and the public at large view the products, whether the products have similar prices, whether the products are sold to similar customers, and whether they are sold by the same kind of sellers. Other factors which you should consider include the special characteristics and uses of each product and the overlap between the consumers of different products.

In sum, you are being asked to decide which products compete with each other. No one factor is necessarily decisive; but the more of these criteria that are present, the more likely the particular market is a separate product or service market.

Sub-markets: Once you have determined the relevant product market, you next have to consider whether **[**54]** or not there exists within that product market a relevant sub-market. Even though a group of products are sufficiently interchangeable to be grouped in one product market, there may be within that group a smaller group of products that compete so directly with each other as to constitute a sub-market with in [sic] the larger market; or the products or services of particular seller may have such particular characteristics and such particular consumer appeal and are sufficiently insensitive to price variations of other products that they constitute a relevant sub-market all by themselves.

There can be both a relevant market and a relevant sub-market or just a relevant market without any relevant sub-market. Thus, if you decide that the relevant product market is downhill skiing at destination ski resorts, you must still determine whether downhill skiing services in Aspen, including multi-area, multi-day lift tickets is a sub-market within the larger market.

Relevant geographic market: Second, you must determine [the] relevant geographic market. The relevant geographic market is the area or areas in which these parties and their competitors compete for the sale of products **[**55]** that form the relevant product market. It is the area or areas to which a potential customer may rationally turn for the service or product he needs.

[*1529] Just as there can be a sub-market within a relevant product market, there can be a sub-market within a relevant geographic market. Your destination [sic] of the geographic market or sub-market must both correspond to the commercial realities of the ski industry and be economically significant. Thus, although the geographic market in some instances may be national or international, under other circumstances it may be as small as a single town or resort area.

In this case, Aspen Highlands contends that the relevant geographic market is the Aspen area, while Aspen Skiing Corporation and its subsidiaries contend that it is North America. Thus, if you decide that the relevant product market is downhill skiing at destination ski resorts and the relative georgraphic [sic] market North America, you may still consider whether downhill skiing services in Aspen, including multi-area, multi-day lift tickets from a relevant product sub-market, and if so, whether the Aspen area is a relevant geographic sub-market.

[56]** XIV R. 2305-08.

Affiliated Capital Corp. v. Houston

United States Court of Appeals for the Fifth Circuit

July 16, 1984

No. 81-2335

Reporter
735 F.2d 1555 *; 1984 U.S. App. LEXIS 20483 **; 1984-2 Trade Cas. (CCH) P66,104

AFFILIATED CAPITAL CORPORATION, Etc., Plaintiff-Appellant, v. CITY OF HOUSTON, et al., Defendants, Gulf Coast Cable Television and James J. McConn, Defendants-Appellees

Subsequent History: **[**1]** Petition for Rehearing Denied September 17, 1984.

Prior History: Appeal from the United States District Court for the Southern District of Texas.

Disposition: Reversed with instructions.

Core Terms

franchise, conspiracy, cable television, municipal, Interrogatory, city council, anti trust law, trial court, anticompetitive, antitrust, answer to an interrogatory, conspirators, territory, cable, immunity, competitor, compete, divide, merits, non-conspirators, co-conspirator, businessmen, sham, circumstantial evidence, unreasonable restraint, qualified immunity, proximate cause, public interest, rule of reason, reconciliation

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN1[] **Trials, Judgment as Matter of Law**

On motions for judgment notwithstanding the verdict a court should consider all of the evidence, not just that evidence which supports the non-mover's case, but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied.

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

HN2[] **Private Actions, Remedies**

A plaintiff seeking damages for an antitrust injury need only prove with a fair degree of certainty that the defendant's illegal conduct materially contributed to his injury.

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

HN3[] **Private Actions, Remedies**

It is proper for a trial judge to infer damages from circumstantial evidence.

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

HN4[] **Private Actions, Remedies**

When direct evidence points to a conspiracy to injure a plaintiff, a court can find causation on the basis of circumstantial evidence and inference.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Civil Procedure > Special Proceedings > Eminent Domain Proceedings > Jury Trials

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

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

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

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

The Noerr-Pennington doctrine provides an exception to antitrust liability enabling citizens or business entities to influence or to petition public officials to take official action that will harm or eliminate competition. When such petitioning is a mere sham or the public officials are participants in the conspiracy, however, there is no exception to antitrust liability.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

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

HN6[] **Noerr-Pennington Doctrine, Sham Exception**

Petitioning calculated to deny a competitor meaningful access to a governmental entity is within the sham exception to Noerr-Pennington immunity. Whether or not such conduct is within the sham exception is a fact issue for the jury.

Governments > Local Governments > Employees & Officials

HN7[] **Local Governments, Employees & Officials**

A municipal official acting in his legislative capacity is entitled to absolute immunity from civil suits.

Governments > State & Territorial Governments > Claims By & Against

Governments > State & Territorial Governments > Employees & Officials

HN8[] **State & Territorial Governments, Claims By & Against**

Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Assuming that the law in question was clearly established, an official can still prevail if he can show extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard.

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For Hon. Jim McConn, Rufus Wallingford, Houston, Texas, Layne E. Kruse, Houston, Texas, (for Gulf Coast Cable), Richard B. Miller, Houston, Texas, Theodore F. Weiss, Jr., Houston, Texas, John L. Jeffers, Houston, Texas, Richard B. Miller, Houston, Texas, for Appellee.

Judges: Clark, Chief Judge, Brown, Gee, Rubin, Garza, * Reavley, Politz, Tate, Johnson, Williams, Jolly, Higginbotham and Davis, Circuit Judges. ** Patrick E. Higginbotham, Circuit Judge, concurring specially. Clark, Chief Judge, with whom Reavley and E. Grady Jolly, Circuit Judges, join, dissenting in part.

Opinion by: GARZA

Opinion

[*1556] GARZA, Circuit **[**2]** Judge

In *Affiliated Capital Corp. v. City of Houston, 519 F. Supp. 991 (S.D.Tex. 1981)*, the district court granted the defendant's judgment n.o.v. motion in an antitrust action because it believed there was insufficient evidence connecting plaintiff's theory of conspiracy to limit competition and its failure to receive a cable television franchise. A divided panel of this court reversed that decision holding among other things that the conspiracy complained of was a *per se* antitrust violation. *Affiliated Capital Corp. v. City of Houston, 700 F.2d 226 (5th Cir. 1983)*. We vacated that decision and decided to hear this case *en banc, 714 F.2d 25 (5th Cir. 1983)*. Because the **[*1557]** district court's j.n.o.v. ruling can be reversed without reaching the issue of a *per se* violation, we again reverse the court below, and reinstate the jury verdict. The City of Houston is not a party to this appeal, having been voluntarily dismissed by the plaintiff on June 23, 1982.

I.

FACTS

The events leading to the litigation at bar commenced in 1972, when several firms sought cable television franchises from the city of Houston. After reviewing these applications the **[**3]** Houston Public Service and Legal

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* Judge Garza, now a senior judge of this circuit, is participating as a member of the panel that initially considered the appeal now subject to en banc review.

** Judges Randall and Garwood did not participate in this decision.

Departments recommended two firms to the Mayor and City Council. The Mayor and City Council then awarded one corporation a franchise for the entire city. The unsuccessful franchise applicant, Gulf Coast Cable Television Co. [hereinafter Gulf Coast] then secured a petition of more than five hundred Houston voters calling for a referendum on the Council action. [1] The voters soundly defeated the grant of a monopoly franchise.

In 1978 the city was again considering granting cable franchises. Mayor McConn, who had been a city councilman in 1973, wanted a plan that would not be overturned by the voters. The Mayor testified at the trial below that he, therefore, determined that several franchises would be granted. In addition, he decided that qualified, local applicants would be favored. Finally, he concluded that any plan should include minority participation. **[**4]** Defendant Gulf Coast was the first of many concerns to seek a cable television franchise in 1978. [2] There is ample evidence that the city of Houston did not even initiate the franchise process; defendant Gulf Coast approached the city and made application for a franchise. The city of Houston is a highly desirable cable television market. The city, however, made no effort to take advantage of its position by publicizing its intention to award franchises. Instead of following this common practice, the city passively accepted applications as they arrived. From the many applications submitted to the Public Service Department, four emerged as strong contenders. Their strength was not based on the merits of their proposals, however, but on the political power of the men behind them. These four actors were Gulf Coast, Houston Cable Television Co., Houston Community Cable Television Co., and Meca. Mayor McConn had let it be known that he did not want to choose between competing applicants. He wanted the applicants to cooperate, resolve any overlaps in their territories and present him with a finished product. He abdicated his responsibility in the franchising process to a group **[**5]** of powerful Houston businessmen. In turn, these businessmen became friendly competitors in an effort to divide the city among themselves and prevent competition from any outsiders.

These businessmen and their attorneys met, and over a period of time mutually agreed on franchise areas. After this agreement, the Mayor informed Gulf Coast that another applicant, Westland Corporation, a group primarily controlled by the Mayor's personal attorney, had to be added to the ranks. A portion of the area Westland desired was in the territory sought by Gulf Coast. Conscious of both the political realities of the situation and the need to avoid competition among potential franchises, Gulf Coast decided to redraw the franchise **[**6]** boundaries in order to comply with McConn's wishes. After this arrangement was completed the businessmen were ready to present proposed franchises to the Mayor and City Council for approval.

While Gulf Coast and the above-mentioned applicants were cutting out competition by carving up the city amongst themselves, the plaintiff, Affiliated Capital Corporation, **[*1558]** [hereinafter Affiliated] entered the picture. Affiliated is a publicly-held corporation that owned a savings and loan association. A federal prohibition against owning both a savings and loan association and a cable television system prevented Affiliated from making application for a franchise until it sold the savings and loan association. After the mid-September sale, Affiliated hired a local attorney to investigate the state of the franchising process. When the attorney contacted counsel for Gulf Coast, he was informed that Affiliated was too late because the "pie had been cut." Surprised by this news, Affiliated's president, Billy Goldberg, went to visit the Mayor who assured him that there was still time for Affiliated to receive a fair hearing. Consequently, Affiliated made application for a cable television **[**7]** franchise on October 16th.

Although the city never advertised its intention to award cable television franchises, it did undertake other measures calculated to give the appearance that the citizens of Houston would receive quality cable television service. The Public Service Department prepared a questionnaire, which was distributed to all franchise applicants. The city hired a consultant, Dr. Robert Sadowski, to evaluate the applicants based on their responses to this questionnaire. By the middle of November, Dr. Sadowski had completed a report that was highly critical of the franchising/selection process. He warned that it was irrational to allow the applicants themselves to divide the city into franchise

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[1] *Tex.Rev.Civ.Stat.Ann. art. 1181* (Vernon 1963) and the Charter of the city of Houston provided for this procedure.

[2] Gulf Coast is a limited partnership that operates solely in the cable television business. After its unsuccessful bid for a franchise in the city of Houston in 1972, Gulf Coast remained in business and obtained franchises for a number of small cities within the Houston Metropolitan area.

territories. He concluded that such a procedure did not give the citizens of Houston the best possible cable television service.

In addition to this general indictment of the process, Dr. Sadowski recommended that only two of the applicants, Meca and Cable-Conn, be awarded the franchise areas they sought. [3] He urged that three applicants, Houston Cable, Westland, and Houston Community Cable, be rejected and that the size of defendant Gulf Coast's service area be reduced **[**8]** substantially. He apparently had doubts about the ability of Gulf Coast to service even this smaller territory so personally inspected its facility. Shortly after this visit, Sadowski was fired. His conclusions were altered before the report was publicized. The five ultimately successful applicants were pronounced qualified. [4]

[9]** The City Council then began taking final action on the franchise applications. The president of Affiliated appeared before City Council and requested that his application be given due consideration. Instead of due consideration, the City Council (through Councilman Johnny Goyen) admonished Affiliated to go and work out an agreement with the defendant and the other above-mentioned applicants. Goyen said:

> Mr. Goldberg, let me address Council's wisdom. As these applications came in, they were sent to the Legal Department. Obviously, a number of lawyers got together and did whatever they did. I was not privy to it nor did I want to sit in on any meeting.
>
> Apparently, they came up with the formula that those applicants agreed upon. I was hoping that your situation might end up in the same pot as the others, whereby there would be some kind of recommendation coming before this Council, and this Council would not have to carve from one to give to another which we have not had to do in the past and which I do not want to do now nor do I intend to.
>
> I do not want to taketh away and giveth to somebody else, because I **[*1559]** haven't had to do that in the past. You have **[**10]** a very competent attorney, and the other people have very competent attorneys. What I would like to see done, and it might take a motion to get this done, is to send this to the Legal Department and try to work something out.

Plaintiff's Exhibit 150, at 27-28.

The message to Goldberg was clear: it was not the Council, but rather private businessmen who would decide the future of cable television in Houston. When Mr. Goldberg did not make an agreement with those businessmen, the City Council and Mayor voted for the convenient franchise package presented by Gulf Coast and the other conspirators.

Affiliated then filed this suit alleging that defendants had engaged in a conspiracy to prohibit its entry into the Houston cable television market, thereby violating *section 1* of the Sherman Act. Specifically, the plaintiff claimed that certain applicants for cable television franchises agreed to define the territories in which they would apply for franchises, so that no two members of the conspiracy would compete for the same territory. In addition, plaintiff charged defendants with participation in a more general conspiracy to limit competition for cable television franchises **[**11]** by excluding non-conspirator competitors.

II.

DISTRICT COURT JUDGMENT

At the close of evidence in the trial of the instant case, the jury was presented with a series of interrogatories. The relevant interrogatories and jury responses are reproduced below.

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[3] Doctor Sadowski never evaluated Affiliated's application because it was submitted after his employment had been terminated.

[4] Shortly before the City Council considered the franchise ordinances, the Public Service Director submitted a letter to the City Attorney to the effect that he lacked the information necessary to judge the merits of each application. In relevant part, the letter concluded that "while these issues may have been considered by the drafting principals, and may have been addressed satisfactorily by them, I have no way of knowing this." Record on Appeal, vol. 14, at 616. The "drafting principals" were later identified as the attorneys for certain franchise applicants.

INTERROGATORY NO. 1

It is established that two or more franchise applicants, including defendant Gulf Coast, participated in agreements on boundary lines so as to divide the geographic areas for which these applicants would seek cable television franchises. Do you find from a preponderance of the credible evidence that these arrangements were part of a conspiracy in unreasonable restraint of trade, in violation of *Section 1* of the Sherman Act. Answer "yes" or "no."
ANSWER: No.
INTERROGATORY NO. 3

Do you find from a preponderance of the credible evidence that one or more of the defendants participated in a conspiracy in unreasonable restraint of trade to limit competition for cable television franchises, in violation of *Section 1* of the Sherman Act? Answer "yes" or "no."
ANSWER: Yes.
INTERROGATORY NO. 4

Do you find from a preponderance of the credible evidence that any of the following persons participated **[**12]** in that conspiracy? Answer "yes" or "no."
a. City of Houston
Yes
b. Mayor Jim McConn
Yes
c. Gulf Coast Cable Television
Yes
INTERROGATORY NO. 5
Do you find from a preponderance of the credible evidence that either of the conspiracies, if you have so found in answer to Interrogatories 1 or 3, proximately caused injury to the plaintiff's business or property? Answer "yes" or "no."
ANSWER: Yes.
INTERROGATORY NO. 6
What sum of money, if paid now in cash, do you find from a preponderance of the credible evidence would fairly and reasonably compensate plaintiff for the damages, if any, you find plaintiff has incurred? Answer in dollars and cents, if any.
ANSWER: $2,100,000.00.

In a post-trial motion, defendants argued for judgment notwithstanding the verdict on three grounds. First, the defendants asserted that all of plaintiff's evidence had related to boundary agreements, found legal by the jury's answer to Interrogatory No. 1, so that there was no evidence to support the jury's finding of an independent conspiracy under Interrogatory No. 3. Second, they claimed that there was no evidence exclusive of boundary agreements **[*1560]** to support **[**13]** the proximate cause finding in Interrogatory No. 5. Finally, defendants contended that the *Noerr-Pennington* doctrine mandated judgment notwithstanding the verdict.

In a thorough and carefully researched opinion, *Affiliated Capital Corp. v. City of Houston, 519 F. Supp. 991 (S.D.Tex. 1981)*, the district court granted the relief requested by the defendants. Although the trial judge found substantial evidence independent of the boundary agreements to support the answer to Interrogatory No. 3, [5] he

[5] In response to defendant's motion, plaintiff cited a wealth of evidence to demonstrate a second theory of conspiracy. In its memorandum opinion the court set out all the evidence which it agreed would support a second theory of conspiracy to limit competition:

By late August 1978, Clive Runnells, on behalf of Gulf Coast, had agreed with Meca that they would be friendly competitors. Testimony of Clive Runnells. Al Levin, Affiliated Capital's lawyer during the franchising process, testified that by September 20, 1978, he contacted Bill Chamberlain, an agent of Gulf Coast. Chamberlain told him that Gulf Coast's attorney Bill Olson "was a pushing force of the cable TV situation at that point." Levin further testified that he then contacted Olson and Olson told him, "as far as I am concerned, Al, it's too late; the pie has already been cut." On the day before this telephone conversation between Levin and Olson, Olson had told Jonathan Day, an attorney for Houston Cable, that Olson was "trying to put a map together" and that "most of the areas are defined on eastern side." Plaintiff's exhibit 63.

On September 28, 1978, a lawyer for Houston Cable wrote to the lawyer for Gulf Coast regarding the franchise ordinance:

> Enclosed is a copy of the proposed cable television ordinance marked to show deletions and additions, including some recommended by our FCC counsel. Also enclosed is an unmarked copy for your convenience.
>
> The enclosed form of the proposed ordinance has been placed in our word processing equipment. Consequently, any changes or additions you wish to make can be easily accommodated. As we discussed, the enclosed form should be considered as an internal working draft so that we can reach an agreed proposal to present to the city.

Plaintiff's exhibit 14. A week later he wrote another letter recounting that they had met on this franchise ordinance, and noting their discussions of various provisions of this proposed ordinance, including the provision with respect to the percentage of the City's interest in the gross revenues from the ordinances:

> Enclosed is a revised form of CATV ordinance with the changes we discussed at our last meeting in Section 8.G; Section 10.B; Section 12.H, J, and M; and Section 23.A.
>
> Also enclosed is a suggested revision to Section 20.A regarding the three percent of gross revenue issue in the event we are unsuccessful in limiting the franchise fee to regular subscriber service.
>
> If you have further comments or suggestions regarding this proposed form of ordinance, please let me know.

Plaintiff's exhibit 15. None of the referenced sections of the proposed ordinance relates to boundaries.

In October 1978, Runnells and others met with Mayor McConn. At that meeting, Runnells was informed that McConn wanted Westland to have a franchise. Westland had applied for a portion of the area sought by Gulf Coast, and the Mayor indicated to Gulf Coast that a general area, Westbury-Meyerland, was what he wanted Westland to have. Testimony of Clive Runnells; Testimony of James McConn.

On November 22, 1978, notice of the November 29th City Council agenda indicated that six (6) ordinances, five of which ultimately were approved, would be considered. On November 27, 1978, the attorney for Houston Cable, one of the applicants scheduled on the upcoming agenda, sent a final proposed cable television ordinance to the City Attorney:

> Enclosed is a revised form of the proposed cable t.v. ordinance which includes the modifications made this week-end.
>
> In order to meet the proposed time schedule, any further revisions must be agreed by 12 noon on Tuesday, November 28. Final proofing of the enclosure will be completed by that time.

Plaintiff's exhibit 29. He also sent a copy of the ordinance to Gulf Coast's attorney, who had discussed it with the lead counsel for Houston Cable earlier that morning:

> Enclosed is the proposed cable t.v. ordinance which Jonathan Day discussed with you this morning. Also enclosed is a copy of the transmittal letter to the City attorney.
>
> I have marked significant changes in red in order to facilitate your review. If you have any questions or comments, please let me know.

Plaintiff's exhibit 30. The next day Houston Cable's attorney sent copies of the ordinances to the ultimately successful applicants. The proposed ordinances were complete except for the names of the applicants and their proposed service area. Plaintiff's exhibits 32 & 189. The successful applicants then filled in the blanks with their names and service areas, and forwarded the ordinances to the City Attorney. Some applicants sent their proposed ordinances back to the Houston Cable Attorney who then forwarded them to the City. Plaintiff's exhibit 35.

The agenda for the City Council meeting of November 29, 1978 contained six (6) cable television franchises, not including plaintiff's, Plaintiff's exhibit 33; those ordinances had been placed on the agenda on or before November 22, 1978, Plaintiff's exhibit 174. When Affiliated attorney Levin heard of this, he contacted Assistant City Attorney Adrian Baer. Baer relayed the following information to Levin:

> The Mayor and City Council had made their decision, and [Baer] said, 'I learned this directly from the Mayor, the franchises are non-exclusive, he does not know about the areas, it's still being worked out by Williams and Baer . . . so the net result will be a de facto exclusive.'

> He [,Baer,] explained to me that there were -- the decisions as to who was going to get what areas, specifically in terms of the actual boundaries, were still under negotiations, but the decision as to who was fait accompli.

Testimony of Al Levin; Plaintiff's exhibit 106.

After an on-site inspection of Gulf Coast's Bellaire facilities, Sadowski, the consultant hired by the City of Houston, told Earle, Director of Public Service, and Baer, Assistant City Attorney, that he would reject Gulf Coast's application. The next morning, Sadowski was fired. One day later a messenger from Earle retrieved the notes Sadowski had made concerning the applications. In his notes, Sadowski had not recommended that Gulf Coast's application be rejected, in spite of his oral suggestion to that effect to Earle and Baer, and he testified that he would have made no substantive changes in his report after the visit to Gulf Coast's facilities. He had recommended in his report, however, that Gulf Coast be given a smaller franchise area than that for which it had applied. When Sadowski's notes were typed by someone with the City, that recommendation was deleted. Moreover, other significant changes were reflected in the typed version of the notes Sadowski had turned over to Earle's messenger: his recommendations that Houston Community Cable, Houston Cable, and Columbia (Westland) be rejected were changed to recommendations that they should continue to be considered; and his statement that Cablecom had presented the only satisfactory application was omitted. Testimony of Robert Sadowski.

Prior to the plaintiff's hearing before City Council on December 12, 1978, McConn suggested to Goldberg that Affiliated seek a franchise in another area of the City rather than in the area sought by Gulf Coast. McConn testified as to his motivation for the suggestion: "I thought that, in trying to really help Mr. Goldberg, it was pretty obvious to me that Gulf Coast had the muscle and that Mr. Goldberg did not."

At the City Council hearing on plaintiff's application which was conducted on December 12, 1978, the following comments were made by Councilman Goyen:

> Mr. Goldberg, let me address Council's wisdom. As these applications came in, they were sent to the Legal Department. Obviously, a number of lawyers got together and did whatever they did. I was not privy to it nor did I want to sit in on any meeting.
>
> Apparently, they came up with the formula that those applicants agreed upon. I was hoping that your situation might end up in the same pot as the others, whereby there would be some kind of recommendation coming before this Council, and this Council would not have to carve from one to give to another, which we have not had to do in the past and which I do not want to do now nor do I intend to.
>
> I do not want to taketh away and giveth to somebody else, because I haven't had to do that in the past. You have a very competent attorney, and the other people have very competent attorneys. What I would like to see done, and it might take a motion to get this done, is to send this to the Legal Department and try to work something out.

Plaintiff's exhibit 150, at 27-28. Subsequently, the Council discussed how to proceed with plaintiff's application, and Councilman Mann made the following suggestions:

> I want to make a substitute motion that the [plaintiff's] application be referred to the Legal Department, and they in turn can contact these other applicants who have come forward and see if they can work out something.
>
> . . . .
>
> If you take this, fine, then see how much Gulf Coast is going to knock off this other group on farther down and then around and around.
>
> . . . .
>
> Substitute motion that this application be referred to the Legal Department and Public Service, and they are to contact the other people that have ordinances and guarantee that these boundaries are being adjusted between them, and they report back to Council.

Plaintiff's exhibit 150, at 37, 39, 40.

Also at that hearing, Mann indicated his knowledge of a house-count survey that had been conducted by Gulf Coast. Plaintiff's exhibit 150, at 25. The survey resulted in a comparison between the area plaintiff was applying for and an area that was within Houston Cable's application, Plaintiff's exhibit 84, and was conducted in conjunction with a proposal by Gulf Coast, that if Houston Cable would give the identified area to Gulf Coast, then Gulf Coast would be willing to give plaintiff its area. Testimony of Al Levin. A document, prepared sometime between November 28, 1978, and December 20, 1978, by Assistant City Attorney concluded that plaintiff had failed to **[*1562]** demonstrate that its injury was caused by anything other than defendants' boundary agreements. Thus, he reasoned that there was no evidence to support Interrogatory No. 5:

> The agreements to allocate and divide territory cannot be considered as evidence proving causation of plaintiff's injury, and no other evidence in the record, either direct or inferential, provides the necessary connection between the second theory of conspiracy to exclude non-conspirators and the plaintiff's failure to receive a franchise.
>
> The testimony elicited by plaintiff from its expert witness further demonstrates that what plaintiff established **[**14]** was a causal relationship between the applicants' agreements to eliminate overlaps in territory and the plaintiff's failure to be awarded a franchise, rather than a relationship between the agreement to exclude non-conspirators and plaintiff's injury.

Baer bears an alternative boundary description for the Gulf Coast franchise including the Houston Cable area, with Baer's notation: "I-10 line shifted to Hwy. 290 without Goldberg's tract -- contingency." Plaintiff's exhibit 56.

The City Council favored Gulf Coast's franchise, which subsumed the area plaintiff had applied for, and at trial several councilmen and Mayor McConn testified as to their reasons therefor. McConn's concern was to keep politically influential groups content:

> Q. You didn't want to step on anybody's political toes, did you?
>
> A Not if I could avoid it.
>
> Q You didn't want to make any type of political decision where some powerful person like Walter Mischer would be unhappy, did you?
>
> A Not if I could avoid it.
>
> Q And if all of the parties could work things out, then you wouldn't have to make any type of decision, other than approving their agreements, isn't that correct?
>
> A Yes, generally that is correct, yes, sir.
>
> Q And isn't that what you wanted to happen?
>
> A That would have been beautiful, if it could have happened that way.
>
> Q But when it didn't happen and you had to make the choice between Southwest Houston and Gulf Coast, you stated that the other -- you thought the other people were more politically powerful than Southwest, isn't that correct?
>
> A Yes, sir. I don't know if I said that, but I'll say it now. Testimony of James McConn.
>
> Councilman Goyen testified by deposition that he would have voted for Affiliated Capital's application if "on the 20th, Mr. Goldberg had come in and Mr. Runnells had come in, Mr. Mishcher had come in, and all the principals had come, and a piece of Houston had been carved out for Mr. Goldberg with no objection by anybody." Councilman Robinson testified that he would have supported Affiliated Capital's application if plaintiff had been able to work something out with Gulf Coast to give him what he wanted. Councilman Westmoreland testified that he did not disagree with his prior deposition testimony that Affiliated had been unable to work out any type of arrangement with Gulf Coast, and for that reason Westmoreland voted in favor of Gulf Coast.
>
> Finally, plaintiff's expert witness, Martin Malarkey, testified at length about the detrimental results of the noncompetitive franchising process in Houston, and about the benefits to residents of other cities where the process has involved competition on the merits of the applications. According to his testimony, the benefits include lower rates, provisions for sanctions in the event of noncompliance by the franchisee, provisions for performance bonds, and provisions requiring city approval prior to changes in ownership or control of the franchises. Further, he testified that normally the city itself prepares the franchise ordinance, rather than allowing applicants to do so.

519 F. Supp. at 1000-05 (footnotes omitted).

519 F. Supp. at 1006.

[15]** III.

IMPACT ON COMPETITION

It is abundantly clear from the record of this case that a group of Houston businessmen decided to ensure the receipt of cable television franchises by agreeing to divide the city among themselves and exclude anyone who wanted to compete for a franchise on the merits. They did so not simply with the blessing of the Mayor, but at his behest. Record on Appeal, vol. 12, at 450. The devastating competitive impact of this gentlemen's agreement to exclude anyone who wished to compete for a franchise, is evident against the backdrop of the inherent structure of the cable television industry.

[*1563] Cable television, like electric utilities, is generally considered a natural monopoly. According to conventional wisdom, the extremely high fixed costs incurred in preparing a cable television company for operation prevent the survival of competition in the marketplace. Plaintiff's expert witness on the cable television industry admitted that it did not make economic sense to grant franchises with overlapping boundaries. Record on Appeal, vol. 35, at 28. The economies of scale do not approach those of electric utilities but the theory for both industries **[**16]** holds that the long-run average costs tend to fall as output increases. We assume for purposes of this discussion that cable television is indeed a natural monopoly and proceed to discuss the pernicious effects of the conspiracy given this assumption.

Defendant Gulf Coast argues that since cable television is a natural monopoly and competition within franchise areas is impractical, the division of territories is a practical characteristic of this industry and was not harmful to consumers. Given this characteristic, competition is possible only before a franchise is granted. Unfortunately for both Affiliated and the citizens of Houston, there was no competition among the corporations that received franchises. The result was lower quality, higher priced cable television for Houston. Record on Appeal, vol. 34, at 23-27.

IV.

THE J.N.O.V. RULING

In *Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969)* (*en banc*), this court established the standard of review of a judgment n.o.v. or directed verdict by a trial court. We stated that:

> ***HN1***[] On motions for . . . judgment notwithstanding the verdict the Court should consider all of the evidence -- not just that evidence **[**17]** which supports the non-mover's case -- but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied.

Id. at 374-75; *accord Bazile v. Bisso Marine Co., 606 F.2d 101, 104 (5th Cir. 1979)*, *cert. denied*, *449 U.S. 829, 101 S. Ct. 94, 66 L. Ed. 2d 33 (1980)*.

In weighing the evidence the jury had at its disposal we find that it amply supports the jury's findings in interrogatories Nos. 3 and 5. In no event is the evidence in favor of the defendant so overwhelming that reasonable men could not arrive at the verdict reached by the jury. Thus, the trial court was incorrect in overturning the jury verdict.

In addressing the harm plaintiff suffered as a result of the **[**18]** conspiracy recognized in Interrogatory No. 3, it is important to understand that the agreement to exclude those who wanted to compete constitutes a separate conspiracy and a valid independent ground for imposing liability. While at first glance the answers to Interrogatories Nos. 1 and 3 appear irreconcilable, the explanation is simple. The manner in which Interrogatory No. 1 was posed to the jury caused them to believe that they were passing on the question of whether or not it was better to have one franchise for the city or multiple franchises. All of the parties to the suit agreed that dividing the city into several franchises was preferable and would not unreasonably restrain trade. Indeed, the jury sent a note to the trial judge asking whether or not they needed to answer both questions. They asked: assuming we want to vote "yes on #3 is there any point in voting on #1?" Jury Note No. 4, Record on Appeal, vol., 1, at 1482.

As noted, the trial court believed that the conspiracy found by the jury (Interrogatory No. 3), was not the proximate cause of plaintiff's failure to receive a franchise. **[*1564]** The court thus overturned the jury's answer to Interrogatory No. 5. **[**19]** Before addressing this argument directly, we pause to point out that proof of causation in this case is necessarily hypothetical (what would have occurred in the absence of the conspiracy). As the Supreme Court has noted, "the vagaries of the market place usually deny us sure knowledge of what plaintiff's situation would have been in the absence of defendant's antitrust violation." *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 567, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)*. We also note that ***HN2***[] a plaintiff seeking damages for an antitrust injury need only prove with a fair degree of certainty that the defendant's illegal conduct materially contributed to his injury. *Hayes v. Solomon, 597 F.2d 958, 978 (5th Cir. 1979) cert. denied*, *444 U.S. 1078, 100 S. Ct. 1028, 62 L. Ed. 2d 761 (1980)*; *Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 20* (5th Cir.), *cert. dismissed*, *419 U.S. 987, 95 S. Ct. 246, 42 L. Ed. 2d 260 (1974)*; *Gainesville Utilities Department v. Florida Power & Light Co., 573 F.2d 292, 304* (5th Cir.) (noting that a jury charge asking whether or not the violation was a "substantial factor" in plaintiff's loss is a model of perfection), **[**20]** *cert. denied*, *439 U.S. 966, 99 S. Ct. 454, 58 L. Ed. 2d 424 (1978)*. *See* *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9, 89 S. Ct. 1562, 1571 n. 9, 23 L. Ed. 2d 129 (1969)* (in proving fact of damage under § 4 of the Clayton Act it is enough that the violation is shown to be a "material cause" of injury).

When the jury considered Interrogatory No. 3, (which asked whether the defendants conspired to limit competition for cable television franchises), they found that the agreement did constitute an unreasonable restraint of trade. The trial court mistakenly assumed that in determining proximate cause the jury improperly considered evidence pertaining to the boundary agreements submitted in Interrogatory No. 1 and that the evidence plaintiff cites in support of Interrogatory No. 5 is inappropriate because it concerns evidence relating solely to Interrogatory No. 1.

Despite the learned trial court's opinion we find that the judgment n.o.v. was improper because there is substantial evidence and inferences to support the jury's finding that the conspiracy found pursuant to Interrogatory No. 3 was the proximate cause of harm to the plaintiff. We reach **[**21]** this conclusion because three categories of evidence indicate that the conspiracy to limit competition prevented Affiliated from obtaining a franchise: (1) circumstantial evidence flowing from the nature of the conspiracy; (2) evidence that Gulf Coast in conjunction with the City Council vetoed approval of Affiliated's application; and (3) evidence that the plaintiff would have been awarded a franchise on the merits in the absence of a conspiracy limiting competition on the merits.

First, Affiliated was the leading rival of Gulf Coast and the other conspirators. The exclusive nature of the conspiracy itself and Affiliated's failure to obtain a franchise is circumstantial evidence from which the jury could infer that the conspiracy operated to exclude Affiliated, a non-conspirator who was very likely to have received a franchise through competition on the merits. In *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*, the Supreme Court held in a trial before the court that ***HN3***[] it is proper for the trial judge to infer damages from circumstantial evidence. The court noted that "the injury alleged by Zenith was precisely the type **[**22]** of loss that the claimed violations of the antitrust laws would be likely to cause. The trial court was entitled to infer from this circumstantial evidence that the necessary causal relation between the pool's conduct and the claimed damage existed." *Id. at 125, 89 S. Ct. at 1577* (citing *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696-701, 82 S. Ct. 1404, 1409-1412, 8 L. Ed. 2d 777 (1962))*. Failure of a nonconspirator to obtain a franchise is exactly the type of loss that a conspiracy to preclude competition for franchises is likely to cause when the entity awarding franchises participates in the conspiracy.

Moreover, even though the jury found the boundary agreements legal, it could **[*1565]** properly consider evidence concerning those agreements as demonstrating the defendant's intent to conspire. *See, e.g., United Mine Workers of America v. Pennington, 381 U.S. 657, 670 n. 3, 85 S. Ct. 1585, 1593 n. 3, 14 L. Ed. 2d 626 (1965)*; *United States v. Southern Motor Carriers Rate Conference, 439 F. Supp. 29, 47 (N.D. Ga. 1977)*. This evidence when considered cumulatively with other independent evidence of a conspiracy to exclude anyone who did **[**23]** not join the conspiracy also supports the jury finding of proximate cause. Consequently, the jury's ruling on Interrogatory No. 5 is supported by circumstantial evidence that the conspiracy itself caused Affiliated's injury.

HN4[] When direct evidence points to a conspiracy to injure the plaintiff, as in the case at bar, a court can find causation on the basis of circumstantial evidence and inference. As this court has noted: "in cases where the defendants' acts are motivated by intent to injure the plaintiff, the inferential leap to the finding of fact of damage is not great. Indeed, one court has found it virtually nonexistent: 'Such damage need not be made patent item by item as on a balance sheet. The mere unlawful combination over a period of time to eliminate competition is proof of damage.'" *Malcolm v. Marathon Oil Co., 642 F.2d 845, 855 (5th Cir. 1981)* (quoting *Fox West Theatres Corp. v. Paradise Theatres Building Corp., 264 F.2d 602, 608 (9th Cir. 1958))*.

Second, the record contains sufficient evidence supporting the inference that co-conspirators prevented Affiliated from obtaining a franchise. The trial court agreed with plaintiff's assessment that Interrogatory **[**24]** No. 3 reflects the jury's "apparent conclusion that the conspiracy to limit competition was an agreement or understanding that franchises would be awarded only to those applicants that were approved by Gulf Coast and other nondefendant participants." *519 F. Supp. at 998*. The trial court held, however, that there is no evidence in the record "either direct or inferential, [that] provides the necessary connection between the second theory of conspiracy to exclude non-conspirators and the plaintiff's failure to receive a franchise." *519 F. Supp. at 1006*.

We disagree; substantial inferential evidence exists. For example, Affiliated's attorney, Al Levin, testified that when he talked to Assistant City Attorney Adrian Baer in November he was told that "the decision as to who was going to get what areas, specifically in terms of the actual boundaries, were still under negotiations, but the decision as to who was fait accompli." Plaintiff's exhibit No. 151, at 84. When Levin then contacted Gulf Coast's attorney he was told "as far as I am concerned, Al, it's too late; the pie has already been cut." We note that the trial court itself recognized that "an inference can be derived from **[**25]** the testimony [of Al Levin] that the defendants had decided who would get franchises regardless of what geographic areas the franchises would cover." *519 F. Supp. at 1000 n. 11*. In other words, the decision of whom to exclude from the award of franchises did not hinge on the boundary agreements. Under the terms of the conspiracy, applicants who joined the plan obtained a franchise and those who wished to compete for a franchise received nothing.

Direct evidence exists that under the conspiracy, Gulf Coast and the other conspirators, in conjunction with the Mayor and City Council had the power to approve or veto plaintiff's attempt to obtain a franchise. Mayor McConn stated that his vote was subject to the wishes of the conspirators because of their political clout. *519 F. Supp. at 1016*. Councilmen Goyen, Robinson, and Westmoreland testified that they would have voted to grant Affiliated a franchise if Gulf Coast and the other applicants had given their blessing. *519 F. Supp. at 1004*. After hearing Affiliated's presentation at a City Council meeting on December 12, 1978, two Councilmen encouraged the City Legal Department and the applicants to "see if [you] can work out something." **[**26]** A document prepared by the City between November 28, 1978, and December 20, 1978, provided for changed boundaries, noting that "I-10 line shifted to Hwy. 290 without Goldberg's tract -- contingency." Plaintiff's exhibit 56. The **[*1566]** record evidence reveals that this alternative was contingent upon the approval of Gulf Coast and the other conspirators. Reasonable men could certainly have drawn the inference that Affiliated's application was denied because Gulf Coast and the other participants in the conspiracy vetoed its application.

Third, the record contains evidence that absent a conspiracy, Affiliated would have obtained a franchise on the merits of its application. Citing Malarkey's testimony, the trial court held that all of the applications, including plaintiffs, were "well below standard and not at all informative as to many important aspects of the franchise application." *519 F. Supp. at 1009*. Although this conclusion is debatable, there can be little doubt that Affiliated was more qualified to receive a franchise than the five successful applicants. Moreover, the evidence demonstrates, so the jury could infer, that Affiliated would have received a franchise if **[**27]** the conspiracy had not prevented a consideration of its application on the merits. Malarkey testified that the most important part of a franchise application concerns a firm's financial qualifications. He testified that Affiliated's application was the only one that contained enough financial information to have permitted the City Council to make a preliminary decision as to its ability to construct a cable system. He stated that Affiliated was financially qualified and that Gulf Coast was not. The last audited financial statements contained in Affiliated's application reveal that it had assets of $25,294,266 and equity of $18,622,383. Plaintiff's exhibit 83. Gulf Coast, on the other hand, had assets of $366,259 and equity of $327,259. Plaintiff's exhibit 10. Moreover, by 1980 many of the conspirators had been bought out by out of town corporations and Gulf Coast had borrowed half of its debt from another company. Plaintiff's exhibit 55, at part II, *§ 1*. Affiliated, on the other hand, had the qualifications of close ties to the community it sought to serve and the capacity to provide immediate service. We find that the jury could properly infer from the preceding evidence **[**28]** that Affiliated would have obtained a franchise if the conspiracy to exclude nonconspirators had not eclipsed competition on the merits.

V.

NOERR-PENNINGTON DOCTRINE

HN5[] The *Noerr-Pennington* doctrine provides an exception to antitrust liability enabling citizens or business entities to influence or to petition public officials to take official action that will harm or eliminate competition. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*. When such petitioning is a mere sham or the public officials are participants in the conspiracy, however, there is no exception to antitrust liability. The trial court instructed the jury fully and correctly with regard to the *Noerr-Pennington* doctrine, [6] the State Action Exemption, and Legislative Process Immunity.

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[6] Indeed, if the instruction was anything but neutral it was favorable to the defendants. It provided:

Defendant Gulf Coast claims that the agreements with Houston Cable and Westland to divide or allocate territories within which certain applicants would apply for a franchise constituted an exercise of Gulf Coast's right to petition government and therefore falls outside the scope of the Sherman Act. The Constitution ensures the right of all persons, whether acting individually or in concert, to petition government for political action, recognizing that persons in the exercise of these constitutional rights naturally will petition government for political action that is favorable to their particular interests and unfavorable to the interests of others. The Supreme Court has declared that this right to petition government for political action is paramount, and that the concerted effort of various parties genuinely to influence public officials does not in any way violate the antitrust laws regardless of intent or purpose. Joint efforts truly intended to influence public officials to take official action do not violate antitrust laws even though the efforts are intended to eliminate competition, unless one or more of the public officials involved was also a participant in the illegal arrangement or conspiracy.

Accordingly, you must determine whether any City official participated in the alleged conspiracy, as that term is defined in this Charge. You may not infer that any member of the City Council or the Mayor was participating in or acting in furtherance of a conspiracy simply because that person accepted or agreed with a position urged by an applicant. A public official's communications with a constituent, even if that official thereby is influenced to favor the constituent, is within the parameters of the legislative process, and cannot violate the antitrust laws so long as the officials' activities are not the product of an illegal arrangement.

Also you must determine whether the petitioning activities of the defendants Gulf Coast, Clive Runnells or Jack Trotter were genuine attempts to influence public officials with regard to political action.

The petitioning activity must be genuine. Protection does not extend to purported petitioning that is in fact a mere sham to cover what actually is nothing more than an attempt to interfere directly with the business of a competitor. That is, protection does not extend to activities that are merely a pretext for inflicting on plaintiff an injury not caused by any government action.

Thus, if you should conclude from your review of the evidence that defendants City of Houston and Mayor McConn did not participate in any illegal agreement or conspiracy and that defendants Gulf Coast, Runnells and Trotter did nothing more in his case than meet with other franchise applicants and with City officials for the purpose of persuading the City to award them a cable television franchise on some basis, and in furtherance of that objective they reached boundary agreements with the Houston Cable and Westland groups, then you may not find that these defendants violated the antitrust laws. Even if you believe

[29]** **[*1567]** In its answer to Interrogatory No. 3 the jury found a conspiracy and implicitly found that the defendants were not entitled to immunity. In analyzing the jury's ruling the trial court produced an exhaustive study of why the public co-conspirator exception to the *Noerr-Pennington* doctrine was applicable to the instant case. The district court's analysis of this issue and the record evidence is thorough and correct. *519 F. Supp. at 1016-23*. Therefore, we need not recount his analysis and reasoning. Numerous examples of official involvement in the conspiracy abound, which indicate that the trial court did not err in finding that the co-conspirator exception applied. For example, the City fired its own expert when he wrote a report unfavorable to Gulf Coast, and then it doctored his report. We agree with the trial court's assessment that the actions of the Mayor and City Council indicate a "vigorous involvement in orchestrating certain aspects of the conspiracy." Thus, its application of the co-conspirator exception was correct.

Since the trial court found the co-conspirator exception applicable it did not discuss the sham exception. We note that a defendant cannot **[**30]** rely on *Noerr-Pennington* immunity when the activity to influence government action is a mere sham to hide what is essentially an attempt to interfere with a competitor's business. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144, 81 S. Ct. 523, 533, 5 L. Ed. 2d 464 (1961)*. ***HN6***[] Petitioning calculated to deny a competitor meaningful access to a governmental entity is within the sham exception to *Noerr-Pennington* immunity. *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 512, 92 S. Ct. 609, 612, 30 L. Ed. 2d 642 (1972)*; *Mason City Center Ass'n v. City of Mason City, 468 F. Supp. 737, 745 (N.D.Iowa 1979)*. Whether or not such conduct is within the sham exception is a fact issue for the jury. *Feminist Women's Health Center v. Mohammad, 586 F.2d 530, 543 (5th Cir. 1978)*, *cert. denied*, *444 U.S. 924, 100 S. Ct. 262, 62 L. Ed. 2d 180 (1979)*.

Appellee argues that Affiliated was not denied access to the City Council but had an opportunity to present its application formally and informally. Appellee questions **[*1568]** the applicability of *California Motor Transport, supra* (where the defendant used frivolous **[**31]** lawsuits to deny a competitor access to a court or agency), in the legislative context of a city council awarding franchises. *See* 1 P. Areeda & D. Turner, ***Antitrust Law*** para. 203 (1978). We need not reach this disputed issue because the defendants' activities were clearly within the co-conspirator exception as the jury implicitly found in its answer to Interrogatory No. 3. We note in passing, however, that the record may indeed contain enough evidence to justify application of the sham doctrine. While in the process of trying to obtain a franchise, Affiliated's attorney was told by Gulf Coast's attorney that the political realities were that " the city is locked up by five franchises." Record on Appeal, vol. 22, at 34. This and similar evidence of the activities of McConn, the City Council and the other co-conspirators may have effectively blocked meaningful access to a fair and impartial consideration of Affiliated's application by the city such that the sham exception applies.

VI.

THE MAYOR'S IMMUNITY

Appellee McConn argues that he is entitled to absolute, or in the alternative, qualified immunity. This circuit and others have recognized that ***HN7***[] a municipal official **[**32]** acting in his legislative capacity is entitled to absolute immunity from civil suits. *E.g., Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981)*, *cert. denied*, *455 U.S. 901, 102 S. Ct. 1242, 71 L. Ed. 2d 440 (1982)*; *Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980)*; *Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980)*.

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that the purpose or the necessary effect of meetings attended by Gulf Coast or its representatives was to exclude plaintiff from obtaining a franchise, you may not find that the defendants were guilty of a conspiracy in restraint of trade if you believe that the defendants' conduct genuinely was aimed toward influencing the City to take favorable action toward them in granting a franchise. On the other hand, if you find that the activity was not really an attempt to influence an official to take official action, but was nothing more than a sham -- an attempt to interfere directly with the business of a competitor, you may consider those actions and any reasonable inferences you may draw from those actions in determining whether defendants engaged in a conspiracy in violation of the antitrust laws.

The burden of proof with regard to this instruction is on the defendants. They must prove by a preponderance of the credible evidence that the petitioning activities were genuine.

In *Hernandez*, we held that local legislators are entitled to absolute immunity for conduct in furtherance of their duties. We also recognized that although a Mayor is the Chief Executive Officer of a city, "he is entitled to absolute immunity from suit for acts taken in a legislative capacity." *643 F.2d at 1193* (citing *Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719, 731-34, 100 S. Ct. 1967, 1974-76, 64 L. Ed. 2d 641 (1980))*.

Although the Mayor of Houston serves in the traditional executive role, he also presides over and has a vote in the City Council, which functions as a legislative body. McConn contends that his activities connected with the award of the cable franchises were "more closely akin to that of a legislator than an executive." Since we find that McConn is entitled to qualified **[**33]** immunity we need not reach the question of his absolute immunity. We note in passing, however, that on the facts before us it is unlikely that he is entitled to absolute immunity. [7]

[34]** **[*1569]** The trial court's interpretation regarding qualified immunity is inapplicable now because the court did not have the benefit of the Supreme Court's decision in *Harlow v. Fitzgerald, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*. In *Harlow* the Court announced that the question of qualified or good faith immunity for public officials is to be determined under an objective standard. The court held that:

> ***HN8***[] government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

457 U.S. at 818, 102 S. Ct. at 2738. Assuming that the law in question was clearly established, an official can still prevail if he can show "extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard." *Id. at 819, 102 S. Ct. at 2739*.

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[7] "The Supreme Court has long held that no immunity exists for actions outside the sphere of legitimate legislative activity." *Espanola Way Corp. v. Meyerson, 690 F.2d 827, 829 (11th Cir. 1982)*, *cert. denied*, ***460 U.S. 1039, 103 S. Ct. 1431, 75 L. Ed. 2d 791 (1983)***. Although McConn's votes at the City Council meetings and some of his other activities were part of the legislative process, he also undertook substantial acts outside of his legislative capacity, which were neither legitimate nor in furtherance of his legislative duties. Mayor McConn participated in and promoted an illegal conspiracy, and intervened several times to apply pressure on Affiliated and the conspirators, doing so outside of his legislative capacity.

The Mayor testified that the franchise process was conducted in an open, public forum. The Public Service Department prepared a questionnaire for all applicants and hired a consultant to evaluate the applications. The public was thus lead to believe that there would be competition on the merits for the franchises, even if the competitors drew the particular boundary lines. The city's expert criticized the application process, determined that only two applicants were qualified, and that three applicants, including Westland, should be rejected.

The Mayor did not adhere to the publicly announced program of granting franchises on the basis of critical evaluation. Instead, the franchise ordinance was drafted by the conspirators, the expert was fired, his report doctored, and the City Council's decision was made solely on the basis of who participated in the conspiracy.

The Mayor did not publicly reveal that to repay a personal debt he had intervened to guarantee a franchise for his lawyer. He never announced that the city's expert had been fired because his recommendations were contrary to the design of the conspiracy. He did not inform the public that the expert's report had been altered to make the conspirators' applications appear qualified and meritorious. He never admitted that the information in the applications was not a factor in the decision-making process. These facts and others belie the contention that the Mayor's acts were part of a legitimate legislative process. As Judge Bue noted, the City was "vigorous[ly] involve[d] in orchestrating certain aspects of the conspiracy" and the Mayor "directed" some of the activities of the conspirators as "an active co-conspirator not content merely to accede to the wishes of private parties." *519 F. Supp. at 1014, 1016*. The illegitimate nature of the Mayor's actions explains why the jury found Runnells (Gulf Coast's attorney) and Trotter (financier) innocent, yet held McConn guilty -- despite a generous *Noerr-Pennington* instruction.

McConn contends that the state of the law regarding a municipal official's liability for an antitrust violation was unsettled in 1978. Since he could not have known that he would be liable **[**35]** for violating the ***antitrust law***, he argues that he is entitled to qualified immunity.

We take note of the fact that at the time the franchises were granted it was unclear whether or not an antitrust violation occurred under the rule of reason when a city let franchises in an uncompetitive manner. Second, it was uncertain whether or not home rule cities were entitled to *Parker* immunity. *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. There were several recent cases indicating that a city or political subdivision of a state could not use *Parker* immunity to avoid the antitrust laws without a state mandate to displace competition. *Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)* (decided March 29); *Whitworth v. Perkins, 559 F.2d 378, 381 (5th Cir. 1977)*, *judgment vacated*, *435 U.S. 992, 98 S. Ct. 1642, 56 L. Ed. 2d 81 (1978)*, *judgment reinstated*, *576 F.2d 696 (1978)* (decided July 17) (per curiam); *Kurek v. Pleasure Driveway and Park District of Peoria, 557 F.2d 580 (7th Cir. 1977)*, *judgment vacated*, *435 U.S. 992, 98 S. Ct. 1642, 56 L. Ed. 2d 81 (1978)*, *judgment reinstated*, *574 **[**36]** F.2d 892 (7th Cir. 1978)* (decided Sept. 18) (per curiam), *cert. denied*, *439 U.S. 1090, 99 S. Ct. 873, 59 L. Ed. 2d 57 (1979)*; *Woolen v. Surtran Taxicabs, Inc., 461 F. Supp. 1025, 1029 (N.D.Tex. 1978)* (decided Nov. 29); *United States v. Texas State Bd. of Public Accountancy, 464 F. Supp. 400, 403-04 (W.D.Tex. 1978)* (decided May 5), *modified on other grounds*, *592 F.2d 919*, *cert. denied*, *444 U.S. 925, 100 S. Ct. 262, 62 L. Ed. 2d 180 (1979)*; *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Auth., 451 F. Supp. 157, 166 (S.D. New York 1978)* (decided May 3). *Contra* *Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975)*.

The cases indicating liability, decided as or shortly before the franchise process occurred, [8] were breaking new ground and were not clearly established. Moreover, the guidance from the Supreme Court was limited because *Lafayette* was a plurality opinion. *See* *Hybud Equip. v. City of Akron, 654 F.2d 1187, 1195 (6th Cir. 1981)*, *judgment vacated*, *455 U.S. 931, 102 S. Ct. 1416, 71 L. Ed. 2d 640 (1982)*. It was not until *Community Communications Co. v. Boulder, 455 U.S. 40, 102 S. Ct. 835, 70 **[*1570]** L. Ed. **[**37]** 2d 810 (1982)*, that it became clearly established that a home rule city was not entitled to blanket *Parker* immunity and could thus be liable for violating ***antitrust law***. Consequently, the mayor could not, nor should not, have known that he was violating a clearly established law.

Although we find that the Mayor can avail himself of qualified immunity, we emphasize that this ruling does not effect his status as a conspirator. The jury found that the Mayor was a conspirator and we do not disturb this finding. The **[**38]** Mayor is absolved of liability only because applying the *Harlow* immunity standard he did not, as a matter of law, violate a clearly established law.

At oral argument McConn's attorney opined that municipal politics are municipal politics and that the appropriate remedy for the Mayor's acts was exercised by the voters of Houston when they booted McConn out of office. *See* *Tenney v. Brandhove, 341 U.S. 367, 378, 71 S. Ct. 783, 789, 95 L. Ed. 2d 1019*. Certainly currying political favor is the hallmark of a good politician and is neither illegal nor violative of the ***antitrust law***. Nevertheless, in future cases involving franchise letting, when an elected official instigates, directs, or actively participates in an illegal conspiracy designed to circumvent competition on the merits -- when the state has not provided the city with an anticompetitive mandate -- a reasonable man should know that such actions violate clearly established ***antitrust law***.

Judgment n.o.v. should not have been granted and the court below is hereby REVERSED with instructions to reinstate the jury verdict and grant the plaintiff judgment against Gulf Coast only.

Concur by: HIGGINBOTHAM

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[8] In July and August of 1978, Houston began taking applications for franchises. In October the city hired an expert and in November the plaintiff applied for a franchise. On November 29, 1978, the city ordinances were tabled and the plaintiff was granted a hearing on its application. On December 12, 1978, the plaintiff made its presentation and all applications were thereafter referred to the Public Service Department for evaluation. On January 10, 1979, the final franchises were awarded.

Concur

PATRICK E. HIGGINBOTHAM, **[**39]** Circuit Judge, concurring specially:

I

To understand the limits of our holding it is important that we isolate the conduct found illegal. The jury's answer to interrogatory number one tells us that the conspiracy in unreasonable restraint found in number three *did not* include "agreements on boundary lines so as to divide the geographic areas for which these applicants would seek cable television franchises." On the evidence, reconciliation of the answers to interrogatories one and three requires the conclusion that the jury found that the city and the private defendants agreed that Affiliated's application would not be considered -- that the city would not consider an application from companies not approved by the original five applicants for franchises. The jury could thus have concluded that the principal purpose of the concerted activity was not to influence public officials or to further any proffered goal of the city other than that of blocking competitive access. Reconciliation of the jury's answers leaves little room for any conclusion that the jury decided otherwise.

The point here is more than whether evidence supports the jury verdict. The relevant point is **[**40]** that the *only* conduct condemned today is an agreement between the city and private defendants to deny a competitor access to the process created by the city for the awarding of franchises. The majority opinion does not otherwise judge the legality of the process. The holding today is then relatively straightforward in its condemnation of a classic restraint and the antitrust rule for municipalities which emerges is a modest one indeed.

Equally, our decision should not be read to imply that a municipality must employ competitive bidding in the award of all contracts and franchises or the procurement of all goods and services. Such a conclusion would be inferable only if we were to hold that the public interest in competition must predominate over other legitimate municipal interests as it predominates over the private profit motive. Emphatically, we have not so held.

The municipal defendants have stated that they intended to favor minority businesses and locally-based businesses, but, even assuming that both of these are legitimate public purposes, neither policy explains the selection of the Gulf Coast consortium in preference to Affiliated. These defendants have also **[**41]** testified that they **[*1571]** hoped to avoid the burden of selecting between competing applicants for particular franchise areas, and only the Gulf Coast group presented a package proposal featuring total city coverage with no overlapping boundaries. Selecting from among competing applicants those companies most fit to provide cable service to the citizens of Houston was a paradigmatic governmental function, and it is difficult to conclude that the desire of the mayor and city council to escape making this determination was itself a legitimate municipal purpose. [1] As the municipal defendants have thus failed to advance any public policy justifying their conduct, I conclude that the jury was warranted in concluding that their anticompetitive actions merit the imposition of antitrust liability.

[42]** II

Isolating the restraint which we today condemn also places in perspective the limits of our rulings regarding *First Amendment* protections of petitions for redress. The *Parker* principle stunted the growth of *Noerr-Pennington* until *City of Lafayette* and *City of Boulder* were decided. The full reach of *Noerr-Pennington* by necessity is now open for exploration. But today we do no exploring. In the present posture of this case there is no petition to government at issue. We do not face a successful request for governmental action with anti-competitive results where the participation of government was confined to that of decisionmaker. Instead, the condemned conduct included active participation by the city with citizens in the exclusion of a competitor. Resolution of the host of difficult issues traveling under the *Noerr-Pennington* rubric must await another day.

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[1] Regardless, the jury could have inferred from the evidence that the city and the defendant applicants agreed that no other applicant would be considered without their permission. It is difficult to defend action as being that of city government, with all the weight such ought to carry, when the decisionmaking is placed in the hands of private potential competitors.

In sum, I concur with Judge Garza's opinion and add this separate writing in parts I and II only to identify issues we do not decide today. I continue in part III to highlight an issue presented by the application of antitrust laws to municipalities and implicit in today's decision.

III

[43]** The Supreme Court in *City of Lafayette* and *City of Boulder* left the inferior courts with the exquisite task of fitting the antitrust laws to municipal government. The rule of reason is at the center of the uncertainty.

Basic antitrust principles teach that private citizens and corporations cannot weigh the public good against the competitive impact of their agreements. [2] It is, for example, no answer to price-fixing charges that competitive letting of design work will cause inferior design. It is for government to weigh the public good against any anti-competitive impact. When the antitrust laws are then found to be applicable to municipalities, how we may balance the competitive impact of decisions by city government against the perception of the public good is uncertain.

This **[**44]** question is posed when city government acts in its unique role of local government, whatever be the issue when it acts as a consumer of goods and services. Arguably, when the city enters the marketplace to compete for the custom of others, or to purchase window cleaners for the City Hall windows, its activity is virtually indistinguishable from private business. Where, however, the city acts as a regulator or governor of the sales and deliveries of goods and services to its constituents, it is engaged in a role dissimilar from that of private business.

In our economic system, private business enterprises are presumed to respond predominately, if not exclusively, to the profit motive. By contrast, the concept of "profit" *per se* is alien to the purposes of a unit **[*1572]** of government. Consequently, the clash of interests necessitating an ***antitrust law*** -- the private desire to reap extra-normal profits versus the public interest in free competition -- will not appear in its traditional form when the accused antitrust conspirator is a governmental entity.

The underlying principle of the antitrust laws, starkly stated, is that when the private pursuit of profit conflicts **[**45]** with the public interest in competition, the public interest shall prevail. In turn, the traditional "rule of reason" states that a present constraint on competition may be justified only by an ultimately pro-competitive effect. Other societal benefits which may allegedly flow from an anticompetitive act are irrelevant because it is not the businessman's prerogative to determine how those benefits may best be obtained. Rather, we presume that competition will ordinarily be attended by greater social benefits than any other market structure. It is then the prerogative of government alone to determine when the competitive process is inadequate to meet the needs or the best interests of society. In such cases, the government may pursue three related and often-overlapping courses: It may replace or restrict competition, for example by adopting a licensing procedure; it may supplement competition, for example by enacting product safety or anti-pollution laws; and it may substitute for competition, for example by regulating the price charged by a natural monopolist.

Though the majority has not addressed this issue directly, its opinion signifies amenability to the rationale that the **[**46]** "rule of reason" which applies when the accused is a governmental entity must differ from that encountered when the accused is a private business. This is so because the majority opinion ultimately rests on a duty of the city to justify the absence of competition in awarding franchises; political patronage is not justification. Under this rationale, public interests other than competition can be balanced against the interest in competition, because it is the particular prerogative of government to advance these other interests. Thus, for example, there was evidence in this case that the City of Houston planned to favor minority-owned businesses in awarding the cable franchises. Such a policy is anti-competitive in that it accords an advantage to certain businesses based on a non-economic criterion, but no antitrust liability should result if one decides that the advancing of public policy is "legitimate" and outweighs any adverse impact on competition.

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[2] Given the procedural posture of this case, the parties do not attack the jury instruction regarding rule of reason. Regardless, how the rule is actually applied gives it meaning apart from its traditional phrasing.

The majority does not surface the problem, but, by analogy to other uses of private suits to implement social goals, such a rationale ought to be implemented by allocating to the party best equipped to make the proof the burden **[**47]** of going forward with the evidence. Thus, when a plaintiff has established a prima facie case of anticompetitive conduct by a municipal defendant, the burden on the municipality would then be to articulate legitimate governmental interests advanced by its conduct which put at issue whether the gains reasonably expected to be achieved by its anticompetitive conduct justify the degree by which competition was reasonably expected to be diminished. The ultimate burden of persuasion that the restraint, so measured, was unreasonable, would be on the plaintiff.

Application of such a rule will not be easy. Critically, such a rule does not reconcile applicability of the federal antitrust laws to municipalities with those principles of federalism which counsel deference to the balancing of public interests performed by local units of government under authority delegated by the states. To the contrary, it would give to the courts the task of balancing a municipal objective against its anticompetitive effect. Reviewing the "reasonableness" of such restraint could travel against our commitment to federalism.

A rule of reason analysis that allows government purpose to be directly weighed **[**48]** against competitive impact seems antithetical to federalism. Yet, the premise of this concern is that decisions by municipal government reflect a species of governmental choice and that such review is an intrusion of the federal government into the affairs of local government. This premise, **[*1573]** however, fails to accept that in this sense the majority opinion in *City of Boulder* denied the sovereignty of municipal government (we are not a nation of city states). In doing so, the court sanctioned this intrusion into free decision-making in a manner not dissimilar to limitations placed upon private business.

Finally, not to weigh the purpose of the restraint and the presence of less anticompetitive alternatives to achieving the purpose would render the rule of reason illusory, for its essence is balance. In sum, the weighty concerns about subjecting decisions of municipal government to traditional rule of reason measures were presumably considered and found insufficient to overcome the pro-competitive policies underlying the antitrust laws when the Supreme Court removed municipalities from the cover of *Parker v. Brown*. While in my view this is a treacherous path, **[**49]** as an inferior court we must accept that judgment and I read the majority opinion as doing so.

Dissent by: CLARK (In Part)

Dissent

CLARK, Chief Judge, with whom REAVLEY and E. GRADY JOLLY, Circuit Judges, join, dissenting in part.

This case came to be reheard en banc because the panel held that the City of Houston, its mayor and a cable franchise applicant committed a *per se* violation of *Section 1* of the Sherman Act. The en banc court abandons that position. Although the reasoning it substitutes lacks the sweep of the prior error, it remains just as wrong in reversing the district court's judgment in favor of Gulf Coast.

Initially, the majority fails to make the critical determination of relevant market. It compounds this legal error by choosing its own path through the facts to arrive at a result which ignores the contrary initial fact finding of the jury and the trial judge's fact reconciliation of the jury's two inconsistent findings. The result is to saddle a bidder for a municipal franchise with an erroneous 6.3 million dollar award for actions that are no more an antitrust offense than would be an agreement to establish separate churches in different parts of town.

Relevant **[**50]** *Market* -- The majority acknowledges that the city started this unfortunate affair when it made a political decision to let multiple franchises for cable TV coverage in Houston. What the majority then promptly ignores is that this final decision established the relevant market for each competitor as, not the city of Houston, but each discrete segment of the city that any competitor for a franchise wanted to designate. This elemental truth negates every anticompetitive conclusion the majority draws. When the proper concept of relevant market is put with the jury finding that there was no conspiracy in restraint of trade in the agreements which drew the proposed boundary lines, every doubt that this is not an antitrust case disappears. Affiliated Capital could have competed in any one or more of the relevant markets designated by any applicant in the defendant group. Affiliated Capital could have competed in yet different markets by forming its own group and dividing territories differently. When it belatedly demanded a choice piece of Gulf Coast's territory, the rebuff was neither conspiratorial nor anticompetitive.

Inconsistent Special Verdicts -- The jury determined that **[**51]** the boundary line agreement to divide geographic areas between franchise applicants was not part of a conspiracy in unreasonable restraint of trade. This finding is a lion in the street for the majority's fact conclusions on causation. This jury fact finding was not a casual aside. The plaintiff insisted this was a major fact issue in the case. The court's instructions as well as its interrogatories made it so. How does the majority harmonize this critical, well supported finding which the trial judge who heard and saw the witnesses found controlling? It recasts the jury's first special verdict -- which found the boundary agreements were not part of a conspiracy in unreasonable restraint of trade -- as a finding that multiple franchises were preferable to one.

The majority's forced reconciliation of the jury's answers to interrogatories 1 and 3 is no reconciliation at all. It merely substitutes this court's finding for that of **[*1574]** the jury. The only reasoned path to resolution of the case through reconciliation of the jury's otherwise inconsistent answers is that followed by the trial court -- to grant judgment for the defendants on the basis of no causation.

[52]** Alternatively, conceding for the sake of argument that there could be some basis for finding causation of damage to plaintiff in a conspiratorial refusal by Gulf Coast to remake a valid boundary agreement, the decision of this court should be that the jury's answers to interrogatories were internally inconsistent and that a new trial is required. *Guidry v. Kem Mfg Co., 598 F.2d 402 (5th Cir. 1979)*; Wright and Miller Federal Practice and Procedure Civil § 2510. But the majority enters its own verdict on inconsistent findings remade at the appellate level. This is wrong.

Lack of Antitrust Injury -- Still more wrong is the court's approval of the use of the Sherman Act in this dispute to wound one who competed on the city's terms and reward a summer soldier who did not. The antitrust laws were not intended to restore losses caused by business mistakes or free market forces. Affiliated Capital, for reasons of its own, did not seek a cable TV franchise until others interested had legally agreed on market areas. That default is the sole proximate cause of its failure to get a franchise.

I concur in the result reached in Part VI of the majority opinion as to the mayor's **[**53]** qualified immunity. I also agree with the view expressed in Judge Higginbotham's concurring opinion that the majority's decision should not be read as a ruling that cities must use competitive bidding to award contracts and franchises. Such a ruling would drastically impede the development of a law of municipal antitrust liability which accords proper deference to municipal decision-making.

I respectfully dissent from the partial reversal of the judgment.

Casey v. Diet Center, Inc.

United States District Court for the Northern District of California

July 17, 1984

No. C-83-1043-WWS

Reporter
590 F. Supp. 1561 *; 1984 U.S. Dist. LEXIS 14879 **; 1984-2 Trade Cas. (CCH) P66,117

CAROLINE CASEY, MARY ANNE JOHNSON and PEGGY GARVEY, individuals, on behalf of themselves and all others similarly situated, Plaintiffs, v. DIET CENTER, INC., a corporation, JENKINS DIET CENTERS, INC., a corporation, SETH L. JENKINS, dba JENKINS DIET CENTER, a sole proprietorship, SETH L. JENKINS, S. BRADLEY JENKINS, CATHY R. JENKINS, VERLA ARCHIBALD, individuals, and all others similarly situated, Defendants

Core Terms

Diet, franchise, franchisees, products, trademark, royalty, tied product, tying product, market power, tying arrangement, package, franchisor, customer, consumer, prices, price discrimination, competitors, antitrust, costs, tie, anti trust law, license fee, comparable, calculate, submarket, charges, outlet, fair market value, summary judgment, relevant market

LexisNexis® Headnotes

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

HN1[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items.

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

HN2[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The test for separate products is whether the arrangement links two distinct markets for products distinguishable in the eyes of buyers. The test derives from the underlying rationale for the rule against tying to prohibit only those arrangements which create the possibility of foreclosing competition on the merits in a product market distinct from the market for the tying item.

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

HN3[] **Price Fixing & Restraints of Trade, Tying Arrangements**

No tying arrangement can exist unless there is a sufficient demand for the purchase of the tied product separate from the tying product to identify a distinct product market in which it is efficient to offer the tied product separately from the tying product.

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

HN4[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Any inquiry into tying arrangements must focus on the markets in which the two products are sold and in which the anticompetitive forcing has its impact.

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

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Franchises

HN5[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The tie of one product to another is per se illegal only if the seller possesses sufficient market power in the tying product to appreciably restrain trade in the tied product.

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

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

HN6[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In the absence of the degree or the kind of market power that enables a seller to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market.

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**

To find a distinct submarket based on price requires detailed consideration of other factors such as the precise contours of the alleged submarket, the spread of price levels throughout the market, the degree of price overlap, cross-elasticity of demand and price sensitivity.

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

Trademark Law > ... > Eligibility for Trademark Protection > Distinctiveness > General Overview

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

HN8[] Price Fixing & Restraints of Trade, Tying Arrangements

Uniqueness, of course, presupposes that competitors are in some way foreclosed from offering the distinctive product. Such barriers may be legal, as in the cases of patented or copyrighted products. Trademarks surely may be included in the list of such legal restraints, and, as with copyrighted material, the mere presence of competing substitutes is insufficient to destroy the legal, and more importantly the economic distinctiveness of the trademark.

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

Patent Law > ... > Utility Patents > Process Patents > Principles & Results

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

HN9[] Price Fixing & Restraints of Trade, Tying Arrangements

The court adheres to the principle applied by the Supreme Court that the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

HN10[] Robinson-Patman Act, Claims

Where the quantity of sales of the tied product operates as a measure of the buyer's intensity of use of the tying product, the seller may exact a premium from the more intensive users by charging supracompetitive prices for the tied product. Price discrimination, as such, of course, is unlawful only if it violates the Robinson-Patman Act, *15 U.S.C.S. § 13*, which requires a showing of lessened competition or tendency toward monopoly.

Antitrust & Trade Law > Sherman Act > Claims

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

HN11[] Sherman Act, Claims

In the absence of per se liability, plaintiffs bear the burden of proving that the purchase requirement violates the Sherman Act, *15 U.S.C.S. § 1* because it unreasonably restrained trade. That burden involves an inquiry into the effect of defendant's, requirement that its franchisees purchase its product on competition among suppliers of the product or its equivalents.

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

HN12[] Regulated Practices, Price Fixing & Restraints of Trade

Without a showing of actual adverse effect on competition, plaintiff cannot make out a case under the antitrust laws, and no such showing has been made.

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

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

HN13[] Private Actions, Standing

A plaintiff seeking to assert a claim under the Sherman Act, *15 U.S.C.S. § 1*, must also demonstrate actual injury causally linked to defendants' antitrust violation.

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

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

HN14[] Private Actions, Standing

One of the essential elements for recovery under the ***antitrust law*** is that the claimant be injured or damaged.

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

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

HN15[] Private Actions, Standing

Absent injury, a private person has no right to complain of a violation of the Sherman Act, *15 U.S.C.S. §§ 1* and *2*.

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

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

HN16[] Private Actions, Standing

A plaintiff who fails to adduce evidence of injury is not entitled to have his claim submitted to the jury.

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

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

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

HN17[] Tying Arrangements, Clayton Act

15 U.S.C.S. § 26 provides for private injunctive relief solely "against threatened loss or damage by a violation of the antitrust laws" and a finding of the possibility of future injury is thus as much a prerequisite for enjoining a tying arrangement as one of prior injury is for awarding treble damages.

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

Business & Corporate Law > Distributorships & Franchises > General Overview

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Franchises

Trademark Law > Conveyances > General Overview

HN18[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The franchisee alleging an illegal tie to the franchised trademark does not meet his burden of proving the injury necessary to recover under *Section 1* merely by establishing that he paid an inflated or noncompetitive price for the tied product.

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

HN19[] **Price Fixing & Restraints of Trade, Tying Arrangements**

To ascertain whether an unlawful arrangement for the sale of products has caused injury to the purchaser, the cost or value of both the tying and the tied products involved, free from the unlawful arrangement, must first be ascertained.

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

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

HN20[] **Private Actions, Remedies**

In other words, a party to a tying arrangement has not suffered economic harm from the inflated price of the tied product where the seller might simply have reduced that price to a "competitive level" and correspondingly increased the price of the tying product. Thus, to demonstrate the injury necessary to establish defendant's liability, plaintiff must prove that the payment for both the tied and tying product exceeded their combined fair market value.

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Judges: Schwarzer, Judge.

Opinion by: SCHWARZER

Opinion

[*1562] MEMORANDUM OF OPINION AND ORDER

This is an antitrust action brought by subfranchisees of defendant Diet Center, Inc., which franchises a system to promote weight loss and control for individual clients. Plaintiffs claim that defendants require franchisees [1] to purchase from Diet Center, Inc., at excessive prices the Diet Center Diet Supplement ("Diet Supp"), a nutritional tablet Diet Center clients must take. They argue that the forced purchase of Diet Supp constitutes a tying arrangement illegal per se under *Section 1* of the Sherman Act, *15 U.S.C. § 1*. The action is before the Court on cross-motions for summary judgment on the issue whether the purchase requirement is an illegal tying arrangement. No facts material to the disposition of these motions are in dispute, and no triable issue is presented. **[**2]**

I. *Background Facts*.

Diet Center is a nation-wide chain of approximately 1830 franchised weight-control **[*1563]** centers. The franchise is structured in three tiers. Diet Center, Inc., the primary franchisor, sells franchises to area franchisees who are permitted to subfranchise; area franchisees operate a total of 350 outlets directly, and subfranchise another 1130 outlets to third-tier operators. Plaintiff Garvey is a third-tier operator who subfranchises from defendant Jenkins Diet Centers which is an area franchisee of defendant Diet Center, Inc. Plaintiffs Casey and Johnson are joint operators who subfranchise one outlet from defendant Archibald, also an area franchisee of Diet Center, Inc., and a second outlet from defendant Jenkins.

Diet Center offers a five-phase weight-control program, the second or "reducing" phase of which is relevant here. Clients in **[**3]** that phase (1) attend daily personalized counseling sessions, (2) follow prescribed diets, (3) have access to nutrition and behavior modification classes, and (4) take various nutritional products daily, including eight Diet Supps which they obtain from their Diet Center outlet. Clients pay a weekly fee which covers all costs including that of the Diet Supps.

The Diet Supp is a chewable tablet consisting of a vitamin B complex in a base of soy protein and invert sugar, together with panothenic acid and niacin. Its inactive ingredients, not listed on its label, are excipients and binding agents which give the supplement its taste, texture, and consistency. It serves as a nutritional supplement, an appetite depressant, and a digestive, and both parties concede its importance to the Diet Center program.

All Diet Center franchisees must purchase their requirements of Diet Supps (either directly or through a subfranchisor) from Diet Center, Inc., which has produced the tablets at an in-house laboratory since early 1980; before then, Diet Center, Inc., had the supplement manufactured by outside sources. Diet Center, Inc., has never sold Diet Supps separately from its weight control program. **[**4]** Supplements with the same active ingredients are or could be made available from other sources, but Diet Center, Inc., claims that the quality of its ingredients and the particular excipients it uses to create taste and texture are secret and unique.

Diet Center franchisees are charged a refundable "initial franchising fee" of $24,000 (this amount has varied over the years) and a "continuing License Fee" of approximately $1.05 per dieter per day of enrollment in the program. It is unclear from the record whether the license fee is a charge solely for the Diet Supp, solely for the franchise (i.e., a royalty), or both, primarily because Diet Center, Inc., has been inconsistent in characterizing the fee in license agreements, disclosure documents, and promotional literature. In any event, the fee covers the cost of the Diet Supp. Defendants do not appear to dispute that a dieter's daily ration of Diet Supps costs Diet Center, Inc., from 35 to 45 cents to produce, an amount it has also on occasion characterized as the price to subfranchisors of the Diet Supp. Subfranchisors pass along these charges to subfranchisees with a mark-up of about 50 cents which covers their charge for processing **[**5]** orders for the Diet Supp. Plaintiffs maintain that products equivalent to the Diet Supp are available for 25 to 30 cents from various sources including a former Diet Center franchisee, a Diet Center competitor, and the laboratory which originally produced the Diet Supp.

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[1] Although plaintiffs are technically subfranchisees, they will be referred to as franchisees except where the context requires otherwise.

II. *Does the Diet Center Franchise Package Tie Separate Products*

Diet Center, Inc., offers its franchisees a comprehensive program of weight reduction and control services, products, and techniques. Sufficient goodwill attaches to the Diet Center trademark to induce franchisees to pay for the right to operate the program and pay for its component products such as the Diet Supp. Plaintiffs argue that this franchise arrangement is a tying agreement illegal per se because it ties two products and because Diet Center possesses sufficient market power in the tying product to appreciably restrain trade in the tied product, *Fortner Enters., Inc. v. United States Steel Corp., 394 U.S. 495, 499, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969)* ("*Fortner I*"); *Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 6, 2 L. Ed. 2d 545, 78 S. Ct. 514* ***[*1564]*** *(1958)*; *California Glazed Products, Inc. v. Burns & Russell* ***[**6]*** *Co., 708 F.2d 1423, 1427* (9th Cir.), *cert. denied*, *464 U.S. 938, 104 S. Ct. 348, 78 L. Ed. 2d 314 (1983)*. [2] Defendants argue first that the trademarked franchise and the Diet Supp are inseparable components of a single product which is therefore not subject to scrutiny as a tying arrangement.

[7]** In its recent decision in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*, the Supreme Court held that defendant hospital's requirement that its patients employ the services of a specified group of anesthesiologists did not violate *Section 1*. A majority of the Court, however, rejected defendants' contention that hospital services and those offered by the anesthesiologists were inseparable merely because they were functionally integrated:

> Our cases indicate . . . that ***HN1***[] the answer to the question whether one or two products are involved turns not on the functional relation between them, but rather on the character of the demand for the two items.

104 S. Ct. at 1562.

The Court relied on *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*, which held that advertising in a morning newspaper and in an afternoon newspaper was a single product because the purchasing advertisers viewed the newspaper reading public of both papers as fungible and not distinct, *id. at 613-14*. *Hyde* thus defined ***HN2***[] the test for separate products to be whether the arrangement "links two distinct **[**8]** markets for products . . . distinguishable in the eyes of buyers," *104 S. Ct. at 1562*. That test, it held, derives from the underlying rationale for the rule against tying to prohibit only those arrangements which create the possibility of "foreclosing competition on the merits in a product market distinct from the market for the tying item," *id. at 1563*.

In *Hyde*, plaintiff presented evidence that patients differentiated between hospital services and anesthesiological services: the latter were frequently separately arranged for and paid for. No such evidence is offered here. Although alternatives to the Diet Supp do exist, it does not follow that the purchase of the Supp or its equivalents by franchisees creates a distinct market. Under *Hyde*, "no ***HN3***[] tying arrangement can exist unless there is a sufficient demand for the purchase of the [tied product] separate from the the [tying product] to identify a distinct product market in which it is efficient to offer [the tied product] separately from [the tying product]," *104 S. Ct. at 1563*.

Here the demand for the Diet Supp is not separate from that for the franchise: it is generated wholly by the franchisee's operation **[**9]** of the franchise. Were it not for the Diet Center's franchised weight control program, there would be no market for the Diet Supp. Indeed, the Diet Supp may be purchased only by Diet Center

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[2] The Ninth Circuit often transforms the per se rule into one of presumptive illegality. *See, e.g., Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1213 (9th Cir. 1977)* ("the presumptive illegality of tie-ins"); *Roberts v. Elaine Powers Figure Salons, Inc., 708 F.2d 1476, 1479 (9th Cir. 1983)* (tying arrangements "presumptively unlawful" if certain elements exist). *But see Digidyne v. Data General Corp., 734 F.2d 1336 (9th Cir. 1984)* (referring to per se illegality). There is, however, no discernible distinction between that rule and the per se rule. The difference in terminology arises from the opportunity the Ninth Circuit affords a defendant to justify an otherwise illegal tie. *See, e.g., Moore, supra.*

franchisees who use it solely as an integral part of the Diet Center method. [3] Treating the Diet Supp as a separate market would thus not serve the purpose of the tying rule to protect distinct markets from anticompetitive restraints.

Ninth Circuit decisions have sought to address the separate products issue by application of two tests. In *Siegel v. Chicken **[*1565]** Delight, Inc., 448 F.2d 43, 48 (9th Cir. 1971)*, *cert. denied* **[**10]** , *405 U.S. 955, 92 S. Ct. 1172, 31 L. Ed. 2d 232 (1972)*, the court articulated a "function of the aggregation" analysis, but this has quite clearly been rejected in *Hyde*. More recently, the court, in *Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1353 (9th Cir. 1982)*, and subsequent decisions, rested on a distinction between business format systems and distribution systems, making the determination of separateness of franchised trademarks and component products turn primarily on the extent to which the trademark is associated in the public mind with the source of the allegedly tied product. *See also* *Roberts, supra note 2*, *708 F.2d at 1481*; *California Glazed Products, supra*; *Hamro v. Shell Oil Co., 674 F.2d 784, 787-88 (9th Cir. 1982)*.

Hyde, at least implicitly, appears to reject this approach. First, the Ninth Circuit test generates legal results based on the application of conclusory labels [4] unrelated to the focus of the "tying" inquiry set forth in *Hyde* -- "whether the arrangement may have the type of competitive consequences addressed by the rule [against tying]." Characterizing a particular franchise as business format or distributional does **[**11]** not aid in weighing the economic benefits that society is acknowledged to derive from franchises against any potential harm from the tie of component products. *See, e.g., Sullivan, Antitrust* 448-49 (1977). [5]

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[3] This may be what the Court had in mind when it stated:

> Similarly, when a purchaser is "forced" to buy a product he would not have otherwise bought even from another seller in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.

104 S. Ct. at 1560.

[4] "Easy labels do not always supply ready answers." *Broadcast Music, Inc. v. CBS, 441 U.S. 1, 8, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*. The Third Circuit has expressed a similar concern:

> We are genuinely concerned that the law of tying is becoming a kind of semantic shell game, resting more on key words than on careful analysis. For that reason, we feel compelled to take a pragmatic and prudential, as well as jurisprudential, view of the problem before us, taking into our perspective both the nature of the franchising industry and the effects which may be perceived to flow from the decision under review.

Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1222 (3d Cir.), *cert. denied*, ***429 U.S. 823, 97 S. Ct. 74, 50 L. Ed. 2d 84 (1976)***.

[5] There are compelling reasons against imposing on franchisors the uncertainty and risk of presumptive illegality inherent in courts' reliance on arbitrary labels. It is doubtful that a franchise agreement requiring franchisees to purchase certain products from the franchisor is so "plainly anticompetitive" or "lacking in redeeming virtue" as to warrant presumptive condemnation unless it can be fitted into the distribution system category. *See* *Broadcast Music, supra* note 4, *441 U.S. at 8* (blanket licenses of musical composition not unlawful per se).

Courts have recognized that tying may serve legitimate, procompetitive purposes, *see, e.g.*, Fortner II, supra, 429 U.S. at 619, n.10. It may for example, create certain production economies, see, e.g., *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)***, cited in *Roberts, 708 F.2d at 1482*; ensure quality control and consumer good-will, *see, e.g., California Glazed Products;* *Krehl, 664 F.2d at 1353-54*; and protect nascent industries, *see* *United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960)*, *aff'd*, ***365 U.S. 567, 5 L. Ed. 2d 806, 81 S. Ct. 755 (1961)***.

Moreover, courts and commentators agree that franchising itself enhances the ability of small businesses to compete effectively. *See GTE Sylvania v. Continental TV, Inc., 537 F.2d 980, 999-1000 (9th Cir. 1976)*, *aff'd*, *433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. Other attributes often credited to franchising are that it tends to promote competition by expanding the number of sales outlets and creating efficiencies of production and distribution otherwise unattainable. It facilitates market entry by small

[12]** Second, the *Krehl* test directs attention to the market in which the ultimate consumer purchases but *Hyde* requires that ***HN4***[] "any inquiry . . . must focus on the . . . markets in which the two products are sold" and in which "the anti-competitive forcing has its impact," *104 S. Ct. at 1561*. **[*1566]** In the franchise context, the markets in which the tying and tied products are sold are those in which the *franchisees* purchase. Thus whether the franchise arrangement ties separate products is not necessarily related to the perception of ultimate consumers who purchase in a different market downstream from that of the franchisees.

Finally, franchise arrangements cannot necessarily be fitted into one of the two *Krehl* categories based on consumer perceptions and an assessment of good will. The present case is an example. The Diet Center trademark and franchise represent a program comprising numerous components, including daily weigh-ins and counseling, daily doses of Diet Supp, Vitamin C and calcium, specified diets, and weekly nutrition and behavior classes. Clearly this is not a simple distribution system in which the trademark and goodwill attach only to products manufactured **[**13]** by or otherwise identified with the manufacturer as in *Krehl* or *California Glazed Products*. Nor is it a business format system in which the trademark represents only a way of conducting business but not a particular component product, as was true of the Chicken Delight franchise in *Siegel*.

This case illustrates the difficulty of principled and consistent application of a test based on consumer perception. The individual client may not attach great significance to a particular component or product of the Diet Center program but the franchisor may reasonably treat each as an essential ingredient. Whether a particular product is essential to the program is more likely perceived by its creator than by consumers who are concerned with the end results obtained from participation rather than with the reasons for the program's success. Comparing the Diet Supp taken each day by Diet Center customers who may or may not give thought to its source with the paper plates on which fast-food customers are served their fried chicken is not helpful to arriving at a sound disposition of this case.

In sum, where, as here, franchisees bargain for the right to use a package of products and **[**14]** services none of which represents a market distinct from that of the franchise itself, the competitive purposes of the rule against tying are not served by fractionating the franchise into separate components. [6] **[**15]** In the absence of any evidence offered to establish the existence of a distinct market for the Diet Supp, the requisite element of separate products is not satisfied, there is thus no illegal tie, [7] and defendants are entitled to summary judgment on this issue.

III. *Does Diet Center, Inc., Possess Sufficient Market Power for Application of the Per Se Rule*? [8]

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enterprises with little start-up capital. It retards the tendency toward vertical integration. It facilitates quality control and protection of franchisors' goodwill. And it promotes the development of innovative production techniques and expertise. *See Note*, A *Clarification and Reformulation of Prevailing Approaches to Product Separability in Franchise Tie-In Sales*, *67 Minn. L. Rev. 1165, 1173-75 (1983)*; *Note, A New Approach to the Legality of Franchising Tie-Ins*, 129 U. Pa. L. Rev. 1267, 1276-77 (1981). Thus, disincentives to the use of franchise arrangements created by the threat of per se or presumptive illegality dependent on vague and conclusory characterizations may affect the economy adversely.

[6] The Fourth Circuit used a somewhat analogous approach to reach the same result in *Principe, supra* note 6, *631 F.2d at 309*, which held a license to use McDonald's trademark and food preparation system inseparable from the required leasing of particular store premises:

> Given the realities of modern franchising, we think the proper inquiry is not whether the allegedly tied products are associated in the public mind with the franchisor's trademark, but whether they are integral components of the business method being franchised. Where the challenged aggregation is an essential ingredient of the franchised system's formula for success, there is but a single product and no tie-in exists as a matter of law.

[7] In the absence of disputed material facts, the issue of separateness is properly decided on summary judgment. *See* *Krehl, supra*; *Hamro, supra.* *Cf.* *California Glazed Products, supra.*

[8] The analysis of tying agreements has at times been muddled by the injection of an additional requirement that plaintiff prove "coercion." In *Moore, supra*, for example, the court held that "there must be some modicum of coercion shown," *550 F.2d at 1216*. It went on to find that the necessary coercion could be inferred from a showing than an appreciable number of buyers had accepted burdensome terms and defendant possessed sufficient economic power in the tying product. *See also,* *Hirsh v. Martindale-Hubbell, Inc., 674 F.2d 1343, 1347* (9th Cir.), *cert. denied*, ***459 U.S. 973, 74 L. Ed. 2d 285, 103 S. Ct. 305 (1982)***.

[16]** Even were the Diet Supp found to be separable from the trademarked franchise, **[*1567]** ***HN5***[] the tie of one product to another is per se illegal only if the seller possesses sufficient market power in the tying product to appreciably restrain trade in the tied product. In confirming the survival of a per se rule against tying, *Hyde* restricted its applicability to cases where "the existence of forcing is probable," *104 S. Ct. at 1560*. *See also Robert's Waikiki U-Drive, Inc. v. Budget Rent-a-Car Systems, Inc., 732 F.2d 1403, 1407 (9th Cir. 1984)*. [9] The Court cited patents, high market share, and the unique character of a product competitors are unable to offer as sources of market power that make forcing likely, *id. at 1560-61*. But ***HN6***[] in the absence of "the degree or the kind of market power that enables [a seller] to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market. . . . Any inquiry into the validity of the tying arrangement must focus on the market or markets in which the two products are sold, for that **[**17]** is where the anticompetitive forcing has its impact." *Id. at 1561*. Thus, following the reasoning in *Hyde*, the analysis here must focus on Diet Center, Inc.'s, sale of franchises to franchisees (and subfranchisees) for that is the market in which the tying and tied products are sold and in which any anticompetitive effect would arise.

[18]** The parties have provided little evidence concerning this market, having instead directed the Court's attention to the retail market in which the franchisees' services are sold to clients. Although that market is not the one relevant to the resolution of the tying issue in this action, the evidence offered illuminates Diet Center's position in the relevant market.

Both parties agree that franchisees compete at the retail level in what they call the service-assisted weight-loss program market, distinguished from a broader market that might include, for example, self-help methods of weight loss such as diet books and appetite suppressants. Plaintiffs posit the existence, however, of a submarket consisting of high-priced individual-counseling diet-related weight loss programs. That market is principally defined by price: plaintiffs claim that customers for such programs pay $30 per week and up, compared to $5 per week for non-individualized services. Given such price differentials and the availability of both kinds of services from single companies, they argue that there are distinct customer groups.

[*1568] The evidence submitted by plaintiffs is not sufficient to establish the **[**19]** existence of a submarket at the retail level. It is far too generalized and vague to fix any comprehensible line of demarcation. Market definitions based on price levels, moreover, have not found favor with courts. *See Brown Shoe Co. v. United States, 370 U.S.*

The Supreme Court in *Hyde* has made it clear that coercion, i.e. forcing, is simply a manifestation of market power.

[9] Application of the "forcing" concept confronts courts with a dilemma. Obviously a seller must have some degree of leverage or power to require buyers to accept the condition of having to purchase the tied product: if buyers always purchased the product voluntarily, the condition would be unnecessary. But if that leverage or power alone suffices to establish the presence of forcing and thus to evoke the per se rule, then every tying agreement would ipso facto be illegal per se. Such a result is clearly not what *Hyde* or earlier Supreme Court decisions intended. First, in the absence of a degree of market power sufficient to raise an issue under *Section 2* of the Sherman Act, a tying agreement, from the perspective of a defendant's competitor, is tantamount to a requirements contract subject to scrutiny under the rule of reason, *104 S. Ct. at 1568 n.51*. From the buyer's point of view, the tie resembles a non-price vertical restraint subject to the rule of reason under ***GTE Sylvania, supra*** note 5. Second, had the Court intended otherwise, the analysis in *Hyde* of competitive conditions in the tying product market would have been superfluous.

At base, "forcing" a buyer to accept a tie-in does not differ from "forcing" him to pay a particular purchase price. The seller simply takes part of the price for the tying product in the form of forced purchases of the tied product. To the buyer, the controlling consideration remains the aggregate price of the package. The anti-tying prohibition is aimed not at such market devices in general but at the unlawful use of market power to unreasonably restrain trade or to monopolize. As the Court stated in *Hyde*,

> Of course, the Sherman Act does not prohibit "tying," it prohibits "contracts . . . in restraint of trade." Thus, in a sense the question of whether this case involves "tying" is beside the point. The legality of petitioners' conduct depends on its competitive consequences, not whether it can be labeled "tying." If the competitive consequences of this arrangement are not those to which the per se rule is addressed, then it should not be condemned irrespective of its label.

104 S. Ct. at 1563 n.34.

294, 326, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962) ("medium priced" shoes found to compete with "low priced" shoes); United States v. Jos. Schlitz Brewing Co., 253 F. Supp. 129 (N.D. Cal.), *aff'd per curiam*, 385 U.S. 37, 87 S. Ct. 240, 17 L. Ed. 2d 35 (1966) (premium and non-premium beers not separate lines of commerce). Further, **HN7**[] to find a distinct submarket based on price requires detailed consideration of other factors such as the precise contours of the alleged submarket, the spread of price levels throughout the market, the degree of price overlap, cross-elasticity of demand and price sensitivity. *See* JBL Enters., Inc. v. Jhirmack Enters., Inc., 509 F. Supp. 357, 373-75 (N.D. Cal. 1981), *aff'd*, 698 F.2d 1011 (9th Cir. 1983). Virtually no evidence has been offered on these points.

Even if price levels were found to suggest a high-end submarket at the retail level, there is nothing before the Court to indicate **[**20]** the existence of a comparable submarket in the market where franchises are sold. There is no reason to suppose a priori that different weight loss program franchises are not "reasonably interchangeable by [franchisees] for the same purposes," United States v. E.I. Du Pont & Co., 351 U.S. 377, 395, 100 L. Ed. 1264, 76 S. Ct. 994 (1956). The retail price of the product is only one factor that might bear on potential franchisees' decisions: others include the cost of the franchise, the quality of the product or service franchised, the demonstrated goodwill among consumers, and profit potential. Nothing before the Court affords a basis for narrowing the market beyond the definition the parties agree on, the nation-wide service-assisted weight-loss market.

The inquiry then becomes whether Diet Center, Inc., possesses the requisite power in that market to support application of the per se rule. To begin with, plaintiffs allege none of the factors on which the Ninth Circuit recently relied in *Data General, supra* note 2, to find that defendant computer manufacturer possessed sufficient market power in the tying product market to foreclose competition in the tied product market. **[**21]** [10] There the tying product, a computer software program, was unique among competing products and could not be reproduced without infringing defendant's copyright or utilizing its trade secrets. Creation of a comparable system was conceded to be economically infeasible. Moreover, the court found many of defendant's customers to be "locked in" to use of defendant's tying product by their substantial investment in compatible application software. No such evidence is offered here. Diet Center's competitors are not prevented from developing or offering a comparable diet program. Plaintiff alleges no patent, copyright or monopoly power of any sort. Defendants' franchisees are not "locked in" to the tying product by substantial investment; indeed, the initial franchising fee is conceded to be refundable. Nor are there technological barriers even remotely analogous to those the court found dispositive in *Data General*.

[22]** Plaintiffs argue that Diet Center, Inc., wields market power solely by virtue of its trademark which is alleged to render the Diet Center franchise sufficiently unique to enable defendants to impose burdensome conditions. *Data General*, in dicta, quoted with approval from the Fifth Circuit's decision in Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39, 48 (5th Cir. 1976), a trademark tying case:

> **HN8**[] uniqueness, of course, presupposes that competitors are in some way foreclosed from offering the distinctive product. *Fortner* points out at 505, 89 S. Ct. 1252 note 2, that such barriers may be legal, as in the cases of **[*1569]** patented or copyrighted products. Trademarks surely may be included in the list of such legal restraints, and, as with copyrighted material, the mere presence of competing substitutes is insufficient to destroy the legal, and more importantly the economic, distinctiveness of the trademark.

But *Carpa* made clear that a trademark, unlike a patent or copyright, is not automatically presumed to confer market power. The *Carpa* opinion goes on to state in the paragraph after that quoted above:

> Neither the Supreme Court, nor this **[**23]** Circuit, has gone so far as to presume that the mere existence of a trademark in and of itself supplies economic power sufficient to constitute an antitrust violation. Unlike a patent or copyright which is designed to protect the uniqueness of the product or process itself, a trademark protects

[10] It is important to note that *Data General* was an action brought by a competing seller, not by a customer as is the case here. The appropriate market analysis will not necessarily be the same in both types of cases. See also the discussion in parts IV and V, below.

> only the name or symbol of the product. This is a basic conceptual difference. . . . ***HN9***[] We adhere to the principle applied by the Supreme Court in *Fortner, supra*: "The proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." *394 U.S. at 504*. [11]

To establish that power, plaintiffs rely primarily on Diet Center's market **[**24]** share. But in the market the Court has determined to be relevant, that of service-assisted weight-loss operations, plaintiffs calculate Diet Center's share at 19%; defendants contend that it is only 13-15%. Thus Diet Center's share of the relevant market is substantially lower than the market shares of defendants in both *Hyde* and *Times-Picayune* which were held insufficient to confer market power.

Additional factors support the conclusion that defendants do not possess market power. Plaintiffs concede that there are no significant barriers to entry in the tying product market. Their evidence shows that Diet Center's initial franchising fee and royalties are lower than those charged by many of its competitors and that Diet Center's share of the service-assisted weight-loss franchise market declined from 1980 to 1982. Finally, it is not disputed that Diet Center's franchise charges declined in constant dollars over the same time period.

The evidence thus establishes that Diet Center, Inc., lacks the requisite market power sufficient to sustain a finding that it forced franchisees to make unwanted purchases of Diet Supp.

It should be noted that even if Diet Center, Inc., possessed **[**25]** some measure of market power, this is not a case warranting relief against a tying arrangement on the ground that it could "increase[] the social costs . . . [by] facilitating price discrimination." *Hyde, 104 S. Ct. at 1567, n.47*. In theory, "where ***HN10***[] the quantity of sales of the tied product operates as a measure of the buyer's intensity of use of the tying product, the seller may exact a premium from the more intensive users by charging supracompetitive prices for the tied product." *Hirsh, supra* note 8, *674 F.2d at 1349*. Assuming the price charged for the Diet Supp to be supracompetitive, the tie enables Diet Center, Inc., to collect more from those franchisees who are more intensive users of the franchise and thus value it more highly than the less intensive users. *See* *Fortner I, 394 U.S. at 513 n.7* (J. White dissenting) (tying arrangements "may be used as a counting device to effect price discrimination"); *Moore, 550 F.2d at 1213* ("importance of tie-ins as a means of price discrimination"); *see generally* W. Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L.J. 19, 23 (1957).

Price discrimination as such, of course, is unlawful only if it violates **[**26]** the Robinson Patman Act, *15 U.S.C. § 13*, which requires a showing of lessened competition or tendency toward monopoly. No **[*1570]** such claim is made here. Nevertheless price discrimination through tying agreements when it could not otherwise have been accomplished (usually by way of variable-quantity purchasing) has been criticized by some courts, *see, e.g.,* *Hirsh, supra*, although commentators disagree on whether it is economically harmful. [12]

For two reasons, price discrimination is not a basis for condemning the Diet Center arrangement. First, it is not a device to evade price control or restraint. *See* *Hyde, 466 U.S. 2, 104 S. Ct. at 1567, 80 L. Ed. 2d 2, n.47*. Second, Diet Center, Inc., could achieve the same result by charging a variable royalty **[**27]** based on a percentage of revenue, *see* *Siegel, 448 F.2d at 50* (royalties based on sales volume are a "feasible alternative method of compensation"), and thereby extract the consumer surplus from intensive users of the franchise.

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[11] *See also* *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 52 U.S.L.W. 4821, 4831 n.19, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*: "Market power is the ability to raise prices above those that would be charged in a competitive market."

[12] *Compare* R. S. Markovits, *Tie-Ins and Reciprocity: A Functional, Legal, and Policy Analysis*, 58 Tex. L. Rev. 1363, 1378-81 (1980), *with* R. Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U.Chi.L.Rev. 506, 508-15 (1974).

There are various unobjectionable reasons why Diet Center, Inc., might prefer to employ a tying rather than a royalty arrangement. [13] But price discrimination does not create anticompetitive consequences merely because it is achieved by one means rather than another. *See* 2 *P. Areeda & D. Turner* ***Antitrust Law*** para. 347b (1978). Absent proof that Diet Center franchisees were competitively damaged (other than by Diet Center, Inc.'s, decision to employ what amounts to a royalty scheme) plaintiffs fail to establish that Diet Center, Inc., has "increased the social costs of its market power."

The Court concludes, **[**28]** therefore, that plaintiffs have failed to demonstrate the existence of market power sufficient to invoke the per se rule. There is no evidence which could support a finding that Diet Center, Inc., is able to impose unreasonable terms on buyers in the relevant market. In the absence of any disputed material facts, defendants are entitled to summary judgment on this issue.

IV. *Is the Arrangement an Unreasonable Restraint of Trade*

HN11[] In the absence of per se liability, plaintiffs bear the burden of proving that the purchase requirement violates the Sherman Act because it unreasonably restrained trade. That burden involves an inquiry into the effect of Diet Center, Inc.'s, requirement that its franchisees purchase its Diet Supp on competition among suppliers of Diet Supp or its equivalents. *Hyde, 104 S. Ct. at 1567*.

Plaintiffs have offered no evidence defining the relevant market or bearing on the effect of the Diet Center, Inc., arrangement on competing suppliers. The only evidence plaintiffs have offered concerns the allegedly lower prices charged for alternative diet supplements from other suppliers. That evidence is not probative of a restraint of trade. There is no indication **[**29]** that the Diet Center, Inc., arrangement had any effect on competition among suppliers or on consumer demand for diet supplements.

As the Court stated in *Hyde*,

> ***HN12***[] without a showing of actual adverse effect on competition, [plaintiff] cannot make out a case under the antitrust laws, and no such showing has been made.

104 S. Ct. at 1568. Plaintiffs have failed to show anything other than that possibly comparable diet supplements (which may or may not secure Diet Center, Inc.'s, requisite approval under the franchise agreement) could be purchased for less. They have come forward with no evidence that competition has been adversely affected. *See also Robert's, supra, 732 F.2d at 1408* ("injury to the antitrust plaintiff alone is not sufficient to prove injury to competition").

[*1571] V. *Even if the Diet Center Franchise Were Held to be an Unlawful Tie-In, Could Plaintiffs Establish Damage*

In addition to establishing the existence of an illegal tying arrangement, ***HN13***[] plaintiffs seeking to assert a claim under *Section 1* must also demonstrate "actual injury . . . causally linked to defendants' antitrust violation," *In re Data General Corp. Antitrust Litigation* ***[**30]*** *, 490 F. Supp. 1089, 1101 (N.D. Cal. 1980)*, *rev'd on other grounds*, *Data General, supra*; *Kline v. Coldwell, Banker & Co., 508 F.2d 226, 230-31, 233 (9th Cir. 1974)*, *cert. denied*, *421 U.S. 963, 44 L. Ed. 2d 449, 95 S. Ct. 1950 (1975)*. "One ***HN14***[] of the essential elements for recovery under the ***antitrust law*** is that the claimant be injured or damaged," *Gray v. Shell Oil Co., 469 F.2d 742, 748 (9th Cir. 1972)*, *cert. denied*, *412 U.S. 943, 37 L. Ed. 2d 403, 93 S. Ct. 2773 (1973)*; ***HN15***[] absent injury, "a private person has no right to complain of a violation of *§§ 1* and *2* [of the Sherman Act]," *Winckler v. Smith Products Co. v. Sunkist Growers, 346 F.2d 1012, 1014 n.1* (9th Cir.), *cert. denied*, *382 U.S. 958, 15 L. Ed. 2d 362, 86 S. Ct. 433 (1965)*. ***HN16***[] A plaintiff who fails to adduce evidence of injury is not entitled to have his claim submitted to the jury, *see Gray, 469 F.2d at 749*. Moreover, ***HN17***[] *15 U.S.C. § 26* provides for private injunctive relief solely "against threatened loss or damage by a violation of the antitrust laws"; a finding of the possibility of future injury is thus as

[13] Tying arrangements may, for example, enable a franchisor to obtain more efficiently accountings of the volume of its franchisees' business. *See also* note 5, *supra*.

much a prerequisite for enjoining a tying arrangement as one of prior injury is for awarding **[**31]** treble damages. [14]

HN18[] The franchisee alleging an illegal tie to the franchised trademark does not meet his burden of proving the injury necessary to recover under *Section 1* merely by establishing that he paid an inflated or noncompetitive price for the *tied* product. As the Ninth Circuit held in *Siegel, 448 F.2d at 52*, where plaintiff franchisees claimed to have been damaged by the supracompetitive price of certain products necessarily purchased from defendant franchisor,

> *HN19*[] to ascertain whether an unlawful arrangement for the sale of products has caused injury to the purchaser, the cost or value of [both the tying and the tied] products involved, free from the unlawful arrangement, must first be ascertained.

HN20[] In other words, a party to a tying **[**32]** arrangement has not suffered economic harm from the inflated price of the *tied* product where the seller might simply have reduced that price to a "competitive level" and correspondingly increased the price of the *tying* product. Thus, to demonstrate the injury necessary to establish defendant's liability, plaintiff must prove that the payment for both the tied and tying product exceeded their combined fair market value. [15]

*Kypta v. McDonald's **[**33]** Corp., 671 F.2d 1282, 1285* (11th Cir.), *cert. denied*, *459 U.S. 857, 74 L. Ed. 2d 109, 103 S. Ct. 127 (1982)*, for example, affirmed summary judgment in favor of defendant fast-food franchisor alleged to have tied its franchised trademark to the lease of restaurant premises. The Court held that the requirement of injury set forth in *Siegel* had not been satisfied both because plaintiff could not establish his ability to secure alternative premises of comparable potential profitability and because he introduced no evidence "that he was charged more than the reasonable value of his lease and license," *id. at 1286*. Although the court acknowledged that *Siegel* had remanded on the issue of the fair market value of the combined products, it found no need to do so **[*1572]** where plaintiff had "conceded his inability to offer any evidence regarding this essential point," *id*.

In the case at bench, plaintiffs rely on two facts to establish that the payments for the franchised trademark and for the Diet Supp exceed the two products' combined market value. First, they contend that while Diet Center sells its Diet Supp at forty-five cents per dieter per day, the same quantity **[**34]** of supplements can be purchased elsewhere for twenty-five to thirty cents. Second, they claim that Diet Center's continuing license fee, effectively a royalty based on a percentage of revenues, exceeds the royalty payments charged by Nutri/System, Diet Center's closest competitor in the weight-control market. According to plaintiffs' calculations, subtracting the forty-five cent payment for Diet Supps from the continuing license fee charged per dieter, Diet Center subfranchisors pay an average of 11.5% of revenues solely for their license and subfranchisees pay an average of 19.3% of revenues. Nutri/System, by contrast, allegedly charges its franchisees only 7% of revenues, 200% less than Diet Center subfranchisees are charged.

Accepting plaintiffs' calculations for purposes of this motion, the issue is whether proof that Diet Center's royalty exceeds those of competing franchisors establishes the cost of the Diet Center franchise package to be supracompetitive, as required by *Siegel*, and hence a basis for antitrust damage. Different franchises possess different attributes and accordingly different degrees of appeal to potential franchisees. Some may have special pricing schemes, **[**35]** others may market a particularly sought after product, and still others may offer an unusually complete package enabling franchisees to commence operations with a minimum of knowhow or financial

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[14] The damage requirement may differ, of course, depending on whether plaintiff is a buyer forced to purchase the tied product or a competitor allegedly foreclosed from the tied product market. *See* *Ungar, supra* note 4, *531 F.2d at 1221, n. 7*a.

[15] The Supreme Court has at least suggested its accordance with this analysis. In *United States Steel Corp. v. Fortner Enters., Inc., 429 U.S. 610, 97 S. Ct. 861, 51 L. Ed. 2d 80 (1977)*, ("Forner II"), the court rejected an inference of market power based on the existence of the tie itself by noting that

> proof that Fortner paid a higher price for the tied product is consistent with the possibility that the financing [the tying product] was unusually inexpensive and that the price for the entire package was equal to, or below, a competitive price.

resources. The price charged by a franchisor reflects the value franchisees in the market attach to the package he offers: a franchisor who charges a price higher than the market is willing to pay will not long survive. To find that the price of one package is noncompetitive solely because it is different from the price of another is to assume products to be fungible when the marketplace clearly establishes that they are not.

Moreover plaintiffs' reliance on Diet Center's 19.6% royalty to demonstrate non-competitiveness ignores the fact that different franchises collect revenue in different ways. Accepting plaintiffs' calculation of Nutri/System's royalty at 7% and thus lower than Diet Center's as calculated by plaintiffs, the fact remains that Nutri/System's initial franchising fee is substantially higher than Diet Center's. A franchisee opening a Nutri/System outlet must immediately lay out $49,500 while his Diet Center counterpart pays an initial fee of only $24,000, about half as much. **[**36]** Thus the allegedly inflated royalty payments do not establish that plaintiffs paid more for the franchise package than its fair market value; they are simply an alternative to a higher initial investment requirement. [16]

In addition there are significant distinctions between other aspects of the Diet Center and Nutri/System franchises which render direct price comparisons unmeaningful. It appears from the evidence that Diet Center provides its franchisees with financing which is unavailable from Nutri/System, and Diet Center's initial franchising fee is, to a limited extent, refundable when a franchisee desires to withdraw from the operation. Furthermore, while Nutri/System **[**37]** derives approximately 80% of its revenue from a 27% gross margin on food items "purchased at wholesale from the company by the franchisees for resale to clients," (Plf. Ex. PPP), Diet Center's revenues are substantially less dependent on sale to franchisees of items not part of the franchise package.

Comparison of royalty fees charged by other franchisors, therefore, does not tend to prove the fair market value of the Diet **[*1573]** Center franchise. Rather, as Areeda and Turner have stated, the most accurate method of determining the combined market value of the tied and tying products is "by reference to what franchisees have demonstrated a willingness to pay." *2 P. Areeda & D. Turner,* ***Antitrust Law***, § 347b (1978). *See also, Ungar, supra, 531 F.2d at 1223* & n.10. Potential franchisees who are free to choose a franchise will not, by definition, pay a higher price for a franchise than its market value, and there is no contention here that they are constrained in selecting from among a variety of weight control franchises.

Moreover, this is not a case in which the pricing scheme employed by the franchisor somehow disguises the cost of the franchise. In *Siegel*, for **[**38]** example, the Court found that the willingness of the plaintiffs to purchase the tied equipment, spices, and paper goods at inflated prices did not establish the competitiveness of the combined package price because franchisees may well have been unaware of what that cost would

> come to in practice. Had the full amount of the overcharge on the tied items been openly specified as the cost of the tying items agreement might not have been forthcoming. We can hardly rule as a matter of law that it would have been.

448 F.2d at 52-53. The court's concern was not that an initial franchisee would always be unable to predict its eventual costs solely because they would vary with the volume of business, an inevitable characteristic of all royalty arrangements. Rather, the court worried that a franchisee might not realize what the "cost of the arrangement . . . would come to" because his entire payment depended on his eventual and unpredictable requirements of the tied products. The true cost of the franchise in *Siegel* could be considered "buried": franchisees paid no royalty or license fee whatsoever and were charged only for products like equipment, ingredients and paper **[**39]** products whose costs as a function of revenue inexperienced franchisees might find difficult to calculate at the outset of the enterprise.

This danger is absent where, as here, the costs of the franchise are "openly specified." Diet Center franchisees know exactly what their cost per customer (i.e. the "cost of the arrangement") will be from the outset; not only are they charged a set license fee per customer but the amount of Diet Supp they must purchase per customer is fixed.

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[16] In fact, the compilation from which plaintiffs have drawn their pricing information estimated the "Range of Capital Needed" for setting up a Nutri/System franchise at $65,000-95,000 and a Diet Center franchise at $15,000-30,000. Moreover, of the 26 weight control franchises surveyed, Diet Center had among the lowest ranges of capital required.

Franchisees can predict the eventual price per customer as accurately as if the cost of the Diet Supp had been recharacterized as part of the licensing cost. [17]

[40]** In sum, bare comparison of the royalties charged for other franchises cannot establish the non-competitiveness of the package price charged by Diet Center absent proof that the initial price of the arrangement was somehow disguised. As *Siegel* indicated, *448 F.2d at 52 n.11*, franchisees will thus rarely be able to establish injury from a tying arrangement because the price paid is usually conclusive proof of the franchise package's fair market value. Restricting the class of persons who can sue for an allegedly illegal tie to those who suffer demonstrable injury, however, does not immunize conduct violative of the antitrust laws. The franchisor who illegally **[*1574]** ties separate products to his trademark may still be subject to challenge not only by the government but also by potential competitors in the tied product market who can establish market foreclosure generated by the tying arrangement.

CONCLUSION

For the reasons stated, defendants' motion for partial summary judgment on the tying claim is granted and plaintiffs' motion is denied.

The parties are directed to appear at a status conference on August 10, 1984, at 10 a.m. to discuss the disposition of the remaining **[**41]** claims.

IT IS SO ORDERED.

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[17] A franchisee may still be able to prove injury if the illegal tie coerces him to buy products or services which are unwanted or of unexpectedly inferior quality causing him to lose customers and revenue. He will thus be able to establish damage arising not from the allegedly anticompetitive price of the package for which he bargained but from the excess cost or inferiority of items which he has no choice but to continue purchasing. *Cf. Roberts, supra.* In *Roberts*, the Court held that defendant franchisor could not, absent justification, tie its trademark to the use of a particular bookkeeping service which plaintiff franchisee complained was incompetent. Although the Court of Appeals did not address the damage issue, plaintiff in *Roberts* might have established injury arising from the unexpectedly poor quality, and thus cost, of the bookkeeping service which he was required to use.

Plaintiffs here do not claim that they were damaged because the Diet Supp they were required to purchase was unwanted, hurt their business or was in any way unsatisfactory. On the contrary, they concede that the Diet Supp is effective and important to the weight-loss program. They merely desire to buy it elsewhere.

W. Goebel Porzellanfabrik v. Action Indus.

United States District Court for the Southern District of New York

July 19, 1984

No. 83 Civ. 8490 (GLG)

Reporter

589 F. Supp. 763 *; 1984 U.S. Dist. LEXIS 14820 **; 224 U.S.P.Q. (BNA) 1018 ***; Copy. L. Rep. (CCH) P25,689; 1984-2 Trade Cas. (CCH) P66,122

W. GOEBEL PORZELLANFABRIK, Plaintiff, v. ACTION INDUSTRIES, INC., Defendant

Core Terms

figures, antitrust, importation, counterclaims, practices, retailers, conspiracy, anticompetitive, distributors, anti trust law, lack standing, drawings

LexisNexis® Headnotes

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

HN1[] **Private Actions, Standing**

A plaintiff must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. The plaintiff must show more than a mere violation of the antitrust laws, he must also show an injury that is a direct result of the anticompetitive behavior of the defendant.

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

HN2[] **Private Actions, Standing**

Before plaintiffs have standing to bring antitrust suits, courts require (1) that the plaintiffs be injured in fact, (2) that the injury be to his "business or property," (3) that the injury be of the type the antitrust laws were intended to prevent, (4) that there be significant causal connection between the defendant's violation and the plaintiff's injury, and (5) that the injury flow from that which makes the defendant's acts unlawful.

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

HN3[] **Private Actions, Standing**

Before a plaintiff can make out a claim for antitrust injury, he must be within the "target area" of the alleged conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued.

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

Copyright Law > ... > Civil Infringement Actions > Defenses > Copyright Misuse

HN4[] **Private Actions, Standing**

Where the holder of a valid copyright brings suit in good faith and based on reasonable grounds, whatever other anticompetitive activity the copyright holder may be guilty of, the copyright laws would seem to authorize him to bring such a non-frivolous suit.

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

Torts > Public Entity Liability > Immunities > Judicial Immunity

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

The seeking of governmental action, whether legislative, judicial, or administrative, is immune from antitrust strictures under the Noerr-Pennington Doctrine, absent a showing that the action is sought without probable cause, or is instituted in bad faith.

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Derivative Works

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > General Overview

Copyright Law > Scope of Copyright Protection > Collective & Derivative Works > Scope of Protection

Copyright Law > Scope of Copyright Protection > Ownership Interests > Governmental Works

Copyright Law > Scope of Copyright Protection > Restoration From Public Domain > General Overview

Copyright Law > Scope of Copyright Protection > Subject Matter > General Overview

Copyright Law > ... > Protected Subject Matter > Graphic, Pictorial & Sculptural Works > General Overview

HN6[] **Collective & Derivative Works, Derivative Works**

17 U.S.C.S. § 103(a) states that derivative works can be copyrighted and that such works and their copyrights exist independently of the original works and whatever copyrights may protect them.

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Judges: Goettel, D.J.

Opinion by: GOETTEL

Opinion

[*1019]** **[*764]** GOETTEL, D.J.:

Before the Court is a motion by plaintiff W. Goebel Porzellanfabrik ("Goebel") to dismiss the antitrust counterclaims brought by defendant Action Industries, Inc. ("AII"), in response to Goebel's complaint charging AII with copyright infringement. AII charges that Goebel's business practices restrained trade in violation of the antitrust laws, that the infringement suit itself was part of the antitrust conspiracy, and that Goebel obtained its copyrights by fraud. Goebel moves to dismiss the counterclaims under *Fed. R. Civ. P. 12(b)(6)* asserting, *inter alia*, that AII has no standing to bring the antitrust claims and so fails to state a claim for which relief can be granted. **[**2]** For the reasons outlined below, the Court grants Goebel's motion to dismiss.

BACKGROUND

Goebel is a West German limited partnership based in Bavaria which manufactures a variety of figurines, plaques, plates, bells, and dolls based on the sketches and drawings of Sister M. Innocentia Hummel (known as "Hummel figures"). Goebel makes the Hummel figures under a license from the Congregation of the School Sisterhood of the Third Order of St. Frances at the Convent of Seissen, of which Sister Hummel was a member until her death in 1946. The convent exercises artistic supervision over the goods produced by Goebel, which holds a number of United States copyrights on the Hummel figures it makes. These figures are imported into the United States by three authorized wholesalers who distribute them to retailers nationwide.

Goebel's complaint alleges that for the past three years, AII has acquired Hummel figures from authorized vendors in Europe and has imported them into this country, thus by-passing Goebel's authorized distributors. [1] Goebel's complaint asserts that AII's importation of these Hummel figures violates those provisions of the copyright laws which prohibit the unauthorized **[**3]** distribution or importation of copyrighted goods. *17 U.S.C. §§ 106* and *602(a) (1982)*. [2] Goebel **[*765]** also charges that this unauthorized importation of Hummel figures constitutes a tortious interference with its exclusive contracts with its United States distributors. Goebel seeks an injunction barring AII from infringing its copyrights by importing the Hummel figures and from interfering with its contracts with its American distributors, and an accounting of the profits that AII earned as a result of its sales of Hummel figures.

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[1] AII operates in what has become known as the "gray market," in which legitimately produced goods are imported without the authorization of the trademark or copyright holder. A gray market is created when an arbitrageur takes advantage of a price difference between two markets by buying in the market where prices are lower and selling in the market where prices are higher. The Hummel figures at issue here are genuine items produced by Goebel; what Goebel seeks to challenge is AII's unauthorized importation of them into the country.

[2] *Section 106* provides, in pertinent part, that "the owner of a copyright under this title has the exclusive right to do and to authorize any of the following:

. . . .

"(3) to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership. . . ." *17 U.S.C. § 106 (1982)*.

Section 602(a) provides: "Importation into the United States, without the authority of the owner of the copyright under this title, of copies . . . of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies . . . under *section 106*. . . ." *17 U.S.C. § 602(a) (1982)*.

[4]** In its answer, AII raises several affirmative defenses, including that the Hummel figures are not new and original works and so should not be afforded protection under the copyright laws. AII also counterclaims for $5 million in damages ($15 million, if trebled) under *sections 1* and *2* of the Sherman Anti-Trust Act, **[***1020]** *15 U.S.C. §§ 1* and *2 (1982)*, and under the Wilson Tariff Act, *15 U.S.C. § 8 (1982)*, which prohibits restraints of trade involving imported goods. It is these antitrust claims that are the subject of the instant motion.

The thrust of AII's antitrust counterclaims is that Goebel is using its copyrights to limit the quantity of Hummel figures being imported into this country, thereby keeping prices artificially high and that this amounts to misuse of the copyright which would strip Goebel of the immunity from antitrust protection normally extended by the copyright laws. AII additionally charges that Goebel (or its American distributors, the counterclaim fails to specify which) engaged in a number of other anticompetitive practices such as requiring retailers to sell at or above published list prices; requiring retailers to purchase non-copyrighted goods in order to get copyrighted **[**5]** goods; requiring retailers to carry slow-moving items in order to get fast-selling ones; and prohibiting retailers who purchased Hummel figures from re-selling the merchandise to other retailers.

DISCUSSION

A. *AII's Lack of Standing Bars Its Antitrust Counterclaims*

In considering this litany of antitrust claims, the Court finds one fact to be inescapable: AII fails to allege that it has suffered any injury as a result of any of these practices. As a consequence, AII lacks standing to prosecute these counterclaims. [3] As the Supreme Court has explained: ***HN1***[] "Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)* (original emphasis). The plaintiff must show more than a mere violation of the antitrust laws, he must also show an injury that is a direct result of the anticompetitive behavior of the defendant. **[**6]** *Id*.

Even before the *Brunswick* decision, the Second Circuit had "committed itself" to the principle that ***HN3***[] before a plaintiff could make out a claim for antitrust injury, he "must be within the 'target area' **[**7]** of the alleged conspiracy, i.e., a person against whom the conspiracy was aimed, such as a competitor of the persons sued." *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971)*, *cert. denied*, *406 U.S. 930, 92* ***[*766]*** *S. Ct. 1776, 32 L. Ed. 2d 132 (1972)*. In *Calderone*, the court held that the landlord of a motion picture theater was not within the "target area" of the antitrust laws, and so did not have standing to bring suit against motion picture distributors, because all that was alleged was that the distributors had conspired with the tenant operator of the theater to book less popular films for the theater. The court reached this conclusion despite the fact that the lease between the plaintiff landlord and the tenant provided for nominal rentals plus a share of the revenues from the theater's ticket sales. *Id. at 1294*.

The *Calderone* court also noted that in the past, a patent owner was found to lack standing to sue for damages to its licensee, *Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678 (2d Cir. 1955)*, *cert. denied*, *350 U.S. 936, 100 L. Ed. 818, 76 S. Ct. 301 (1956)*, and that **[**8]** a franchisor lacked standing to bring suit for damages resulting from an antitrust conspiracy aimed at its franchisee, *Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183* (2d

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[3] On the question of which plaintiffs have standing to bring antitrust suits, Professors Areeda and Turner have written:

> ***HN2***[] In an effort to cope with the infinite numbers of possible plaintiffs the courts have required (1) that the plaintiffs be injured in fact, (2) that the injury be to his "business or property," (3) that the injury be of the type the antitrust laws were intended to prevent, (4) that there be significant causal connection between the defendant's violation and the plaintiff's injury, and (5) that the injury flow from that which makes the defendant's acts unlawful.

P. Areeda and D. Turner, II ***Antitrust Law*** para. 334a (1978). As is demonstrated below, AII fails to show that it suffered any injury, much less an injury of the sort the antitrust laws were intended to prevent.

Cir.), *cert. denied*, *401 U.S. 923, 27 L. Ed. 2d 826, 91 S. Ct. 877 (1971)*. *Calderone Enterprises Corp. v. United Artists Theater Circuit, supra, 454 F.2d at 1295*.

In those three cases, the plaintiff arguably suffered some loss, though the loss was indirect, flowing from a direct injury suffered by a tenant, licensee, or franchisee. AII, however, is in a much weaker position because it cannot even point to an indirect loss; none of the allegedly anticompetitive practices engaged in by Goebel were aimed at AII itself, or anyone in privity with AII. If anyone at all was affected by the alleged practices, it was the retailers who purchased the Hummel figures for resale and the consumers who ultimately purchased them.

Indeed, AII may actually have been benefited by Goebel's allegedly restrictive trade **[***1021]** practices. Assuming that all of the facts in AII's counterclaim are true, the prices of Hummel figures were artificially inflated to the point where it was possible for AII to purchase the figures in Europe, **[**9]** ship them to the United States and, even after paying the freight costs, still undersell the authorized Goebel distributors and make a profit. Thus, in the absence of the complained of practices, AII would never even have had the financial attraction to import the Hummel figures.

AII does not even allege that Goebel refused to deal with it, which Goebel would, in any event, be free to do. The Supreme Court recently affirmed the right of a manufacturer to refuse to do business with those who decline to comply with the manufacturer's conditions as long as there is no conspiracy between the manufacturer and other competing retailers to cut off any non-complying retailers. *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775 (1984)*. *See Note, Oligopolistic Interdependence: The FTC Adopts a "No Agreement" Standard to Attack Parallel Non-Collusive Practices*, *50 Brooklyn L. Rev. 255, 265-66* & n.59 (1984) (decisions not to deal, in the absence of some concrete showing of agreement, cannot be attacked under the antitrust laws).

AII does claim that it suffered a direct loss because, after the filing of Goebel's suit, it was "forced" to stop **[**10]** importing the Hummel figures it had already purchased in Europe and thereby incurred storage and other costs. If this is true, the Court notes that this injury is strictly self-inflicted. The decision to stop importing Hummel figures was not made in response to a court order, but was instead a unilateral decision on the part of AII. By no stretch of the imagination can Goebel be held liable for any loss that AII incurred as a result of its decision to cease imports.

For these reasons, the Court finds that AII lacks standing to bring suit for damages resulting from any anticompetitive trade practices that may have been engaged in by Goebel.

B. *The Lawsuit Itself Cannot Be Treated As An Anticompetitive Act*

AII also claims that the mere institution of the lawsuit by Goebel was itself **[*767]** an act in furtherance of the antitrust conspiracy. Aside from the fact that AII has no standing to challenge Goebel's trade practices, the Court notes that lawsuits have only rarely been treated as part of an antitrust conspiracy. ***HN4***[] Where the holder of a valid copyright brings suit in good faith and based on reasonable grounds, "whatever other anti-competitive activity the [copyright holder] **[**11]** may be guilty of, the [copyright laws] would seem to authorize him to bring such a non-frivolous suit." *Ansul Co. v. Uniroyal, Inc., 448 F.2d 872, 882 (2d Cir. 1971)*, *cert. denied*, *404 U.S. 1018, 30 L. Ed. 2d 666, 92 S. Ct. 680 (1972)*. *See also* *Rex Chainbelt, Inc. v. Harco Products, Inc., 512 F.2d 993* (9th Cir.), *cert. denied*, *423 U.S. 831, 46 L. Ed. 2d 49, 96 S. Ct. 52 (1975)*; *Sulmeyer v. Seven-Up Co., 411 F. Supp. 635 (S.D.N.Y. 1976)*.

In *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 674 F.2d 1252 (9th Cir. 1982)*, *modified*, *690 F.2d 1240*, *cert. denied*, *459 U.S. 1227, 103 S. Ct. 1234, 75 L. Ed. 2d 468 (1983)*, the court explained that ***HN5***[] the seeking of governmental action, whether legislative, judicial, or administrative, is immune from antitrust strictures under the *Noerr-Pennington* Doctrine, absent a showing that the action is sought without probable cause, or is instituted in bad faith. *Id. at 1262-63*.

Here, AII fails to make any showing that there was bad faith behind Goebel's commencement of the instant suit, or that there was any intent to harrass. Given the direct language of *section 602* of the copyright laws, *see supra* **[**12]** note 2, AII's claim that Goebel's suit was part of an antitrust conspiracy must also be dismissed.

C. *Goebel Did Not Obtain Its Copyrights By Fraud*

In another part of its counterclaim, AII alleges that Goebel obtained its copyright by perpetrating a fraud on the copyright office. The gist of this allegation is that the three-dimensional Hummel figures are based on the two dimensional drawings by Sister Hummel and that there may be some doubt as to the true ownership of her drawings. Because Goebel's Hummel figures are based on these drawings, AII's argument continues, there must also be some doubt as to the validity of Goebel's copyrights on the three-dimensional figures.

In pressing these arguments, AII ignores one of the basic principles of copyright law -- that ***HN6***[] derivative works can be copyrighted and that such works and their copyrights exist independently of the original works and whatever copyrights may protect them. *17 U.S.C. § 103(a) (1982)* (derivative works may be copyrighted). For example, under the predecessor to this section, the Second Circuit held that a collection of mezzotints of art works which were in the public domain could be copyrighted. *Alfred Bell &* **[**13]** *Co. v. Catalda* ***[***1022]*** *Fine Arts, Inc., 191 F.2d 99, 104 (2d Cir. 1951)*. [4]

Here, there is no question that the Hummel figures are derivative of the works of Sister Hummel, so the Court need not concern itself with the confused (and confusing) affidavit submitted in opposition to Goebel's motion to dismiss, which attempts to imply that there may be some doubts as to the true ownership of Sister Hummel's drawings. Even if the allegations in that affidavit were true, the artists in the employ of Goebel who translated the sketches into three-dimensional art works have added sufficient creative effort to make the Hummel figures protectible under the copyright laws. Therefore, as a matter of law, Goebel perpetrated no fraud on the copyright office by applying for copyrights on its Hummel figures.

CONCLUSION

For the reasons outlined above, AII lacks standing to bring its claims of antitrust **[**14]** violations against Goebel; therefore, Goebel's motion to dismiss those counterclaims must be, and hereby is, granted.

SO ORDERED.

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[4] Similarly, at oral argument, counsel for Goebel quite properly noted that a film based on a novel was copyrightable on its own.

Sedima, S.P.R.L. v. Imrex Co.

United States Court of Appeals for the Second Circuit

February 1, 1984, Argued ; July 25, 1984, Decided

No. 83-7965 -- August Term, 1983

Reporter

741 F.2d 482 *; 1984 U.S. App. LEXIS 20163 **; Fed. Sec. L. Rep. (CCH) P91,599

SEDIMA, S.P.R.L., Appellant, v. IMREX COMPANY, INC., GIDON ARMON and JACOB ARMON, Appellees

Prior History: [1]** Appeal from judgment by the United States District Court for the Eastern District of New York (Glasser, J.), dismissing claims under the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. §§ 1961-1968 (1982)* (RICO), for failure to allege a "RICO-type injury" in a complaint alleging business fraud.

Disposition: Affirmed for the reasons stated by the district court and for the additional reason that appellant's RICO claims were based on predicate acts listed in *18 U.S.C. § 1961(1)* in the absence of criminal convictions of such acts.

Core Terms

organized crime, racketeering, predicate act, enterprise, courts, indictable, cases, criminal conviction, civil remedy, violations, treble damages, chargeable, legislative history, racketeering activity, civil action, provisions, prior criminality, damages, prior conviction, standing requirement, anti trust law, punitive, Clayton Act, purposes, safeguards, antitrust, decisions, suits, preponderance of evidence, liberal construction

LexisNexis® Headnotes

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

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

HN1[] **Racketeer Influenced & Corrupt Organizations Act, Elements**

See *18 U.S.C.S. § 1962(c)*.

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

HN2[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

See *18 U.S.C.S. § 1962(d)*.

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

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

HN3[] Private Actions, Racketeer Influenced & Corrupt Organizations

See *18 U.S.C.S. § 1964*.

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

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

HN4[] Private Actions, Racketeer Influenced & Corrupt Organizations

18 U.S.C.S § 1964(c) states that anyone injured by reason of a violation of *18 U.S.C.S. § 1962* is entitled to treble damages. *18 U.S.C.S. § 1962* violations include conducting enterprises through a pattern of racketeering.

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

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

HN5[] Racketeer Influenced & Corrupt Organizations Act, Elements

A pattern of racketeering is defined by *18 U.S.C.S. § 1961(5)* as two or more acts of racketeering occurring within a given time.

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

HN6[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

Acts of racketeering are defined by *18 U.S.C.S. § 1961(1)* as any of a number of acts chargeable under state law, acts indictable under a variety of federal laws, or an offense under the federal securities law.

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

HN7[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

See *18 U.S.C.S. § 1961*.

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

HN8[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

See *18 U.S.C.S. § 1961(5)*.

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

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

HN9[] Racketeer Influenced & Corrupt Organizations, Remedies

The term "enterprise," as used in the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, encompasses both legitimate and illegitimate enterprises, and that an enterprise must be an entity separate and apart from the pattern of activity in which it engages. However, as a general proposition, the civil remedies could be useful in eradicating organized crime from the social fabric, whether the enterprise be ostensibly legitimate or admittedly criminal. The aim is to divest the association of the fruits of its ill-gotten gains. It is untenable that the existence of the civil remedies limits the scope of this criminal provision.

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

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

HN10[] Private Actions, Racketeer Influenced & Corrupt Organizations

The "by reason of" language in *18 U.S.C.S. § 1964(c)* is intended to limit standing to those injured by a racketeering injury, by an injury of the type the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, was designed to prevent.

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

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

HN11[] Racketeer Influenced & Corrupt Organizations Act, Elements

The Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961 et seq.*, is intended to address the infiltration of legitimate business by organized crime.

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

HN12[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

18 U.S.C.S. § 1964(a) gives the district courts jurisdiction to prevent and restrain violations of 18 U.S.C.S. § 1962. It is not a general grant of jurisdiction and does not relate to § 1964(c). 18 U.S.C.S § 1964(b) permits the Attorney General to institute proceedings under the section. It was drawn when § 1964(c) was not in the statute and relates back to § 1964(a).

Criminal Law & Procedure > ... > Procedures > Return of Indictments > General Overview

Criminal Law & Procedure > ... > Grand Juries > Procedures > General Overview

HN13[] Procedures, Return of Indictments

Courts do not traditionally look at a given set of facts, proved by a preponderance of the evidence only, and say that these facts make out acts which are "indictable" or "chargeable." In the case of indictments that is the purpose of grand juries.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Grand Jury Requirement

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

Criminal Law & Procedure > ... > Grand Juries > Indictments > Right to Indictment by Grand Jury

HN14[] Procedural Due Process, Grand Jury Requirement

U.S. Const. amend. V provides that no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury.

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

HN15[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

The criminality of the predicate acts to be proved before a private Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. § 1961 et seq., action goes forward. A criminal conviction must precede a private civil suit.

Counsel: Franklyn H. Snitow, New York, New York (William H. Pauley, III, Keith S. Orenstein, Orenstein, Snitow & Pauley, New York, New York, of Counsel), for Appellant.

Richard Eisenberg, Garden City, New York (Shaw, Goldman, Licitra, Levine & Weinberg, Garden City, New York, of Counsel), for Appellees.

Judges: Lumbard, Oakes, and Cardamone, Circuit Judge. Cardamone, Circuit Judge, dissenting.

Opinion by: OAKES

Opinion

[*484] OAKES, Circuit Judge

This is another in the new wave of cases involving "private civil RICO" -- the private right of action found in the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. §§ 1961-1968 (1982)*. Appeal **[**2]** is from a judgment, designated as final pursuant to *Fed. R. Civ. P. 54(b)*, of the United States District Court for the Eastern District of New York, I. Leo Glasser, Judge, dismissing the RICO claims in appellant's amended complaint. *574 F. Supp. 963*. We affirm.

Facts

This case involves business fraud. Plaintiff-appellant Sedima S.P.R.L. (Sedima) is a Belgian corporation in the business of importing and exporting to and from Belgium electronic, mechanical and hydraulic parts manufactured in the United States and abroad. Appellee Imrex is an American corporation engaged in exporting aircraft and aircraft-related electronic component parts. Appellees Jacob Armon and Gidon Armon are officers of Imrex.

In 1979, Sedima and Imrex entered into a joint venture to provide electronic component parts for a NATO subcontractor in Belgium. Imrex obtained the parts and shipped them to Europe pursuant to orders secured by Sedima. Sedima allegedly secured approximately $8.5 million worth of orders to be placed through Imrex.

Sedima alleges that Imrex and the Armons fraudulently prepared purchase orders, invoices and credit memoranda for Sedima that they knew falsely overstated purchase prices, **[**3]** attendant costs and shipping and financing charges of the parts purchased on behalf of the joint venture. The complaint further alleges that Imrex received monies belonging to the joint venture pursuant to these fraudulent purchase orders, invoices and credit memoranda. In addition to counts alleging breach of contract, breach of fiduciary duty, unjust enrichment, breach of the joint venture agreement, conversion, breach of a constructive trust and a cause of action based on quasi contract, three of the counts allege violations of RICO, 18 U.S.C. *§ 1962(c)*. [1]

[*485] Two of the RICO counts allege that the fraudulent purchase **[**4]** orders, invoices and credit memoranda constitute a pattern of racketeering activity, the predicate acts being separate and numerous violations of the Mail Fraud Act, *18 U.S.C. § 1341 (1982)* and the Wire Fraud Act, *18 U.S.C. § 1343 (1982)*. The third count charges a RICO conspiracy under *18 U.S.C. § 1962(c)* and *(d)*. [2] Sedima seeks treble damages and reasonable attorneys' fees under these RICO counts. *18 U.S.C. § 1964(c)*. [3]

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[1] *18 U.S.C. § 1962(c)* provides:

> (c) ***HN1***[] 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.

[2] *18 U.S.C. § 1962(d)* provides:

> (d) ***HN2***[] It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

[3] *18 U.S.C. § 1964* provides:

> *§ 1964*. ***HN3***[] Civil remedies
>
> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of *section 1962* of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

[5]** *The District Court Decision*

Judge Glasser dismissed the RICO counts on the basis that there was a failure to allege a RICO-type injury. In so holding, he relied on a series of decisions, discussed *infra*, which have stated that in order for an injury to be "by reason of a violation of *section 1962*," as required by *section 1964(c)*, something more than or different from injury that would result from the predicate acts alone must be shown by the plaintiff. *Bankers Trust Co. v. Feldesman, 566 F. Supp. 1235, 1240-42 (S.D.N.Y. 1983)*; *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co., 527 F. Supp. 206, 206-09 (E.D. Mich. 1981)*; *North Barrington Development, Inc. v. Fanslow, 547 F. Supp. 207, 210-11 (N.D. Ill. 1980)*.

The district court adopted the reasoning of two related lines of cases. One series of cases, relying on an analogy between RICO and the antitrust laws, requires that a RICO plaintiff allege a "competitive injury," that is, an injury to business or property stemming from competitive harm. *North Barrington, 547 F. Supp. at 210-11*, *Harper v. New Japan Securities International, Inc., 545 F. Supp. 1002, 1007 (C.D. Cal. 1982)*; *Feldesman, **[**6]** 566 F. Supp. at 1241*. The other series of cases requires plaintiffs to allege a "racketeering enterprise injury," an injury that occurs where "a civil RICO defendant's ability to harm the plaintiff is enhanced by the infusion of money from a pattern of racketeering acts into the enterprise." *Landmark Savings, 527 F. Supp. at 209*, relying upon Note, *Reading the Enterprise Element Back Into RICO: Sections 1962 and 1964(c)*, 76 NW. U.L. Rev. 100, 125-33 (1981). Judge Glasser found no allegation of any injury in this case apart from that which would result directly from the alleged predicate acts of mail fraud and wire fraud, and accordingly dismissed the RICO counts.

Background

The problem addressed by the district court, which has received much attention **[*486]** both in the courts and among commentators, is that a broad reading of the civil RICO provisions would allow plaintiffs to bring suit in federal court [4] under RICO nearly anytime they could allege injury caused by two acts which are violations of any one of the predicate acts listed in RICO. Since these predicate acts include a great many state law violations, federal securities law violations, and federal **[**7]** mail and wire fraud violations, an expansive interpretation of RICO allows plaintiffs to bring into federal courts many claims formerly subject only to state jurisdiction, and to bypass remedial schemes created by Congress, particularly in the securities area. The fact that successful RICO plaintiffs may obtain treble damages and attorneys' fees provides, of course, additional incentives to plaintiffs to categorize their actions as RICO claims.

Section 1964(c) ***HN4***[] states that anyone "injured" "by reason of" a violation of *section 1962* is entitled to treble damages. *Section 1962* "violations" include conducting "enterprises" "through a pattern of racketeering"; ***HN5***[] a "pattern of racketeering" is defined by *section 1961(5)* as two **[**8]** or more "acts of racketeering" occurring within a given time. ***HN6***[] "Acts of racketeering" are defined by *section 1961(1)*, inter alia, as any of a number of acts "chargeable under State law," acts "indictable" under a variety of federal laws, or an "offense" under the federal

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(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) 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 threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

[4] Recently at least one state court has exercised jurisdiction over a federal civil RICO claim. *See Greenview Trading Co. v. Hershman & Leicher P.C.*, N.Y.L.J. Mar. 13, 1984, at 5, col. 3 (N.Y. Sup. Ct.); Flaherty, *Two States Lay Claim to RICO*, Nat'l L. J., May 7, 1984, at 3, col. 1.

securities law. Thus, ignoring for the moment some troubling ambiguities, the statute on its surface seems to allow private suits for people injured by defendants who have committed two so-called predicate acts.

Given this language it is not surprising that there has been an explosion of civil RICO litigation. Only a few cases including civil RICO claims were published in the decade following passage of the Act in 1970; [5] **[**10]** a law review note asserts that courts published only two opinions dealing with civil RICO by 1978 and only thirteen by early 1981. Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101 n.7 (1982). There are now over 100 published decisions. Siegel, *"RICO" Running Amok in Board Rooms*, L.A. Times, Feb. 15, 1984, at 1. This development has resulted, no doubt, from the bar's increased awareness of the statute, spawned, perhaps, by an influential law **[**9]** review article coauthored by Professor G. Robert Blakey and Brian Gettings which proposed a broad reading of the statute. Professor Blakey's position as chief counsel to the Senate subcommittee which proposed RICO has evidently given his expansive views of the statute special credence. [6] A veritable wave of commentaries and cases making civil claims along lines suggested by Blakey and Gettings and others has occurred. We are told that there is now indeed a "RICO bar" which specializes in bringing or defending **[*487]** RICO claims. And members of that "bar" have found, as would appear obvious, that the stigma associated with the label "racketeering" is a good settlement weapon. [7] Indeed, a current adage is said to be that "RICO provides the only *civil* action where the defendant pleads not guilty." Bridges, *supra* note 6 at 44.

The problem with civil RICO is not the explosion of federal litigation. Congress is of course free to create federal causes of action for civil litigants within constitutional limits not necessarily **[**11]** in question here. *But see infra* notes 24, 49. But there is simply no evidence that in creating RICO, Congress intended to create the broad civil cause of action that the reading of the statute given by its proponents would allow.

The Racketeer Influenced and Corrupt Organizations Act, as its very name implies, was designed to combat organized crime. The damage done by organized crime was the subject of much public concern and congressional activity throughout the 1950s and 1960s. [8] RICO was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. Law 91-452 (1970), an act designed "to seek the eradication of organized crime in the United States . . . by providing new remedies to deal with unlawful activities of those engaged in organized crime." 116 Cong. Rec. 35191 (1970).

Title IX itself was designed "to protect legitimate businesses against the syndicate's **[**12]** infiltration." [9] It was an attempt to deal with organized crime as an economic phenomenon. In so doing, its enforcement provisions were modeled after the enforcement provisions of the antitrust laws. *See, e.g., infra* text accompanying note 26.

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[5] This is true though there were some law review commentaries dealing with the subject, particularly in reference to the Seventh Circuit's *United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974)*. *See* Note, *Equitable Law Enforcement and the Organized Crime Control Act of 1970 -- United States v. Cappetto*, 25 DePaul L. Rev. 508 (1976); Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity,"* 124 U. Pa. L. Rev. 192 (1975).

[6] Blakey & Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts -- Criminal and Civil Remedies*, 53 Temp. L.Q. 1009 (1980).

Professor Blakey was the chief counsel of the Senate Subcommittee on Criminal Laws and Procedures in 1969-1970 when, as he puts it, "the Organized Crime Control Act of 1970 . . . was processed." *See id.* at 1009 n.*. His writings are listed in Bridges, *Private RICO Litigation Based on "Fraud in the Sale of Securities"*, *18 Ga. L. Rev. 43, 46 n.20 (1983)*; *but see id.* 76-77 n.165; *Kaushal v. State Bank of India, 556 F. Supp. 576, 581 n.16, 582 n.17 (N.D. Ill. 1983)*. *See also infra* note 20.

[7] *See* Bridges, *supra* note 6, at 47 & nn.27-28 and sources cited therein; Granelli, *Playing for Keeps with State RICO*, Nat'l L.J., July 5, 1982, at 1, col. 4; at 8, col. 1; *RICO the Enforcer*, Newsweek, Aug. 20, 1979, at 82.

[8] *See* Bradley, *Racketeers, Congress and the Courts: An Analysis of RICO*, 65 Iowa L. Rev. 837, 837-39 & nn.4, 9-15 (1980).

[9] *Subcomm. No. 5 of the House Comm. on the Judiciary, Hearings on S. 30, and Related Proposals, Relating to the Control of Organized Crime in the United States*, [hereinafter "House Hearings"] 91st Cong., 2d Sess. 157 (1970) (Statement of Attorney General Mitchell). *See also* 116 Cong. Rec. 35200 (1970) ("Title IX . . . is aimed at keeping organized crime out of legitimate

Given the general purpose of the RICO legislation, the uses to which private civil RICO has been put have been extraordinary, if not outrageous. *Section 1964(c)* has not proved particularly useful for generating **[**13]** treble damage actions against mobsters by victimized business people. It has, instead, led to claims against such respected and legitimate "enterprises" as the American Express Company, E. F. Hutton & Co., Lloyd's of London, Bear Stearns & Co., and Merrill Lynch, [10] to name a few defendants labeled as "racketeers" in civil RICO claims resulting in published decisions.

Though there are a few reported cases where RICO has been used against reputed mobsters [11] or at least against organized criminals, [12] it is being far more frequently used for purposes totally unrelated to its expressed purpose. It has become a **[**14]** standard practice, for example, to insert a RICO claim in litigation involving tender offers. [13] It has become commonly used, as here, in typical business fraud cases, [14] in **[*488]** so-called "garden variety" securities fraud cases, [15] and in bank fraud cases. [16]

RICO, then, presents a classic case of a statute whose ambiguous language needs to be construed in light **[**15]** of Congress's purpose in enacting it. [17] The need to discern legislative intent is particularly important when, as here, crucial statutory language is drawn *in haec verba* from another statute where it has a peculiar technical meaning. The law itself calls for reference to legislative intent since the liberal construction clause states that the text should be construed to "effectuate its remedial purpose." We are, then, obliged to study the legislative history of RICO and particularly of *section 1964(c)* to inform our reading of that statute and, in particular, of the scope of the private civil remedy created by the Congress.

[16]** *Legislative History*

The legislative history of the Organized Crime Control Act of 1970 gives little hint of the intended scope of private action under civil RICO. While the Act for the most part originated in the Senate, the civil provision permitting suit by private persons, *18 U.S.C. § 1964(c)*, originated in the House. [18] Consequently it is not mentioned in the Senate

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businesses through the use of both criminal and civil penalties.") (Statement of Congressman St. Germain); Bradley, *supra* note 8, at 840-42 (review of legislative history).

[10] *Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231 (S.D.N.Y. 1983)*; *Hokama v. E.F. Hutton & Co., 566 F. Supp. 636 (C.D. Cal. 1983)*; *Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352 (E.D. Mich. 1983)*; *Taylor v. Bear Stearns & Co., 572 F. Supp. 667 (N.D. Ga. 1983)*; *Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 570 F. Supp. 667 (W.D. Mich. 1983)*.

[11] *E.g., Hellenic Lines, Ltd. v. O'Hearn, 523 F. Supp. 244 (S.D.N.Y. 1981)*.

[12] *Beth Israel Medical Center v. Smith, 576 F. Supp. 1061 (S.D.N.Y. 1983)*.

[13] *E.g., In re Action Indus. Tender Offer, 572 F. Supp. 846 (E.D. Va. 1983)*.

[14] *E.g., Adair v. Hunt Int'l Resources Co., 526 F. Supp. 736 (N.D. Ill. 1981)*.

[15] *E.g., Trane Co. v. O'Connor Secs., 561 F. Supp. 301* (S.D.N.Y.), *vacated as moot*, *718 F.2d 26 (1983)*.

[16] *E.g., Kleiner v. First Nat'l Bank of Atlanta, 526 F. Supp. 1019 (N.D. Ga. 1981)*, *overruled, Morosani v. First Nat'l Bank of Atlanta, 703 F.2d 1220 (11th Cir. 1983)*.

[17] *Holy Trinity Church v. United States, 143 U.S. 457, 459, 36 L. Ed. 226, 12 S. Ct. 511 (1892)*. *See also United Steelworkers of America v. Weber, 443 U.S. 193, 201-02, 61 L. Ed. 2d 480, 99 S. Ct. 2721 (1979)*; Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 528 (1947). *See also United States v. American Trucking Ass'ns, 310 U.S. 534, 543, 84 L. Ed. 1345, 60 S. Ct. 1059 (1940)* ("Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this court has followed that purpose, rather than the literal words" (citing *Ozawa v. United States, 260 U.S. 178, 194, 67 L. Ed. 199, 43 S. Ct. 65 (1922))*).

Report, although the other **[*489]** three subsections of *section 1964* that were included in the Senate bill are discussed. This fact, we believe, is critical to consideration of the legislation. This is true because the "civil approach" discussed in the report of the Senate Judiciary Committee accompanying S. 30, Rep. No. 91-617, 91st Cong., 1st Sess. 80-83 (1969), refers solely to the Government's right to seek and obtain injunctions to prevent and restrain violations of *section 1962* through divestment by individuals of their interest in enterprises, imposing restraints on future activities or investments, or ordering dissolution or reorganization of any enterprise. *Id.* at 24. Consequently any comments in the Senate Report analogizing to the antitrust laws, referring to the American Bar Association **[**17]** position in the Senate hearings, or otherwise pertaining to the Senate's "civil approach" do not pertain to the scope, impact, or purpose of the private treble damage remedy inserted later by the House of Representatives.[19]

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[18] RICO had a long legislative lineage. The Organized Crime Control Act of 1970 was derived from S. 30, 91st Cong., 1st Sess., 115 Cong. Rec. 769 (1969). Title IX of the Act, RICO, was added to S. 30 by the Senate. The substance of Title IX was contained in an earlier Senate bill, S. 1861, 91st Cong., 1st Sess., 115 Cong. Rec. 9568-71 (1969). Neither S. 1861 nor S. 30 contained a private civil cause of action. An earlier predecessor of RICO, S. 1623, 91st Cong., 1st Sess., 115 Cong. Rec. 6995-96 (1969), did contain a private civil cause of action based closely on the Clayton Act, providing explicitly for injunctive relief as well as for treble damages. S.1623 §§ 3(c), 4(a). That bill was itself patterned on two earlier Senate bills, S. 2048 and S. 2049, 90th Cong., 1st Sess. (1967), both of which contained civil private actions similar to that in S. 1623. The Senate Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary replaced S. 1623 with S. 1861 apparently in part because S. 1861 provided broader governmental civil relief, such as the investigative demand, and was in other ways a more comprehensive bill. *See Hearings on Measures Relating to Organized Crime Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary*, 91st Cong., 1st Sess. 387 (1969) [hereinafter, "Hearings on S. 30"]; Bradley, *supra* note 8, at 841-42 & nn.27-28. There is no discussion in the legislative history indicating why S. 1861 did not provide a private cause of action. Professor Blakey, then Chief Counsel to the Senate Subcommittee, subsequently has written that the private civil section was dropped "in an effort to streamline [the bill] and sidestep a variety of complex legal issues, as well as possible political problems in trying to process legislation that expressly created a variety of both public and private remedies." Blakey & Gettings, *supra* note 6, at 1017-18.

There were also a number of House predecessors to RICO which paralleled S. 30. *See* H.R. 19215, 91st Cong., 2d Sess., 116 Cong. Rec. 31914, H.R. 19586, 91st Cong., 2d Sess., 116 Cong. Rec. 35242 (1970). The private cause of action section eventually inserted by the House was taken from H.R. 19586. H.R. 19215 included a much more complete private cause of action section, explicitly allowing for private party injunctive relief. *See* Blakey & Gettings, *supra* note 6, at 1020.

While one may or may not agree with Blakey & Gettings that it is "unfortunate" that H.R. 19215 was not used, *id.*, it is significant that it was not. The more general H.R. 19586 was obviously less controversial, less likely to promote debate and hence more likely to result in passage of the bill.

All of the amendments made by the House to S. 30 limited its scope, with the exception of the inclusion of a private remedy.

[19] **[**18]** Failure to recognize this crucial point has led a number of courts and commentators astray. For example, the original Eighth Circuit panel in *Bennett v. Berg, 685 F.2d 1053, 1058 (8th Cir. 1982)*, *aff'd en banc*, *710 F.2d 1361*, *cert. denied sub nom.* ***Prudential Ins. Co. of America v. Bennett, 464 U.S. 1008, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983)***, states that "*section 1964(c)* provides a private cause of action modelled on the antitrust laws" and then for its first citation to this effect refers to S. Rep. No. 617, 80-82, 125, 160 (1969). Yet every statement made in that Senate Report relates exclusively to civil remedies *not* including a private civil right of action, but only concerning the government's right to seek an injunction or forfeiture under the provisions of section 1963(a). This is not to say, of course, that the House insertion of the private treble damage action was not based on an analog to the antitrust laws, for it is obviously somewhat patterned in part after *section 4(a)* of the Clayton Act. *15 U.S.C. § 15(a) (1982)*. Indeed, the testimony of Edward L. Wright, then ABA president, in the House hearings on S. 30, the absolutely critical testimony leading to the inclusion of *section 1964(c)* in the House version of the bill, says only:

> In the portion seeking to add a proposed *Section 1964*, "Civil Remedies," we would recommend an amendment to include the additional civil remedy of authorizing private damage suits based upon the concept of *Section 4* of the Clayton Act. *Section 4* provides as follows: [quoting *15 U.S.C. § 4*].

House Hearings, *supra* note 9, at 543-44.

[19]** Ultimately the Senate accepted the House amendment adding subsection (c). Apparently, as the session was about to end, the Senate did not ask for a conference.

The legislative history on the House side is not much more instructive. The decision to add a civil private damages provision was made by a House subcommittee at the behest of Representative Sam Steiger and the American Bar Association. [20] **[**21]** The addition **[*490]** was not considered an important one, a remarkable fact which in itself indicates that Congress did not intend the section to have the extraordinary impact claimed for it. Indeed, when the Judiciary Committee initially introduced the amended bill, it did not even announce to the House that it had made the addition. [21] It was only in the middle of the second and last day of House discussion of the bill that a member of the committee noted that

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[20] House Hearings, *supra* note 9, at 520 (Proposal of Rep. Steiger), 548 (Proposal of the American Bar Association). Both proposals were patterned on the private remedy found in the Clayton Act. Significantly Steiger's proposal, like those in the rejected Senate bills, provided explicitly for a private injunctive remedy. *Id. at 521*. The legislative history is silent as to why the subcommittee rejected this language and explicitly created only the private action for treble damages which was eventually enacted as *§ 1964(c)*. The adopted statutory language was drawn from H.R. 19586, 91st Cong., 2d Sess. 56 (1970), one of the two House bills which paralleled S. 30. In choosing H.R. 19586 over H.R. 19215, 91st Cong., 2d Sess. (1970), the House explicitly rejected a private injunctive relief section. *See supra* note 18.

Later, on the House floor, an amendment also offered by Representative Steiger to provide private injunctive relief was withdrawn before the House could vote on it. 116 Cong. Rec. 35346 (1969). In the next term of the Senate the same amendment was proposed as a bill, S. 16, 92nd Cong., 1st Sess. (1971), as a way to "expand the available civil remedies" since "now only the United States can institute injunctive proceedings." *See Victims of Crime, Hearing before the Subcom. on Criminal Laws and Procedures of the Senate Com. of the Judiciary*, 92nd Cong., 1st Sess. 158 (1972) (Statement of Richard Velde, Associate Administrator, Law Enforcement Assistance Administration) [hereinafter "Victims of Crime"]. While post-enactment legislative history is not by any means conclusive, it cannot merely be ignored. *North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 530-35, 72 L. Ed. 2d 299, 102 S. Ct. 1912 (1982)*. It thus seems altogether likely that *§ 1964(c)* as it now stands was not intended to provide private parties injunctive relief. *But see* *Aetna Cas. and Sur. Co. v. Liebowitz, 570 F. Supp. 908, 909-10 (E.D.N.Y. 1983)* (injunctive relief granted), *aff'd on other grounds*, *730 F.2d 905*, slip op. at 2510 (2d Cir. 1984). Two other courts of appeals have reserved judgment on this issue. *Dan River, Inc. v. Icahn, 701 F.2d 278, 290 (4th Cir. 1983)*; *Bennett v. Berg, 685 F.2d at 1064*.

Professor Blakey also disagrees with this conclusion, making a rather remarkable argument based upon the use of the word "and" in *§ 1964(c)*, as follows. He states:

> A Congressional grant of the right to sue in the absence of statutory limitations, conveys the availability of all necessary and appropriate relief. *See, e.g.,* *Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239, 24 L. Ed. 2d 386, 90 S. Ct. 400 (1969)*; *Bell v. Hood, 327 U.S. 678, 684, 90 L. Ed. 939, 66 S. Ct. 773 (1946)*. Significantly, the treble damage clause of *§ 1964(c)* is preceded by "and" and not "to." *See* *National R. R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 458, 38 L. Ed. 2d 646, 94 S. Ct. 690 (1974)* (grant of right in one form implies denial of right in another). Consequently, the availability of comprehensive civil relief should prove of particular significance, for example, in the area of government fraud at the state and local level.

Blakey & Gettings, *supra* note 6, at 1038 n.133.

We do not find it significant that the word "and" is used in *§ 1964(c)*, especially since its treble damage antitrust analog, *§ 4* of the Clayton Act, *15 U.S.C. § 15(a) (1982)*, uses the same word, "and," while a different specific statutory provision of that act expressly gives a private antitrust plaintiff the right to seek an injunction (except when a common carrier is a defendant). Clayton Act § 16, *15 U.S.C. § 26 (1982)*. We endorse Judge Shadur's comment that an argument based on the word "and" is "bizarre and wholly unconvincing as a matter of plain English." *Kaushal v. State Bank of India, 556 F. Supp. 576, 582 & n.17 (N.D. Ill. 1983)*. Indeed, the Supreme Court has explicitly held that the parallel language of *§ 4* of the Clayton Act *precluded* private injunctive relief. *Paine Lumber Co. v. Neal, 244 U.S. 459, 61 L. Ed. 1256, 37 S. Ct. 718 (1917)*; *Minnesota v. Northern Secs. Co., 194 U.S. 48, 48 L. Ed. 870, 24 S. Ct. 598 (1904)*.

[21] One Judiciary Committee member indicated on the floor that three changes had been made from the Senate bill "merit[ing] discussion," but did not include the addition of the private cause of action among these three. 116 Cong. Rec. 35197-98 (1970) (remarks of Congressman McCulloch).

> at the suggestion of the gentleman from Arizona (Mr. Steiger) and also the American Bar Association and others, the committee has provided that private persons injured by reason of a violation of the title may recover treble damages in Federal courts -- another example of the antitrust remedy being adapted for use **[**20]** against organized criminality. [22]

This brief remark is one of only three statements regarding section 1964(c) made on the House Floor. *See supra* note 22.

[22]** The House subcommittee hearings [23] are not much more helpful. Although they contain useful analysis of the purposes for creating civil remedies for the government, [24] **[**23]** and generally for applying antitrust **[*491]** type civil remedies in the fight against organized crime, [25] most of this discussion took place before the private remedy was added to the bill. Thus, although there was testimony that section 1964 was too broad, [26] none of that testimony was addressed to the private cause of action provision. The only discussion accompanying the introduction of the private action came in a statement by Representative Steiger, who wrote that such an amendment would enable "those who have been wronged by organized crime [to] at least be given access to a legal remedy" and that it would also "enhance the effectiveness of Title IX's prohibitions." [27]

Nor do the House's broad pronouncements on the purposes of Title IX or on the meaning of its other sections reveal Congress' intent in promulgating the private action. The House Report in its introductory section refers, inter alia, to the purpose of "proscribing the operation of any enterprise engaged in interstate commerce through a 'pattern' o[f] 'racketeering activity.'" H. Rep. No. 91-1549, 91st Cong., 2d Sess. 35, *reprinted in* 1970 U.S. Code Cong. & Ad. News 4007, 4010 (1970). It states that "'racketeering activity' is defined in terms of specific State and Federal criminal statutes." *Id.* It adds that "the title, as amended, also authorizes civil treble damage suits on the part of private **[**24]** parties who are injured." *Id.*

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[22] 116 Cong. Rec. 35295 (1970) (remarks of Congressman Poff). Beyond this cursory statement, there are only two indications that the House was even made aware of the fact that the bill included a private cause of action. First there was Representative Steiger's amendment, quickly withdrawn, to add an injunctive remedy to the private action. *See* discussion *supra* note 20. More significantly, Representative (now Judge) Mikva offered an amendment providing for treble damages for defendants who became subjects of frivolous suits under the section. *See* 116 Cong. Rec. 35342-43 (1970). The evident purpose of this amendment, which was quickly defeated, *id.*, was to point out the dangerous overbreadth of the section, which Mikva claimed was a "dangerous tool . . . given to a competitor who wants to go after somebody who is competing too vigorously against him." *Id.* at 35342. We decline to infer from Representative Mikva's comments the conclusion that Congress intended to promulgate a statute as broad as the one he feared it was passing. Deriving legislative intent from a dissenting congressman's "parade of horrors" speeches in opposition is a notoriously dubious practice.

[23] House Hearings, *supra* note 9.

[24] *Id. at 106* (Statement of Sen. McClellan). It was thought wise to provide the government with civil remedies as a way around the "one-sided" procedural protections afforded criminal defendants in American courts. *Id.* As to the constitutional permissibility of avoiding the procedural protections built into the criminal law by labelling a proceeding "civil," *see* Note, *Criminal Law -- Enforcing Criminal Laws Through Civil Proceedings: Section 1964 of the Organized Crime Control Act of 1970*, *18 U.S.C. § 1964 (1970)*, 53 Texas L. Rev. 1055 (1975); Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity*," 124 U. Pa. L. Rev. 192 (1975); *see also* Comment, *Constitutional Issues Raised by the Civil-Criminal Dichotomy of the Maine OUI Law*, 35 Me. L. Rev. 385 (1983). Civil remedies were also found to be a useful way to expand the nature of relief available to the federal prosecutors. House Hearings, *supra* note 9, at 107.

[25] *See* House Hearings, *supra* note 9, at 147-49 (report of the ABA).

[26] In particular, representatives of the Association of the Bar of the City of New York and of the American Civil Liberties Union objected to the scope of Title IX. *See* House Hearings, *supra* note 9, at 327-31 (Ass'n of the Bar report), 499-518 (statement and testimony of ACLU).

[27] *Id. at 520*.

The section by section explanation is hardly more helpful. Referring to *section 1961(1)* [28] **[**26]** which defines "racketeering activity," the report says that that term is defined

> to include murder, kidnaping, gambling, arson, robbery, bribery, extortion, narcotic violations, counterfeiting, usury, mail, bankruptcy, wire and securities fraud, and obstruction of justice. State offenses are included by generic designation. Federal offenses are included by specific reference. The term "racketeering **[*492]** activity" is a key statutory term. Under *section 1962* below, racketeering activity is one of three prerequisites to commission of an offense. If there is no racketeering activity, or no collection of an "unlawful debt" there can be no violation of the provisions of this title.

Id. at 56, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4032. The House Report defines "pattern of racketeering activity" only by referring to the *section 1961(5)* [29] definition that it is the equivalent of at least two acts of racketeering activity occurring within a given time period. *Id.* The report deals with *section 1962* by saying that it **[**25]** "establishes a threefold prohibition aimed at stopping the infiltration of racketeers into legitimate organizations," noting that subsection (c) "prohibits the conduct of the enterprise through the prohibited pattern of activity or collection of debt." *Id. at 57*, *reprinted in* 1970 U.S. Code Cong. & Ad. News at 4033. In reference to the civil remedies provided in *section 1964(c)* for the violation of *section 1962*, the report merely paraphrases the language of *section 1964(c)*.

The most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible implications of *section 1964(c)*. If Congress had intended to provide a federal forum for plaintiffs for so many common law wrongs, it would at least have discussed it. If Congress had intended to provide an alternate and more attractive scheme for private parties to remedy violations of the securities laws -- involving decades of statutes, regulations, commentaries, and jurisprudence -- it would at least have mentioned it. The House

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[28] *18 U.S.C. § 1961* provides in part:

> ***HN7***[] As used in this chapter --
>
> (1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title *18, United States Code: Section 201* (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), *section 1341* (relating to mail fraud), *section 1343* (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title *29, United States Code, section 186* (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds, or (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States. . . .

[29] *18 U.S.C. § 1961(5)* provides:

> (5) ***HN8***[] "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. . . .

Judiciary Committee, which authored the provision, would at least have mentioned the amendment to the full House as a major change in its report had there been any inkling of its **[**27]** possible implications.

The clanging silence of the legislative history, coupled with the section's use in areas far afield from the battle against organized crime, has led some, though concededly not all, courts to read various limitations into the act in order to conform its use to that thought to best effectuate the congressional purpose.

Four such limitations have been widely considered: (1) whether RICO requires some nexus between the challenged activity and organized crime; (2) whether the injury complained of must result from "enterprise" involvement in the racketeering, rather than directly from the activity itself; (3) whether plaintiffs must allege a "competitive" or "racketeering injury"; and (4) whether there must be criminal convictions for the predicate acts underlying a civil RICO suit.

Even a cursory review of the case law indicates that there is simply no consensus on what RICO requires. While some courts have held that only those activities with some connection to organized crime may be the subject of civil RICO suits, [30] others, including this circuit, [31] have rejected this limitation. [32] **[**29]** Similarly, although **[*493]** some courts have read RICO to require **[**28]** a showing of "competitive" [33] or "racketeering" [34] injury, more have held against imposing such limitations. [35] Finally, courts have split on whether there must be criminal convictions for the predicate acts prior to institution of a private civil RICO suit. *See* cases cited at *infra* note 42.

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[30] *E.g.,* *Hokama v. E.F. Hutton & Co., 566 F. Supp. 636, 643 (C.D. Cal. 1983)*; *Waterman S. S. Corp. v. Avondale Shipyards, Inc., 527 F. Supp. 256, 260 (E. D. La. 1981)*. *Adair v. Hunt Int'l Resources Corp., 526 F. Supp. 736, 747 (N.D. Ill. 1981)*, *Noonan v. Granville-Smith, 537 F. Supp. 23, 29 (S.D.N.Y. 1981)*; *Barr v. WUI/TAS, Inc., 66 F.R.D. 109, 112-13 (S.D.N.Y. 1975)*.

[31] *Moss v. Morgan Stanley, Inc., 719 F.2d 5, 21 (2d Cir. 1983)*, *cert. denied sub nom.* ***Moss v. Newman, 465 U.S. 1025, 104 S. Ct. 1280, 79 L. Ed. 2d 684 (1984)***.

[32] *E.g.,* *Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1287 n.6 (7th Cir. 1983)*; *Schact v. Brown, 711 F.2d 1343, 1356* (7th Cir.), *cert. denied*, ***464 U.S. 1002, 104 S. Ct. 508, 78 L. Ed. 2d 698 (1983)***; *Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231, 1239 (S.D.N.Y. 1983)*; *Noland v. Gurley, 566 F. Supp. 210, 217 (D. Colo. 1983)*; *Windsor Assoc., Inc. v. Greenfeld, 564 F. Supp. 273, 277 (D. Md. 1983)*; *Eisenberg v. Gagnon, 564 F. Supp. 1347, 1351 (E.D. Pa. 1983)*; *Guerrero v. Katzen, 571 F. Supp. 714, 719 (D.D.C. 1983)*; *Austin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 570 F. Supp. 667, 669-70 (W.D. Mich. 1983)*; *Crocker Nat'l Bank v. Rockwell Int'l Corp., 555 F. Supp. 47, 49 (N.D. Cal. 1982)*; *Lode v. Leonardo, 557 F. Supp. 675, 680 (N.D. Ill. 1982)*; *Hellenic Lines, Ltd. v. O'Hearn, 523 F. Supp. 244, 247 (S.D.N.Y. 1981)*.

[33] *E.g.,* *Bankers Trust v. Feldesman, 566 F. Supp. 1235, 1241 (S.D.N.Y. 1983)*; *North Barrington Dev., Inc. v. Fanslow, 547 F. Supp. 207, 211 (N.D. Ill. 1980)* ("plaintiff must allege how it was injured competitively by the RICO violation in order to state a cause of action under *§ 1964(c)*").

[34] *Waste Recovery Corp. v. Mahler, 566 F. Supp. 1466, 1468-69 (S.D.N.Y. 1983)*; *Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352, 358 (E.D. Mich. 1983)*; *King v. Lasher, 572 F. Supp. 1377, 1382 (S.D.N.Y. 1983)*; *In re Action Indus. Tender Offer, 572 F. Supp. 846, 852 (E.D. Va. 1983)*; *Guerrero v. Kafzen, 571 F. Supp. at 721* (injury "by reason of a RICO violation"); *Van Schaick*, 535 F. Supp. at 1137 & n.11 (commercial or business injury required); *Harper v. New Japan Secs. Int'l, Inc., 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982)*; *Johnsen v. Rogers, 551 F. Supp. 281, 285 (C.D. Cal. 1982)*; *Gitterman v. Vitoulis, 564 F. Supp. 46, 49 (S.D.N.Y. 1982)*; *Landmark Savs. & Loan v. Loeb Rhoades, Hornblower & Co., 527 F. Supp. 206, 208-09 (E.D. Mich. 1981)*.

[35] The following are among the cases that have rejected a "competitive injury" requirement: *Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d at 1288*; *Schacht v. Brown, 711 F.2d at 1358*; *Bennett v. Berg, 685 F.2d 1053, 1059 (1982)*, *aff'd en banc*, *710 F.2d 1361* (8th Cir.), *cert. denied sub nom. Prudential Ins. Co. of America v. Bennett, 464 U.S. 1008, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983)*; *Kimmel v. Peterson, 565 F. Supp. 476, 493-95 (E.D. Pa. 1983)* (also finding racketeering injury indistinguishable from competitive or commercial injury); *Mauriber v. Shearson/American Express, Inc., 567 F. Supp. at 1240*; *Ralston v. Capper, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983)*; *Gitterman v. Vitoulis, 564 F. Supp. at 48*; *USACO Coal Co. v. Carbomin Energy, Inc., 539 F. Supp. 807, 814* (W.D. Ky.), *aff'd on other grounds*, *689 F.2d 94 (6th Cir. 1982)*; *Crocker Nat'l Bank, 555 F. Supp. at 49*.

[30]** We have as yet little guidance from the Supreme Court as to which, if any, of these different understandings of RICO's private civil remedy is appropriate. In holding in *United States v. Turkette, 452 U.S. 576, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981)* that ***HN9***[] the term "enterprise" as used in RICO encompasses both legitimate and illegitimate enterprises, and that an enterprise must be an entity separate and apart from the pattern of activity in which it engages, *452 U.S. at 587*, the Court said in reference to the civil remedies that "as a general proposition, however, the civil remedies could be useful in eradicating organized crime from the social fabric, whether the enterprise be ostensibly legitimate or admittedly criminal." It went on to say that "the aim is to divest the association of the fruits of its ill-gotten gains." *Id. at 585*. The Court concluded that it is "untenable" that the existence of the civil remedies "limits the scope of this criminal provision." *Id.*

The Court recognized that Congress, in passing RICO, intended to "alter somewhat the role of the Federal Government in the war against organized crime," *id. at 587*, and rejected the lower court's view **[**31]** that in order to right "the balance between federal and state enforcement of criminal law" it was obliged to read narrowly the statutory definition of "enterprise." *Id. at 586-87*. However, the Court was only discussing congressional intention as to the criminal enforcement provisions of RICO, **[*494]** not the intended scope of the private civil remedy. *Id.* Similarly, the Court's invocation of the plain meaning rule as regards the Congressional definition of "enterprise" in *18 U.S.C. § 1961(4)*, *452 U.S. at 580-81*, provides little or no guidance as to the handling of the very real ambiguities, which we discuss below, surrounding the complex statutory scheme providing for the private civil remedy. *See* *Harper v. New Japan Securities International, Inc., 545 F. Supp. 1002, 1005-06 (C.D. Cal. 1982)*. [36]

[32]** *Discussion*

I. *Injury by Reason of Racketeering Activity*.

We agree with the district court that the appellant has failed to allege any injury to its business "by reason of a violation of *section 1962*," as required by *section 1964(c)*. The "by reason of" standing limitation to RICO has been endorsed by a great many district courts. *See* cases cited in *supra* notes 33-34. They argue that the "by reason of" language was put into the statute by Congress as a way to limit standing to sue under RICO to people hurt by an injury of the type RICO was intended to prevent. RICO was intended not simply to provide additional remedies for already compensable injuries, [37] **[**34]** but rather to provide added remedies and procedures to fight certain specific kinds of organized criminality. The "by reason of" language, therefore, requires that plaintiffs allege injury

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The following cases have rejected a "racketeering injury" requirement: *Mauriber v. Shearson/American Express, Inc., 567 F. Supp. at 1240*; *Windsor Assocs., Inc. v. Greenfeld, 564 F. Supp. at 278-79* (also finding racketeering injury "analytically indistinguishable" from argument that RICO applies only to organized crime); *Seville Indus. Mach. Corp. v. Southmost Mach. Corp., 567 F. Supp. 1146, 1157 (D.N.J. 1983)*.

Commentators too have disagreed about the propriety of a "racketeering injury" requirement. *Compare* Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1109-14 (1982) (limitation unprincipled) [hereinafter "Note, Civil RICO"] *with* Comment, *Reading the "Enterprise" Back Into RICO: Sections 1962 and 1964(c)*, 76 Nw. L. Rev. 100, 126-32 (1981) (supporting a standing requirement); Bridges, *supra* note 6, at 71-73 (*id.*).

[36] In another recent criminal RICO case the Court similarly rejected a narrow reading of the word "interest" in § 1963(a)(1). *Russello v. United States, 464 U.S. 16, ___, 104 S. Ct. 296, 300, 78 L. Ed. 2d 17 (1983)*. As it did in *Turkette*, the Court relied upon the plain meaning of the statutory language, also making reference to the liberal construction clause in RICO. *Id. at 302*. The Court also repeated its conclusion that the legislative history of RICO suggests that Congress intended the criminal provisions to be given a broad construction. *Id. at 302-03*.

[37] *United States v. Forsythe, 560 F.2d 1127, 1135 (3d Cir. 1977)* ("State law offenses are not the gravamen of RICO offenses. RICO was not designed to punish state law violations; it was designed to punish the impact on commerce caused by conduct which meets the statute's definition of racketeering activity."). *Cf.* *United States v. Bledsoe, 674 F.2d 647, 659 (8th Cir. 1982)* ("RICO was not designed to serve as a recidivist statute, imposing heavier sentences for crimes which are already punishable under other statutes."), *cert. denied sub nom.* ***Phillips v. United States, 459 U.S. 1040, 103 S. Ct. 456, 74 L. Ed. 2d 608 (1982)***.

caused by an activity which RICO was designed to deter, which, whatever it may be, is different from that caused simply by such predicate acts as are alleged here.

The justification for this limitation is not derived solely from the language of the statute. [38] Instead, many courts focus on the fact that the "by reason of" **[**33]** language is drawn directly from section four of the Clayton Act. In that act the language has been construed to require plaintiffs to allege and prove an "antitrust injury," *e.g.,* ***[*495]*** *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*, which the Supreme Court has defined as "injury of the type the antitrust laws were intended to prevent." *Id.* By analogy, then, ***HN10***[] the "by reason of" language in *section 1964(c)* is intended to limit standing to those injured by a "racketeering injury," by an injury of the type RICO was designed to prevent. *See, e.g.,* *In re Action Industries Tender Offer, 572 F. Supp. at 851-52*; *Johnsen v. Rogers, 551 F. Supp. at 285*.

[35]** Two kinds of questions have, however, been raised in relation to finding a standing requirement analogous to the Clayton Act's in RICO's "by reason of" language. First, courts and commentators have argued that the legislative history demonstrates that Congress did not intend to have the Clayton Act's standing requirement applied to RICO. *E.g.* *Schact v. Brown, 711 F.2d at 1357-58*; Blakey & Gettings, *supra* note 6, at 1015-17 & nn. 24-32, 1041. The second question has to do with defining precisely what is meant by a "racketeering injury."

One of the Senate predecessors to RICO was framed as an amendment to the Clayton Act. S. 2048, 90th Cong., 1st Sess. (1967). This approach was rejected by the House Judiciary Committee in part because it was thought that the strict standing requirements of the Clayton Act should not have to be met by plaintiffs suing under RICO. House Hearings, *supra* note 9, at 149 (Statement of the Antitrust Section of the ABA). Similarly, on the Senate Floor a number of Senators explicitly rejected the idea of "imputing the great complexity of ***antitrust law*** enforcement" to RICO, [39] although this discussion did not refer to the *private* civil action **[**36]** which, as we have noted, was added to the bill only after it had left the Senate. The legislative history suggests that it would therefore be inappropriate to carry over wholesale all of the elaborate antitrust standing case law onto RICO. It would no doubt violate both the congressional purpose and common sense to require RICO plaintiffs to allege an injury of the type the *antitrust* laws were designed to prevent to maintain a RICO suit.

On the other hand, there is nothing in the legislative history which suggests that Congress did not intend to create *analogous* standing barriers to RICO by using the "by reason of" language. By borrowing language imposing a

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[38] It can be argued that a "pattern of racketeering activity" is defined merely in terms of predicate offenses and nothing more, *§ 1961(1)*, *(5)*, so the fact that racketeering activity must be proved under *§ 1964(c)* does not in itself require that something other than the predicate offenses be proved. On the other hand the statutory definition states that a pattern "*requires* at least two acts of racketeering activity. . . ." *18 U.S.C. § 1961(5)* (emphasis added). An argument can be made that the use of the word "requires" instead of the word "means" implies that Congress left it to the courts to define the contours of the concept of "pattern." *See* Bridges, *supra* note 6, at 64-65 & n.119. Here Senator McClellan's observations, quoted in *id.* at n.118, may assume importance:

> The [ACLU] offers an inaccurate and prejudicial criticism of title IX when it states that "pattern of racketeering activity" is defined as two or more acts of "racketeering activity," and worries that a person could be subjected to the sanctions of title IX simply for committing two widely separated and isolated criminal offenses, one of which related to an interstate business. Again, a careful reading of title IX would have informed the union that a pattern under title IX is not defined as two or more acts of racketeering activity, but requires them.
>
> The term "pattern" itself requires the showing of a relationship, and the committee report . . . thus reinforces that interpretation. So, therefore, proof of two acts of racketeering activity, without more, does not establish a pattern and the ACLU's fears are unwarranted.

116 Cong. Rec. 18940 (1970) (statement of Sen. McClellan).

[39] 115 Cong. Rec. 9567 (1969) (Statement of Senator McClellan). *See also* 115 Cong. Rec. 6993 (1969) (Statement of Senator Hruska).

standing limitation, it is reasonable to believe that Congress indicated a desire to have an analogous standing limitation imposed in RICO. [40]

[37]** The question then becomes what kind of injury is a "racketeering injury"? As has been said, ***HN11***[] RICO was intended to "address the infiltration of legitimate business by organized crime." *Turkette, 452 U.S. at 591*. According to the congressional statement of findings and purpose, the Act was to seek to eradicate organized crime because "organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens." *See also* legislative history cited in *Bridges, supra* note 6, at 68-72 & nn. 133-39. RICO was not enacted merely because criminals break laws, but because mobsters, either through **[*496]** the infiltration of legitimate enterprises or through the activities of illegitimate enterprises, cause systemic harm to competition and the market, and thereby injure investors and competitors. It was to help solve this problem that Congress added RICO to the arsenal of weapons used to fight organized crime. It is only when **[**38]** injury caused by this kind of harm can be shown, therefore, that we believe that Congress intended that standing to sue civilly should be granted.

This is, we repeat, by no means to say that standing to sue under RICO should be limited only to people who have standing to sue for a competitive injury under the antitrust laws. [41] This is so because Congress in promulgating RICO was addressing the kind of economic injury which has an effect on competition, but nowhere suggested that actual anticompetitive effect is required for suits under the statute. For purposes of clarity, it is better to identify the RICO standing requirement as a "racketeering injury" requirement rather than a "competitive injury" requirement, as the latter term may incorrectly suggest that all of the details of the ***antitrust law*** standing requirement are being incorporated by reference. This carries with it at least, as the trial judge found, the obligation that the plaintiff show injury different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter.

[39]** II. *Necessity of a Prior Conviction*.

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[40] Thus, in an interesting paper in the post-legislative history, the American Law Division of the Library of Congress, after reviewing the purposes of RICO and of the antitrust laws, concluded that "given the similarity of language and circumstances between the antitrust provisions and those of the Organized Crime Control Act, there is no reason to believe that many of these [antitrust] principles and problems would [not] be applicable to both [antitrust and RICO] types of cases." *Reprinted in* Victims of Crime, *supra* note 20, at 331. *See* *Landmark Savs. & Loan, 527 F. Supp. at 208-09* ("Competitive injuries and racketeering enterprise injuries would frequently overlap, but they are not necessarily the same."). *See also* Bridges, *supra* note 6, at 68-73 & nn. 133-34.

[41] For example, recent antitrust cases which focus on market efficiency rather than on damage to business people, *see, e.g., Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 n.21, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*, are not relevant to the requirements of RICO standing. Nothing in RICO suggests, then, that only competitors can sue, or that Congress in enacting RICO was more concerned with economic efficiency than with providing remedies for victims of organized crime. *See* Note, *Civil RICO, supra* note 35, at 1113-14 ("RICO's explicit aim to promote free competition focuses as much on insuring a fair market as on insuring an efficient one. Thus, the state should protect the plaintiff injured competitively by a corrupt business even at a cost to market efficiency.").

Similarly, claims alleging the kinds of business fraud which often affect competition should go forward under RICO even if in the particular case no harm to competition results, as, for example, when all competitors are being extorted from equally. For example, in *Hellenic Lines, Ltd. v. O'Hearn, 523 F. Supp. 244 (S.D.N.Y. 1981)*, a company was forced to pay kickbacks to an illegal enterprise for required services. A RICO claim was allowed even though defendant claimed that the inflated price was still reasonable so that no injury to competition had occurred. It was enough that the plaintiff's alleged injury was the *kind* of injury which Congress identified as threatening competition. The fact that the suit may not have been viable under the Clayton Act shows that the two standing requirements overlap but are not identical.

We do not in this business fraud case attempt to define the scope of the standing requirement when the RICO suit is based upon securities law violations.

In *Trane Co. v. O'Connor Securities, 718 F.2d 26, 29 (2d Cir. 1983)*, we left "to another day" the question whether a prior criminal conviction is a prerequisite to a civil RICO action. We now hold that it is. A number of cases have discussed the problem with little or no analysis. Even the commentators who would call for an expansive reading of the Act have done likewise, merely citing those same cases in footnotes. *E.g.*, Note, *Civil RICO, supra* note 35, at 1103 n.17; Blakey and Gettings, *supra* note 6, at n.129. For reasons that appear below, we cannot agree with these decisions and commentators.

A. *The Case Law*.

United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), *cert. denied*, *420 U.S. 925, 43 L. Ed. 2d 395, 95 S. Ct. 1121 (1975)*, is the case most frequently relied upon by courts which have held that criminal convictions are not required before private civil actions may be maintained. *Cappetto*, however, dealt solely with the government's right, in the absence of a criminal conviction, to sue for an injunction under *section 1964(a)* to prevent or restrain violations of RICO. The case held **[**40]** that Congress was entitled to make civil equitable **[*497]** relief available to the government to prevent or restrain certain actions under subsection 1964(a). In so doing, the court relied on a long series of cases which hold that the government is entitled to bring civil suits for acts which are also punishable as crimes, especially when it is seeking remedial equitable relief and not punitive relief. *502 F.2d at 1356-57*. Thus, far from determining the question of the intended or appropriate scope of the treble damage remedy provided to private parties under subsection 1964(c), *Cappetto* made no holding with respect to private civil actions. As a matter of policy, government actions and private actions are of course very different. Prosecutorial discretion, and in the case of RICO, guidelines from the Department of Justice, protect against overbroad use of RICO. *See United States Attorneys' Staff Manual, Executive Office for U.S. Attorneys, RICO Guidelines* (Jan. 30, 1981). There is no comparable way to limit private RICO.

Farmers Bank of Delaware v. Bell Mortgage Corp., 452 F. Supp. 1278, 1280 (D. Del. 1978), did squarely hold that *section 1964(c)* "does not condition **[**41]** that cause of action in any way upon a previous conviction under the criminal provisions of the statute," and adds that it is only necessary that the plaintiff prove the elements of the RICO action by a preponderance of the evidence in order to be awarded damages in a civil action. However, as support for these propositions it cites only to *Cappetto*. 452 F. Supp. at 1280. Almost all other cases that hold that criminal convictions are not necessary rely either on *Farmers Bank* or *Cappetto* and offer no other reasoning to support their conclusion. [42]

[42]** The only other argument put forward for the position that criminal convictions are not required for civil RICO suits is contained in *USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 95 n.1 (6th Cir. 1982)*. In a footnote the court stated:

> *Section 1962* merely describes acts that are "unlawful" under RICO. Section 1963 provides that violations of *§ 1962* are criminal, just as *§ 1964(c)* provides that violations of *§ 1962* create a private right of action for damages. If Congress had intended to limit liability under *§ 1964(c)* only to those convicted of or charged with RICO crimes, it would have done so within *§ 1964(c)* by referring to § 1963 or by otherwise specifically indicating that a conviction under § 1963 is a basis for civil damages. By referring in *§ 1964(c)* only to the

[42] *See, e.g., Glusband v. Benjamin, 530 F. Supp. 240, 241 (S.D.N.Y. 1981)*; *Harper v. New Japan Secs. Int'l, Inc., 545 F. Supp. 1002, 1007 n.8 (C.D. Cal. 1982)*; *Mauriber v. Shearson/American Express, Inc., 546 F. Supp. 391, 396 (S.D.N.Y. 1982)*; *Heinold Commodities, Inc. v. McCarty, 513 F. Supp. 311, 313-14 (N.D. Ill. 1979)*. *But see Van Schaick v. Church of Scientology of Cal., Inc., 535 F. Supp. 1125, 1137 n.12 (D. Mass. 1982)* (dicta that criminal convictions may be required); *Kleiner v. First Nat'l Bank of Atlanta, 526 F. Supp. 1019, 1022 n.2 (N.D. Ga. 1981)* *(id.), overruled on other grounds, Morosani v. First Nat'l Bank of Atlanta, 703 F.2d 1220 (11th Cir. 1983)*.

Certain other cases holding that criminal convictions are not required have relied in part upon the "liberal construction" language in *Turkette, 452 U.S. at 580-81*. *See USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 95 n.1 (6th Cir. 1982)*; *cf. Glusband, 530 F. Supp. at 241* (following *Turkette's* plain meaning analysis). For reasons we stated previously, we do not find the language in *Turkette* particularly helpful in analyzing this problem.

unlawful acts of § 1962, Congress has created a civil remedy that is independent of criminal proceedings under § 1963. [43]

[**43] While this argument is, at least, based upon the statute, we think it is misguided. If Congress had referred to [*498] section 1963 in section 1964(c), the result would have been not only to require criminal convictions for the predicate acts before bringing a civil suit, but to require a conviction under *RICO*. By referring to section 1962 in section 1964(c), it is our view that Congress intended to refer to injuries caused by the "unlawful" pattern of racketeering, defined in section 1961(5) as "requir[ing]" two of the criminal acts listed in section 1961(1). Thus people injured by "racketeering activity" may sue, assuming they have standing to sue, whether or not the government has brought an action *under RICO* to punish that activity. As to whether that racketeering activity itself must already have been proven criminal, the question we are facing here, the reference to section 1962 in section 1964(c) provides no indication.

B. *Statutory Analysis*.

1. *Language*. To determine the scope and content of the civil remedy, the proper place to begin analysis is, as always, the statutory language itself. To start, section 1964 itself draws several distinctions **[**44]** between the government and private persons. Subsection 1964(a) **HN12**[] gives the district courts jurisdiction to "prevent and restrain violations" of section 1962; it is not a general grant of jurisdiction and does not relate to subsection (c). Subsection (b) permits the Attorney General to institute proceedings under the section; it was drawn when subsection (c) was not in the statute and relates back to subsection (a). [44]

[**45] Study of the particular words chosen by Congress in drafting section 1964(c) is also fruitful. Section 1964(c), as has been noted, "is modeled after, but is not identical to, section 4 of the Clayton Act." [45] Therefore, any variations between the language of section four of the Clayton Act and section 1964(c) of RICO are especially instructive.

The Clayton Act provision reads 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. . . ." 15 U.S.C. § 15(a) (1982) (emphasis added). RICO section 1964(c), on the other hand, reads: "Any person injured in his business or property *by reason of a violation* of

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[43] 689 F.2d at 95 n.1.

Two other courts have forwarded versions of this same argument. State Farm Fire & Cas. Co. v. Caton, 540 F. Supp. 673, 675 (N.D. Ind. 1982); Parnes v. Heinold Commodities, Inc., 487 F. Supp. 645, 647 (N.D. Ill. 1980). Other courts have relied on *USACO* while holding or saying that criminal convictions are not necessary. Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1287 (7th Cir. 1983); Moss v. Morgan Stanley, Inc., 719 F.2d 5, 19 n.15 (2d Cir. 1983) (dicta), *cert. denied sub nom. Moss v. Newman, 465 U.S. 1025, 104 S. Ct. 1280, 79 L. Ed. 2d 684 (1984)*; Barker v. Underwriters at Lloyd's, London, 564 F. Supp. 352, 356 (E.D. Mich. 1983); In re Longhorn Secs. Litigation, 573 F. Supp. 255, 270-71 (W.D. Okla. 1983).

[44] It would be a strained construction to say that any person by virtue of § 1964(c), which gives such a person only a right to damages, would also have a right to sue for permanent injunctive relief under subsection (a). *See supra* text at note 24. The differences between the private remedy sections in the Clayton Act and in RICO are particularly significant here. There are specific Clayton Act provisions giving the government and individuals the right to bring actions for injunctive relief, 15 U.S.C. §§ 25-26 (government, private persons), something which is not set forth in RICO § 1964 or evidently recognized by the *Cappetto* court when it speaks of the Clayton Act's § 4. 502 F.2d at 1357.

Moreover, section 1964(a) speaks of "jurisdiction to prevent and restrain violations of section 1962," on its face allowing injunctions *before* the violations have occurred or criminal prosecution commenced. Subsection (c), on the other hand, speaks of injury "by reason of a violation of section 1962," language which at least suggests that the violation must be proved criminally before the action commences.

[45] Blakey & Gettings, *supra* note 6, at 1040. *See* House Hearings, *supra* note 9, at 543-44 (ABA report). *Cf.* Bridges, *supra* note 6, at 68-70.

section 1962 of this chapter may sue . . ." (emphasis added). The difference is instructive. It is possible to argue that "violation" is simply a shorthand **[**46]** way of saying "by reason of anything forbidden," and one could suppose that when the House of Representatives reinserted the treble damage private right of action provision which had been rejected by the Senate it approved this change in a desire merely to eschew surplusage. [46] But this interpretation does not seem as compelling as one which suggests that the change was made with a specific intent in mind -- to require that conviction at least of the predicate acts be had before **[*499]** a civil suit may be brought by a private person. [47]

[47]** It is helpful to look back to the definition in section 1961(1) of "racketeering activity," since we are referred to section 1962 by way of section 1964(c), and section 1962(a) makes "a pattern of racketeering activity" "unlawful" in certain circumstances. Section 1961(1) describes four distinct types of such activity. Those under subparagraph (A) include "*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 is punishable by imprisonment for more than one year (emphasis added). The "racketeering activity" acts under subparagraph (B) include "*any act which is indictable* under" certain provisions of federal law including mail fraud and wire fraud, in addition to other typical organized crime activities (emphasis supplied). The predicate acts under section 1961(1)(C) are, as in subparagraph (B), "indictable" acts dealing with labor matters. Finally, the predicate acts under subparagraph (D) include "any *offense* involving fraud" in the securities or bankruptcy areas, or in the felonious dealing in narcotic or other dangerous drugs (emphasis **[**48]** supplied).

The difference between the "chargeable under state law" and "indictable under federal law" language can readily be explained by the fact that some matters even involving imprisonment for more than a year may be chargeable by information under state law, as in the State of Connecticut for example. The distinction between "indictable" acts under (B) and (C) or "chargeable" acts under (A), on the one hand, and "offense[s]" under subparagraph (D), on the other, is more troubling. An "offense" speaks to conviction. An indictable or chargeable act refers obviously to an earlier stage in the criminal process. All these terms, however, speak along criminal rather than civil lines.

A person who is charged in a civil case with securities fraud (for example, by way of willful misrepresentations in a proxy statement), proof of which is by a preponderance of the evidence, can surely not be said to have committed "an offense," conviction of which requires proof beyond a reasonable doubt, with all of the traditional constitutional and other safeguards. Criminal violation of the securities laws occurs only with the requisite criminal scienter. Is one to be held liable under a lesser **[**49]** standard of proof in a private right of civil action and, not incidentally, thereby stigmatized as a "racketeer"? It is hard to believe that in adopting civil RICO Congress intended to permit proof of "willful" violations by only a preponderance of the evidence. [48] Otherwise, two misstatements in a proxy solicitation could subject any director in any national corporation to "racketeering" charges and the threat of treble damages and attorneys' fees.

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[46] We are fully aware that the "by reason of a violation" language can be found in the earlier Senate and House bills which did contain private civil remedies. S. 1623, 91st Cong., 1st Sess., *§ 4(a)* (1969); S. 2048, S. 2049, 90th Cong., 1st Sess. (1967); H.R. 19586, H.R. 19215, 91st Cong., 2d Sess. (1970). *See supra* note 18 for a discussion of these bills. Nevertheless, the question remains why the House chose this language over the language of the Clayton Act.

[47] We note in the post-legislative history that this conclusion was rejected by the American Law Division of the Library of Congress in its comparative study of RICO and the Clayton Act, *see* Victims of Crime, *supra* note 20, at 323, 329, on the basis that "violation" is used elsewhere in the antitrust laws, e.g., in *15 U.S.C. §§ 4*, *25*, *26*. But two of the provisions cited in that study have their own parallels in RICO: *15 U.S.C. §§ 4* and *25* are equivalents of *18 U.S.C. § 1964(a)* giving district courts jurisdiction to prevent and restrain violations at the behest of the government. And the other Clayton Act provision cited, *15 U.S.C. § 26*, which has no parallel in RICO, gives similar jurisdiction at the behest of private parties, a matter which the American Law Division study sought explicitly to remedy as to RICO. Thus, the American Law Division statement does not meet the argument based on the difference in language between the treble damage private action provisions which are otherwise parallel, *15 U.S.C. § 15* and *18 U.S.C. § 1964(c)*.

[48] The Securities and Exchange Act of 1934 makes only "willful" violations criminally punishable. Section 32(a), *15 U.S.C. § 78ff (1982)*. On "offense" under the securities laws in RICO, *see generally* Bridges, *supra* note 6, at 63-64.

As for the language "any act which is indictable" (or "chargeable"), conceivably Congress meant by the choice of these words to suggest either that indictments or, in the case of certain state felonies informations, are not required, since the **[*500]** acts need only be "indictable or "chargeable" (emphasis added). But **[**50]** a plausible alternative view of the words "indictable" and "chargeable," found in RICO's definitional section, is that Congress did not intend to give civil courts power to determine whether an act is "indictable" in the absence of a properly returned indictment or "chargeable" absent an information. ***HN13***[] Courts do not traditionally look at a given set of facts -- proved by a preponderance of the evidence only -- and say that these facts make out acts which are "indictable" or "chargeable." *See* Kleiner v. First National Bank of Atlanta, 526 F. Supp. 1019, 1022 (N.D. Ga. 1981), *overruled on other grounds sub nom.* Morosani v. First National Bank of Atlanta, 703 F.2d 1220 (11th Cir. 1983). In the case of indictments that is the purpose of grand juries. ***HN14***[] The Fifth Amendment provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . ." Surely, being declared a "racketeer" or being held responsible for being one is being held to "answer for" an "infamous crime." [49] Whatever else one may think of grand juries or the processes by which they pursue their deliberations, they may stand as a bulwark **[**51]** between the individual and the government. Under the interpretation given RICO by those courts which do not require criminal convictions of the predicate acts before the bringing of a civil action, every private plaintiff becomes his own one-person grand jury, or in the case of state felonies chargeable by information, his own prosecutor.

[52]** 2. *Intent*. But we need not rest the argument for this narrow interpretation of RICO on parsing of the words of the statute, since concededly they are ambiguous and could be construed to relate to underlying conduct. The structure of RICO as a whole leads one to the narrower interpretation requiring criminal convictions by a more direct route. The Act is designed to provide new penalties and remedies to combat conduct which explicitly has already been found criminal. Thus it has been noted by the very commentators who have most strenuously urged a broad reading of civil RICO that RICO did not itself "draw a line between criminal and innocent conduct," but rather "authorized the imposition of different criminal or civil remedies on conduct *already criminal*, when performed in a specified fashion." Blakey & Gettings, *supra* note 6, at 1032 (emphasis supplied). [50] **[**54]** In this sense RICO **[*501]** is significantly different from the antitrust laws, where it is possible to bring a civil action even in the absence of criminal conduct. [51] RICO liability simply does not exist without criminal conduct, [52] though of course, in

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[49] The American Bar Association has recommended that the RICO statute be amended to replace the term "racketeering activity" with the phrase "criminal activity" as a way to resolve this problem. Report to the House of Delegates, 1982 ABA Sec. Crim. Just. Rep. 3-4 (Jan. 1982). *Cf.* United States v. Guiliano, 644 F.2d 85, 89 (2d Cir. 1981) (prejudicial taint inevitably surrounds label of "racketeer").

As we have indicated in *supra* note 24, there are potential constitutional problems created by the broad reading of RICO endorsed by many courts. At some point defendants are entitled to the constitutional protections of the criminal law regardless of how the government chooses to characterize a given cause of action. *See* Boyd v. United States, 116 U.S. 616, 634-35, 29 L. Ed. 746, 6 S. Ct. 524 (1886). Relevant factors in characterizing an action as "criminal" are the nature of the underlying offense, the stigma attached to the charge made, In re Gault, 387 U.S. 1, 23-25, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967), the nature of the punishment authorized by the statute, Trop v. Dulles, 356 U.S. 86, 94-95, 2 L. Ed. 2d 630, 78 S. Ct. 590 (1958), the intent of Congress in promulgating the statute, *id.*, and whether the government or a private party is bringing the action. *See generally* Note, *infra* note 59, at 210-12. Reading private civil RICO suits not to require criminal convictions would provide civil remedies for offenses criminal in nature, stigmatize defendants with the appellation "racketeer," authorize the award of damages which are clearly punitive, including attorney's fees, and constitute a civil remedy aimed in part to avoid the constitutional protections of the criminal law. Thus, the construction advanced in this opinion avoids serious constitutional questions.

[50] This structure is, of course, altered to some extent by the provision which allows the government to seek injunctive relief in the absence of criminal convictions. As we have indicated, however, injunctive relief to *prevent* violations is simply a very different kind of remedy than a treble damages action and is accordingly subject to a unique regimen. It would be contrary to the entire purpose of equitable remedies if their utilization had to await the imposition of criminal sanctions.

The argument made in text is nowhere answered by our dissenting brother.

[51]

a criminal RICO case, the proof of the predicate act **[**53]** convictions may be made under the same indictment, in the same trial and coordinately with the proof of the RICO offense(s). But in a civil context, there is no way to know whether the conduct in question is "already criminal," a problem compounded by the fact that ordinarily there is a lower burden of proof in civil actions. We conclude that had Congress considered this problem, it would have explicitly required previously established convictions in the context of *section 1964(c)*. Absent such explicit congressional direction, such a narrow reading of *section 1964(c)* best integrates that subsection into the entire structure of the Act. On the other hand, if the broad reading is accepted, problems are created of which there is no indication that Congress even dreamed.

[55]** Chief among these problems, as the foregoing argument suggests, is the proper burden of proof in proving predicate offenses in the absence of a criminal conviction. It is not surprising that courts which have allowed civil suits to go forward have wrestled with the proper burden of proof required to maintain the action. The problem, of course, relates to the burden to which a plaintiff must be put to prove that a defendant is a "racketeer" because he has committed two predicate acts. At least three different standards of proof are within the realm of plausibility: proof beyond a reasonable doubt, [53] **[**56]** proof by clear and convincing evidence, [54] and proof by preponderance of the evidence. [55] Courts in addition have indicated that probable cause must be alleged with reference to the predicate acts, although how this is meant to relate to the burden of the plaintiff at trial remains something of a mystery. [56]

Insofar as the RICO scheme calls for only criminal conduct to be punished, it thus appears that in the absence of previous convictions a civil plaintiff must carry a burden equal to that in a criminal case in **[*502]** proving that

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> [There is] a significant distinction between *section 1964* and the antitrust laws . . . . [Sherman Act] civil actions may be brought in cases in which criminal prosecution would not have been justified . . . . Thus, a civil action may succeed . . . [even] if the government [does] not show that the violation constituted a *criminal* act.
>
> . . .
>
> Thus, *the charge that a section 1964 action is "inherently criminal" is true*. (emphasis added) (footnote omitted).

Note, *Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity*," 124 U. Pa. L. Rev. 192, 208-09 (1975). *See also Matz, Determining the Standard of Proof in Lawsuits Brought Under RICO*, Nat'l L. J., Oct. 10, 1983, at 21, col. 1.

[52] *United States v. Campanale, 518 F.2d 352, 365 n.36 (9th Cir. 1975)* ("The acts constituting racketeering activity must themselves be criminal offenses."), *cert. denied sub nom.* ***Mathews v. United States, 423 U.S. 1050, 96 S. Ct. 777, 46 L. Ed. 2d 638 (1976)***; *Salisbury v. Chapman, 527 F. Supp. 577, 579 (N.D. Ill. 1981)* ("RICO does not contain any substantive prohibitions unknown to other sections of federal criminal law. Instead, it confers upon victims of certain *criminal violations* the right to proceed in a civil suit against the offenders." (Emphasis added.))

[53] No court to date has held that the criminal burden is appropriate. The standard is mentioned in Matz, *supra* note 51. *See also Note, Enforcing Criminal Laws Through Civil Proceedings: Sec. 1964 of the Organized Crime Control Act of 1970, 18 U.S.C. § 1964 (1970)*, 53 Tex. L. Rev. 1055, 1062 n.52 (1975) ("Where, as with *section 1964*, proof of a violation of the statute requires proof of the commission of a crime, the defendant should arguably receive the benefit of a traditional criminal trial.").

[54] *Swanson v. Wabash, Inc., 577 F. Supp. 1308 (N.D. Ill. 1983)* (suggesting appropriateness of clear and convincing standard, citing Matz, *supra* note 51, at 21, col. 1).

[55] *Farmers Bank of Del. v. Bell Mortgage Corp., 452 F. Supp. 1278, 1280 (D. Del. 1978)*; *Parnes, 487 F. Supp. at 647* ("civil burden of proof"); *State Farm Fire & Cas. Co., 540 F. Supp. at 676* (citing *Farmers Bank); Heinhold Commodities, 513 F. Supp. at 313 (id.); Eaby v. Richmond, 561 F. Supp. 131, 133-34 (E.D. Pa. 1983)*.

[56] *Taylor v. Bear Stearns & Co., 572 F. Supp. 667, 682-83 (N.D. Ga. 1983)*; *Bache Halsey Stuart Shields Inc. v. Tracy Collins Bank & Trust Co., 558 F. Supp. 1042, 1045 (D. Utah 1983)*.

criminal conduct. Yet it would be extraordinarily difficult for juries to understand the different burdens of proof required for different elements **[**57]** of a civil case. Moreover, if Congress had intended to impose such an unusual scheme, one would think that some suggestion of it would have occurred in the extensive legislative history. Instead, that history indicates that Congress assumed a preponderance standard was appropriate. [57] The most logical conclusion to be drawn is that ***HN15***[] Congress expected the criminality of the predicate acts to be proved before the private action went forward -- that a criminal conviction must precede a private civil suit.

[58]** In addition to burden of proof problems, allowing private civil RICO claims to proceed without criminal convictions would make a hash of the very "liberal construction" provision said to require just such a result. It has been argued by the leading proponents of a broad reading of civil RICO that liberal construction is appropriate because RICO merely penalizes conduct already criminal; thus, it is said, requirements of strict construction have already been applied in construing the predicate criminal offenses. [58] Acknowledging that due process, of course, requires that criminal statutes be strictly construed, *e.g., Dunn v. United States, 442 U.S. 100, 112, 60 L. Ed. 2d 743, 99 S. Ct. 2190 (1979)*, these proponents argue that since proof of criminal conduct could already be presumed in RICO suits, there would then be no need to "*further* restrict the scope of the statute by *re* applying these policies." Blakey & Gettings, *supra* note 6, at 1032 (emphasis added).

[59]** In the civil context, absent predicate act convictions, the policy of strict construction simply cannot be implemented. As one commentator has suggested, "if the liberal construction clause is applicable to determine the scope of criminal liability under Title IX, the provision is therefore unconstitutional." Tarlow, *RICO Revisited*, *17 Ga. L. Rev. 291, 309 (1983)*. How could the line be crossed into the sphere of criminality simply by bringing a civil action? It is this peculiar structure of RICO that strongly suggests that, had Congress considered the problem, it would have intended criminal convictions of at least the predicate crimes as a prerequisite for a civil RICO action. RICO's statutorily mandated requirement of liberal construction cannot fairly be relied upon in interpreting *section 1964(c)* without undermining its very justification. Nor is this anomaly surprising given that private civil RICO was added to RICO in the House as an afterthought, **[*503]** subsequent to the inclusion of the liberal construction clause in the Senate version of the bill. The statute, we repeat, is simply not a symmetrical whole.

In sum, after reviewing the words and structure of the **[**60]** enacted statute, its legislative history, and the prior case law interpreting the statute, we find it impossible to believe that in enacting RICO, Congress intended to

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[57] House Hearings, *supra* note 9, at 106-07, 664, 687. All of this discussion referred only to the government's private action. Nevertheless, some witnesses in the House hearings assumed that the "pattern of racketeering activity" element in a civil suit would have to be proved beyond a reasonable doubt. *See id. at 328-29* (Report of the Association of the Bar of the City of New York).

Our dissenting brother does not directly confront the burden of proof problems except by apparently suggesting that a preponderance standard is sufficient (dissenting op., [slip op.] page 6), but that if it is not some heightened standard would be (dissenting op., [slip op.] pp. 7-8). Having in mind Congress's omission to examine this problem except very obliquely, as we point out in text, to attempt to draw a jury charge dealing with different burdens of proof is not only a very difficult task, likely to cause great confusion, but also not a little bit of the judicial legislation Judge Cardamone decries. And to accept the proposition that you can prove *criminal* acts, notes 50 *supra* and 58 *infra*, by a preponderance of the evidence raises its own problems of a higher magnitude, as we point out in text.

[58] *See* Blakey & Gettings, *supra* note 6, at 1031-32:

> Congress believed that the normal practice of following a policy of strict construction . . . was inappropriate in the context of RICO, since *RICO did not draw a line between criminal and innocent conduct*. Instead, *RICO authorized the imposition of different criminal or civil remedies on conduct already criminal, when performed in a specified fashion*. Once the policies of strict construction or leniency had been implemented in the construction of the underlying "racketeering activity," *and the line had been crossed into the sphere of criminality*, it was *inappropriate to further restrict the scope of the statute by reapplying these policies*.

(Emphasis added) (footnote omitted). This point is simply not addressed by our dissenting brother. See note 50 *supra*.

sweep all ordinary injuries occasioned by the predicate criminal acts within the dragnet of the treble damage remedy provided by *section 1964*. To bring a private civil action, there must be a "violation," that is, criminal convictions on the underlying predicate offenses. Of course, a conviction under RICO itself will do, a fortiori. Moreover, plaintiffs must satisfy the standing requirement set out in this opinion and by the court below, a requirement that, as a practical matter, will not create an added barrier to a plaintiff's suit following upon criminal convictions under RICO, though it may present a problem in the case of convictions only of predicate acts, a problem which we need not here address.

Neither should the criminal conviction requirement create a significant additional barrier to a RICO plaintiff with proper standing to sue. Even without such a requirement, if a criminal prosecution is possible, it is unlikely that private RICO actions can progress very far, since defendants will block discovery by **[**61]** invoking the *Fifth Amendment*. *See* Bridges, *supra* note 6, at 53 n.66.

We therefore reject arguments based on the supposed "plain meaning" of a statute that, whatever its virtues and vices, is hardly a model of clarity. Being required, then, to look to the legislature's intent as demonstrated in the legislative history, we find nothing conclusive, but discern in the legislative silence a purpose that is entirely at odds with the open-ended reading of the statute adopted by a number of the courts and promoted by certain commentators. The legislative history indicates that the private action provision is modeled upon the Clayton Act, and we hold that standing requirements analogous but not identical to those in the Clayton Act should be required in RICO. We also note that the civil RICO provisions differ in some significant ways from the Clayton Act provisions.[59] In particular, the Clayton Act allows suits in the absence of criminal conduct, and therefore obviously in the absence of criminal convictions. Private civil RICO, on the other hand, is designed only to penalize conduct already determined to be criminal. In addition, the analysis of the RICO private treble damage provision **[**62]** must necessarily be differentiated from analysis of the injunctive provisions of RICO, both because of the differences between the government and a private party as a plaintiff, and because of the inherent differences between injunctive and punitive damages relief. Finally, we have tried to suggest that RICO's "liberal construction" clause actually requires that criminal convictions be obtained before civil suits under *section 1964(c)* commence.

We need not rest the argument on the burdens to which the courts would otherwise be subjected, though other things being equal that might carry weight. We do strongly suggest, however, that if Congress had intended to permit defendants in every "garden-variety" **[**63]** fraud or securities violation case to be stigmatized as "racketeers," on the basis of a preponderance of the evidence, it would have said so in plainer language than it did. Before we impute to Congress the intention of federalizing a large portion of the common law which, since the time of the Constitution, has been left to the courts of the several states, and of providing treble damages and attorneys' fees for violations of these laws, or of altogether replacing or eliminating much of the need for extensive bodies of federal law **[*504]** specifically directed at extensively considered evils, we will require more explicit language from Congress indicative of such intent.

Judgment affirmed.

Dissent by: CARDAMONE

Dissent

CARDAMONE, Circuit Judge, dissenting.

[59] Proponents of a broad reading of the statute apply Clayton Act provisions by analogy when they suggest that since criminal convictions are not required there, they should not be required under RICO. At the same time they urge that the Clayton Act standing provisions should *not* be applied in interpreting RICO.

I disagree with the majority's conclusion that this Court should create a requirement of prior criminal conviction for the predicate acts forming the pattern of racketeering activity for all civil RICO claims. In so doing, the panel majority takes this Circuit far from the shores of principled and disciplined reasoning, and leads it unnecessarily into a sea of uncertainty. In the panel's view, Congress would have intended -- had **[**64]** it thought about the implications of *§ 1964* -- that prior convictions be required. Not only does the majority turn the ordinary rules of statutory construction on their head by ignoring the plain meaning of the statutory language, but it also ignores the sound policy reasons for permitting civil RICO cases to proceed absent prior convictions for the predicate acts. In my view, the civil RICO provisions mean just what they say. Because these and other considerations have convinced me that the majority has crossed the line and trespassed in an area exclusively reserved to Congress, I dissent.

I. *Prior Criminal Conviction Requirement*

Looking at the reasoning that creates a "prior predicate act criminal conviction" requirement one is struck that it -- in Alice's words -- gets "curiouser and curiouser." [1] No support for this proposition is found in the statute or its legislative history. Almost none of the decisions or the commentators argue for such drastic redrafting of the statute. In fact, they support the opposite conclusion, *i.e.* that no prior conviction is necessary to bring a civil claim under RICO.

[65]** Along the way to reaching its novel conclusion, the panel misconstrues Congress' reasons for the enactment of this statute and makes a number of faulty assumptions. The panel majority's position seems bottomed on: (1) disapproval of cases that have taken a contrary view; (2) a view that Congress did not give civil courts power to decide when acts are "indictable" or "chargeable"; (3) a view that *§ 1964* would constitute an unconstitutional "quasi-criminal" statute were a prior criminal conviction for the predicate acts not required; (4) a fear that defendants will be " stigmatizes" by a civil "conviction" for racketeering activity; and (5) analysis based on the word "violation" contained in *§ 1964*. I propose to deal with each of these premises *seriatim*.

(1) *Disapproval of Contrary Decisions*

The majority begins by analyzing those decisions that have refused to adopt a prior criminal conviction requirement, and disapproves of them because they supposedly are not well-reasoned. For example, *United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974)*, *cert. denied*, *420 U.S. 925, 43 L. Ed. 2d 395, 95 S. Ct. 1121 (1975)* is dismissed almost without comment because " **[**66]** *Cappetto* made no holding with respect to private civil actions." Others are discarded because they merely cite to *Cappetto. USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 95 n.1 (6th Cir. 1982)*, which rejected a prior conviction requirement, and reasoned that Congress would have defined the *§ 1964* "violation" differently had it desired such a requirement, is labelled "misguided."

This panel's evaluation of *Cappetto* puts it at odds with other panels of this Circuit that have cited that decision with apparent approval in other respects. *See* *United States v. Huber, 603 F.2d 387, 393 (2d Cir. 1979)*, *cert. denied*, *445 U.S. 927, 63 L. Ed. 2d 759, 100 S. Ct. 1312 (1980)*; *United States v. Altese, 542 F.2d 104, 107 (2d Cir. 1976)*, *cert. denied*, *429 U.S. 1039, 97 S. Ct. 736, 50 L. Ed. 2d 750 (1977)*. *Cappetto* involved a government prosecuted civil RICO claim. Ordinarily more, not less, protection is expected for a defendant **[*505]** when the government is plaintiff. When the plaintiff is a private party, as here, the quick dismissal of *Cappetto* totally ignores the "private attorney general" rationale built into RICO.

Discarding the numerous decisions **[**67]** of other courts that have not raised the bar of a prior conviction requirement will not make them go away. Virtually every court that has directly addressed the issue has decided no prior conviction is required. *E.g.,* *State Farm Fire and Cas. Co. v. Estate of Caton, 540 F. Supp. 673 (N.D.Ind. 1982)* (holding no prior conviction is required based on statutory interpretation); *Farmers Bank of State of Del. v. Bell Mtg. Corp., 452 F. Supp. 1278, 1280 (D. Del. 1978)* (*§ 1964(c)* "does not condition that cause of action in any way upon a criminal previous under the criminal provisions of the statute"). *See* *Bunker Ramo Corp. v. United Business*

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[1] L. Carroll, *Alice's Adventures in Wonderland*, (Children's Classic ed.) 25.

Forms, Inc., 713 F.2d 1272, 1287 (7th Cir. 1983) (Civil RICO action available "without any requirement of a prior criminal conviction for that conduct," citing USACO, supra). Morosani v. First Nat'l Bank of Atlanta, 703 F.2d 1220 (11th Cir. 1983) (overruling Kleiner v. First Bank National Bank, 526 F. Supp. 1019 (N.D. Ga. 1981) without discussing prior criminal conviction dictum in *Kleiner*); Parnes v. Heinold Commodities, Inc., 487 F. Supp. 645, 647 (N.D. Ill. 1980); (private RICO action need not be proceeded by criminal **[**68]** conviction). The majority's dismissal of these holdings as uninformed or as simply "following *Cappetto*" ignores the obviously simple explanation for their resounding rejection of any prior conviction requirement -- it does not appear in the statute.

(2) *"Indictable" or "Chargeable" Acts*

Congress, the majority further tells us, did not intend to give civil courts power to determine whether an act is 'indictable' absent a properly returned indictment or 'chargeable' absent an information." How can this view be correct? To begin, the words themselves connote the contrary -- *i.e.*, Congress did not use the phrase "for which an indictment or information has been *returned* or *filed*"; much less did it say "for which the defendant has been criminally *convicted*." More significantly, Congress clearly used the terms "indictable" or "chargeable" in reference to "acts" forming a pattern of racketeering activity under § 1961, to which sanctions specifically labelled as "civil remedies" were then directed. To stretch this language into a requirement that a prior *conviction* must be obtained strains credulity. Had that been Congress' aim, § 1964's title would have been **[**69]** "Post Criminal Conviction Civil Remedies," not "Civil Remedies."

Further, the statute as Congress enacted it does not require civil courts to determine that the RICO predicate acts are in fact criminal acts. All that need be determined is that they are acts which, if proved by the government in a criminal proceeding, would subject the violator to criminal sanctions. The use of criminal and civil sanctions for the same conduct is common. Congress has frequently enacted legislation giving private litigants civil remedies for acts which may also be punished criminally. In addition to the antitrust example, Congress has provided for multiple damages, statutory punitive damages, civil penalties and counsel fees in scores of statutes, including *inter alia*, the patent (35 U.S.C. § 281) and trademark laws (15 U.S.C. § 1117), the Truth in Lending Act (12 U.S.C. § 1640), the water pollution control statute (33 U.S.C. § 1321), the false claims statute (31 U.S.C. § 3729), the wiretap statute (18 U.S.C. § 2520), and the tax laws (26 U.S.C. 6653(b)). In some of these areas, Congress has gone further and accorded to the *government* a civil remedy for acts that are also punishable under **[**70]** federal criminal law. Helvering v. Mitchell, 303 U.S. 391, 82 L. Ed. 917, 58 S. Ct. 630 (1938) (after an acquittal for criminal tax fraud, the government obtained a 50 per centum penalty in a civil proceeding against the taxpayer and the court held this a civil, not criminal, sanction); *see* One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237, 34 L. Ed. 2d 438, 93 S. Ct. 489 (1972) (*per curiam*) (forfeiture proceeding, civil in nature, not barred under Double Jeopardy Clause after defendant's **[*506]** acquittal on criminal charges). Rather than asking what kind of sanctions, *i.e.*, criminal or civil, are imposed against a defendant, the majority mistakenly focuses on the nature of the proceeding taken under § 1964. Here the sanction is treble damages. Treble damages have been part of our jurisprudence for centuries -- since first appearing as a remedy for waste in the Statute of Gloucester (1278) -- and they have never been viewed as "criminal" sanctions.

(3) *Constitutionality of* § 1964 *Absent Criminal Conviction*

As just noted, the majority analyzes a proceeding under § 1964 and implicitly finds it "quasi-criminal." It then seems to conclude that **[**71]** such finding necessitates holding the section unconstitutional were a prior criminal conviction not to be required. If true, this implicit conclusion is at odds with analogous case law in such areas as civil forfeitures, penalties and deportation cases which teaches that the correct procedure is for a court in a civil case to assure, on a selective basis, the existence of certain procedural safeguards, that would otherwise be applicable only in criminal cases. That is, only those criminal procedural remedies necessary to protect a defendant are required in the civil action. *See, e.g.*, Boyd v. United States, 116 U.S. 616, 29 L. Ed. 746, 6 S. Ct. 524 (1886); Lopez-Mendoza v. I.N.S., 705 F.2d 1059 (9th Cir. 1983) (*en banc*) (applicability of Fourth Amendment exclusionary rule in civil deportation proceeding), *cert. granted*, *464 U.S. 1037, 104 S. Ct. 697, 79 L. Ed. 2d 163, 52 U.S.L.W. 3509 (1984)*. Bramble v. Richardson, 498 F.2d 968, 973 (10th Cir.) (rejecting claim that In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), requires proof beyond a reasonable doubt in a forfeiture proceeding), *cert.*

denied, *419 U.S. 1069, 95 S. Ct. 656, 42 L. Ed.* **[**72]** *2d 665 (1974)*; *accord,* *United States v. Regan, 232 U.S. 37, 58 L. Ed. 494, 34 S. Ct. 213 (1914)* (standard of proof in action for penalty for violation of Alien Immigration Act is preponderance of the evidence). *Cf.* *In re Ruffalo, 390 U.S. 544, 552, 20 L. Ed. 2d 117, 88 S. Ct. 1222 (1968)* (absence of fair notice of charges deprived petitioner of due process in disbarment proceeding). Close to 90 years ago the Supreme Court rejected the view that a civil forfeiture proceeding of the type involved in *Boyd v. United States, supra*, is a "criminal prosecution" in which the *Sixth Amendment* right of confrontation is implicated. *United States v. Zucker, 161 U.S. 475, 482, 40 L. Ed. 777, 16 S. Ct. 641 (1896)*. Despite this teaching, the panel holds in effect that *§ 1964* is "criminal" for *all* purposes by requiring a prior criminal conviction before a civil RICO plaintiff can sue.

Thus, even accepting *arguendo* the view that *§ 1964* cannot be constitutionally applied in the absence of unspecified safeguards, the proper course is not to require a prior criminal conviction, but to insist on application of those safeguards (*e.g.*, the exclusionary rule, a heightened standard **[**73]** of proof or other criminal protections) within the context of a civil proceeding. The majority's response that imposing criminal safeguards in a civil case would confuse juries is not borne out in practice. Juries already apply heightened standards of proof to specific issues, in fraud, defamation, paternity and other types of civil actions. *See McCormick on Evidence* §§ 339-40 (2d ed. 1972) (citing cases).

Moreover, the Supreme Court has outlined the proper method of analysis for challenges to statutory civil remedies on the ground they are "quasi-criminal" or sufficiently "punitive" to require the procedural protections of a criminal trial. In *United States v. Ward, 448 U.S. 242, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980)*, the Court analyzed a challenge to section 311(b)(6) of the Federal Water Pollution Control Act (FWPCA) which permitted the government to assess a civil penalty of up to $5000 for each violation of the FWPCA. To decide whether a statute is "civil" or "criminal" involves a two-step test: first, courts must examine whether Congress indicated a preference for one label or the other; second, where Congress has signalled a preference for a civil penalty, there **[**74]** must be further inquiry to determine whether the **[*507]** statutory scheme is "so punitive either in purpose or effect as to negate that intention." *Id. at 248-249*. The Court concluded after considering the seven factors set forth in *Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 9 L. Ed. 2d 644, 83 S. Ct. 554 (1963)*, that the penalty in *Ward* was analogous to traditional civil damages and held it not sufficiently punitive to require *Fifth Amendment* criminal safeguards. *United States v. Ward, supra, 448 U.S. at 251*. Justice Blackmun's concurrence emphasized "that monetary assessments are traditionally a form of civil remedy" and found it significant that the FWPCA § 311(b)(6), like *18 U.S.C. § 1964*, does not provide for "an affirmative disability or restraint" (such as imprisonment, deportation or disbarment). *Id. at 257* (Blackmun, J.) (concurring).

More recently, in *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, *104 S. Ct. 1099, 79 L. Ed. 2d 361, 52 U.S.L.W. 4228 (1984)*, the Supreme Court held that neither the *Fifth Amendment double jeopardy clause* nor collateral estoppel bars a forfeiture proceeding where the defendant in the prior **[**75]** criminal proceeding was acquitted. A unanimous Court applying the two-level *Ward* test indicated that even "discouraging unregulated commerce in firearms" and "removing [them] from circulation" are remedial, not punitive, purposes. *Id.* 465 U.S. at 364, 104 S. Ct. at 1106. The Court stressed that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission," (*citing* *Helvering v. Mitchell, supra*) and held forfeiture to be a "separate civil sanction, remedial in nature." *Id.*

Applying the *Ward* test to *§ 1964* demonstrates that it is not a "quasi-criminal" statute even for purposes of *Fifth Amendment* guarantees, much less all criminal protections. The remedial purpose expressed in the statute is evident from its legislative history. Congress specifically provided that RICO "shall be liberally construed to effectuate its remedial purposes." Pub. L. 91-452, 84 Stat. 941 (1970) § 904(a). *Section 1964* is designed to *compensate* private parties who are victims of tortious activity. *See* *United States v. Bornstein, 423 U.S. 303, 314, 46 L. Ed. 2d 514, 96 S. Ct. 523 (1975)* (double damages under False Claims Act designed to ensure **[**76]** government is made completely whole); *United States ex rel. Marcus v. Hess, 317 U.S. 537, 549, 87 L. Ed. 443, 63 S. Ct. 379 (1943)* (holding that double damages under False Claims Act are compensatory even if recovered by federal government). Its treble damage provision is therefore primarily remedial, and only partly punitive. The recovery in excess of actual damages constitutes statutory punitive damages designed in part to punish the defendant for tortious conduct, but traditionally allowable in civil proceedings without special criminal law safeguards. *See* Missouri Pacific Ry. Co. v. Humes, 115 U.S. 512, 29 L. Ed. 463, 6 S. Ct. 110 (1885) (multiple damages partly compensatory, partly punitive). Thus, § 1964 is "primarily remedial" under the Supreme Court's tests in *Helvering* and *Ward* because its principal purposes are to compensate victims of racketeering activity and to encourage them to vindicate their rights. In serving as private attorneys general, civil RICO plaintiffs aid in the eradication of such activity. In short, Congress' "civil" and "remedial" labels should not therefore be disregarded.

The majority apparently faced the dilemma of either upholding **[**77]** this statute as written or declaring it unconstitutional as punitive and hence quasi-criminal in nature. It chose neither of these straightforward alternatives. It specifically rejected the former. And, since a statute as written may be held unconstitutional only if the challenger presents "the clearest proof" of it, United States v. Ward, supra, 448 U.S. at 249 (quoting Flemming v. Nestor, 363 U.S. 603, 617, 4 L. Ed. 2d 1435, 80 S. Ct. 1367 (1960)), and because such proof is absent here, it could not choose the latter. Instead, to resolve the problem, the majority inserts the prior criminal conviction requirement to avoid perceived "serious constitutional questions." The premise is flawed because this course of "avoidance" has actually created **[*508]** a constitutional question of even greater significance. Addition of this new requirement to civil RICO -- one which Congress did not vote on and which the President did not endorse -- has raised a question as to whether such judicial creativity is an unwarranted and unconstitutional intrusion into the legislative process.

(4) *Stigma*

The panel opinion stresses a fear that defendants will be "stigmatized" by their "indictment" **[**78]** at the hands of a "one-man grand jury" for racketeering activity. Yet, stigma alone ordinarily does not suffice to convert a proceeding from civil to criminal. *See* Ullmann v. United States, 350 U.S. 422, 100 L. Ed. 511, 76 S. Ct. 497 (1956) (contempt conviction for refusing to testify before grand jury upheld following grant of immunity over claim defendant would be stigmatized by revealing past connection with the Communist party). One commentator observed that the holding of *In re Gault, 387 U.S. 1, 18 L. Ed. 2d 527, 87 S. Ct. 1428 (1967)*, relied on by the majority, has been largely limited to sanctions threatening loss of liberty, and that stigma alone does not trigger the need for criminal safeguards. Note, *Organized Crime and The Infiltration of Legitimate Business: Civil Remedies for "Criminal Activity*," 124 U.Pa.L. Rev. 192, 214-15 (1975).

Further, the majority's sensitivity to the stigma that may attach to decent citizens named as defendants in civil RICO cases seems a bit overstated. Today, defendants in civil suits are labelled as violators of environmental laws when pumping coal by-products into the atmosphere, despoilers of our rivers when emptying oil from **[**79]** their tanker's bilges, adulterers in state divorce actions, and killers in vehicular wrongful death actions. The allegations of the civil complaint do not make these citizens criminals, although their conduct may well subject them to separate criminal prosecutions. Why the outcry over RICO? I, for one, believe the public is sophisticated enough to distinguish between a criminal conviction and a civil claim. To be named as a RICO defendant is not quite the Sword of Damocles that the majority would have it. Repeated often enough, it will either lose its effect as a settlement weapon or create enough public pressure to cause Congress to amend the statute. Again, it is not for this Court to alter the statute.

(5) *Use of Word "Violation"*

The opinion also places heavy reliance on Congress' use of the term "violation," and finds this word supports its thesis for a prior criminal conviction. In *Ward*, the statute also specifically referred to "violations" of the FWPCA. That Court notably attached no special significance to this term, presumably because the word "violation" is commonly used to designate civil wrongs.

Finally, the effect of this ruling will leave victims of those **[**80]** defendants whose activities were at the heart of Congress' concern without the remedy Congress envisioned. Regardless of whether a defendant is a member of an organized crime family and no matter how lawless his pattern of racketeering activity may be, if he escapes conviction -- through acquittal, a beneficial plea, or a decision not to prosecute -- then the remedy granted the victim of these activities is lost.

II. *Racketeering Injury*

Concern that the RICO civil remedy will permit recovery of treble damages and attorneys' fees in every "garden variety" civil fraud case leads the majority to impose an additional standing requirement. Limiting RICO's broad reach by requiring, for example, an "organized crime" connection was rejected by Congress and by this court, *see* *Moss v. Morgan Stanley, supra, 719 F.2d at 21 n. 17*. Similarly, a "competitive injury" requirement has been rejected in the Seventh and Eighth Circuits. *Schacht v. Brown, 711 F.2d 1343, 1359* (7th Cir.), *cert. denied*, *464 U.S. 1002, __, 104 S. Ct. 508, 509, 78 L. Ed. 2d 698*, (1983). *Bennett v. Berg, 685 F.2d 1053, 1058 (8th Cir. 1982)*, *aff'd in part on rehearing en banc*, *710 F.2d 1361* **[**81]** (8th Cir.), *cert. denied*, *464 U.S. 1008, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983)*. The Supreme Court has specifically rejected an approach that would require an **[*509]** allegation that the enterprise be "illegitimate." *United States v. Turkette, 452 U.S. 576, 586-87, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981)*. [2]

[82]** What remains is the theory adopted by some courts and that, together with the prior conviction requirement, the majority embraces here. That is, there must be an allegation of an injury from the "racketeering enterprise," a so-called "racketeering injury." Such has also been described as an injury "by reason of conduct the RICO act was designed to prevent," and as "something more than" the injury caused by the predicate acts alone. How one can distinguish between the injury caused by the predicate acts and the injury done by the enterprise is not explained. My colleagues state that "only when injury caused by this *kind of harm* can be shown" (emphasis added) does a plaintiff have standing under *§ 1964*. "This kind of harm," in turn, occurs when "mobsters, either through the infiltration of legitimate enterprises or through the activities of illegitimate enterprises, cause systemic harm to competition and the market, and thereby injure investors and competitors." This formulation is no more than a euphemism for an "organized crime" nexus requirement that should not be adopted by this Court after its rejection by the lawmakers. Other courts, the statute's congressional sponsors **[**83]** and commentators do not assign to civil RICO a scope on such a Lilliputian scale.

In *Schacht v. Brown, supra*, the Seventh Circuit evaluated a similar standing requirement and stated that one trouble with "judicial pruning of RICO's civil provisions . . . where business fraud is alleged [is that] . . . there is simply no legitimate principled criterion" that accomplishes the distinction between ordinary "garden variety" fraud and fraud by an organized crime syndicate. *Schacht, 711 F.2d at 1356*. The *Schacht* court concluded that since the organized crime limitation on civil RICO had been rejected, it did not want it "revived under the guise of determining the kinds of activity covered by RICO." *Id. See* *Ralston v. Capper, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983)* (racketeering enterprise injury "undefined"). *Accord*, Note, *Civil RICO and "Garden Variety" Fraud -- A Suggested Analysis*, 58 St. John's L. Rev. 93, 107-08 (1983). *See also* *Bennett v. Berg, supra, 685 F.2d at 1059* (rejecting "racketeering injury" requirement which is just another way of arguing that no "enterprise" existed). *Hokama v. E.F. Hutton & Co., 566 F. Supp. 636, 643 (C.D.Cal. 1983)* **[**84]** (racketeering enterprise injury "little more than indirect statements" of requirement of "a 'nexus to organized crime'"). *Eisenberg v. Gagnon, 564 F. Supp. 1347, 1353 (E.D.Pa. 1983)* (cases do not make clear "what that 'something more' would be"); *Windsor Associates, Inc. v. Greenfeld, 564 F. Supp. 273, 279 (D.Md. 1983)* (racketeering enterprise injury "analytically indistinguishable" from organized crime requirement).

Again, the majority's reliance on *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*, is misplaced for two reasons. First, Congress, at the suggestion of the ABA Antitrust section, indicated an intent *not* to incorporate technical antitrust standing and proximate cause notions into *§ 1964*. *See* 115 Cong. Rec. at 6995 (1969) (discussing private civil actions). Second, in *Brunswick*, the Court found no clear

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[2] I cannot agree with the majority's view that *Turkette* and other Supreme Court cases in the criminal area have no application to the issues raised on this appeal. In the first place, *Turkette* itself specifically refers to the civil provisions, noting that they "could be useful in eradicating organized crime from the social fabric, whether the enterprise be ostensibly legitimate or admittedly criminal." *Id. at 585*. Further, the majority's concerns over "federalization" of the common law of fraud are identical to the concern in *Turkette* regarding the balance between federal and state enforcement of criminal law, which the Supreme Court noted was considered specifically by Congress, and which provided no basis for courts "to restrict the application of the statute." *Id. at 587*.

expression of Congressional purpose to allow suits for "losses which are of no concern to the antitrust laws." *Brunswick, 429 U.S. at 487*. **[*510]** Fraud, however, was one of Congress' specifically targeted activities in enacting RICO, and plaintiff has alleged injury from fraudulent conduct. **[**85]** Whatever *Brunswick's* contours may be, its holding has no application where injury from two acts of mail or wire fraud is alleged, since such injury *is* of the type RICO was "intended to prevent and that flows from that which makes defendants' acts unlawful," *id. at 489*.

To cast a net sufficiently wide to catch organized criminals, Congress took the calculated risk that others, whose activities are chargeable as crimes under other federal or state laws, would also be netted. Courts should not "creat[e] standing requirements that would preclude liability in many situations in which legislative intent would compel it." Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1120-21 (1982). *See* *Moss v. Morgan Stanley, Inc., supra, 719 F.2d at 21*. As with the majority's prior conviction requirement, the danger is that the racketeering injury standing requirement might well exclude plaintiffs in other cases where defendant's conduct "would be near the heart of Congress' concern." *Mauriber v. Shearson/American Exp., Inc., 567 F. Supp. 1231, 1240 (S.D.N.Y. 1983)*.

Finally, despite the majority's thesis that the House of Representatives **[**86]** was unaware of the consequences of civil RICO, Congressman Poff, its sponsor, stated:

> The curious objection has been raised to [RICO's provisions] that they are not somehow limited to organized crime -- as if organized crime were a precise and operative legal concept, like murder, rape or robbery. Actually, of course, it is a functional concept like white-collar or street crime serving simply as a shorthand method of referring to a large and varying group of individual criminal offenses committed in diverse circumstances.

116 Cong. Rec. at 35,344. Senator McClellan further noted that RICO "will have some application to individuals who are not themselves members of LaCosa Nostra or otherwise engaged in organized crime." 116 Cong. Rec. at 18,945 (1970). Congress recognized the possibility of enacting a statute aimed only at "mobsters" or organized crime members and *consciously* chose not to do so. The majority simply rewrites the statute in a manner Congress rejected under the guise of restricting *§ 1964* to "mobster" activity. Congress chose means to achieve its ends that imposed a risk of RICO liability on those like appellee Imrex in this case. The allegations **[**87]** alleging wire and mail fraud against defendant Imrex -- assumed on a motion to dismiss to be true -- are indictable offenses. Fraud is a typical activity of organized crime and Congress specifically noted it in its statement of findings and purpose. Pub. L. No. 91-452, § 1, 84 Stat. 941 (1970). The legislative branch fully considered the possibility of vexatious litigation and took that risk advisedly. H.R. Rep. No. 1549, 91st Cong., 2d Sess. 187 (1970). Moreover, since the lawmakers explicitly provided in *§ 1964(c)* for a private right of action, quite distinct from one judicially inferred, the judiciary's duty is to administer the law Congress passed and to defer its views on the policy considerations to the legislature. Note, *Civil RICO, supra*, 95 Harv. L. Rev. at 1117. Judicial creativity can only lead to inconsistency and confusion in the application of civil RICO. Whatever limitation is made should come not from the courts, but from Congress.

Accordingly, I vote to reverse the order appealed from and would reinstate the complaint.

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Furman v. Cirrito

United States Court of Appeals for the Second Circuit

May 16, 1984, Argued ; July 27, 1984, Decided

No. 84-7113 -- August Term, 1983

Reporter
741 F.2d 524 *; 1984 U.S. App. LEXIS 20080 **; Fed. Sec. L. Rep. (CCH) P91,663; 3 Fed. R. Serv. 3d (Callaghan) 1284

AARON J. FURMAN, ALVIN KATZ, FRANCIS P. MAGLIO, MARTIN J. JOEL, JR., HARVEY SHEID, EVERARD M.C. STAMM, ROBERT C. STAMM, Plaintiffs, MARTIN J. JOEL, JR., HARVEY SHEID, EVERARD M.C. STAMM, ROBERT C. STAMM, Plaintiffs-Appellants, v. JOHN CIRRITO, HAROLD S. COLEMAN, JOHN A. MILLER, FRANCIS G. REA, PETER M. TOCZEK, A.J. YORKE, Defendants-Appellees

Prior History: [1]** Appeal from a Judgment of the United States District Court for the Southern District of New York, Cooper, J., dismissing plaintiffs' civil claim under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C. §§ 1961-1968 (1982)*, for failure to allege a "seperate, distinct racketeering enterprise injury".

Disposition: Affirmed.

Core Terms

enterprise, racketeering, antitrust, pattern of racketeering activity, predicate act, organized crime, district court, treble damages, anti trust law, racketeering activity, attorney's fees, cases, terms, legislative history, slip opinion, negotiated, remedies, Bankers, courts, mail, civil remedy, arbitration, defendants', plaintiffs', provisions, remarks, garden, wire

LexisNexis® Headnotes

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

Criminal Law & Procedure > Sentencing > Forfeitures > General Overview

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

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

HN1[] **Racketeer Influenced & Corrupt Organizations, Remedies**

The Racketeer Influenced and Corrupt Organization Act, *18 U.S.C.S. §§ 1961-68*, prescribes criminal penalties, *18 U.S.C.S. § 1963*, as well as civil remedies, *18 U.S.C.S. § 1964*, for violation of its substantive provisions, *18 U.S.C.S. § 1962*.

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

Governments > Legislation > Interpretation

HN2[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

If unambiguous, statutory language controls, absent clearly expressed legislative intent to the contrary. In construing the Racketeer Influenced and Corrupt Organization Act, *18 U.S.C.S. §§ 1961-68*, the court should keep in mind that Congress intended that its provisions shall be liberally construed to effectuate its remedial purposes.

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

HN3[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

See *18 U.S.C.S. § 1964(c)*.

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

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

HN4[] Racketeer Influenced & Corrupt Organizations Act, Elements

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

HN5[] Racketeer Influenced & Corrupt Organizations Act, Elements

"Enterprise" includes 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)*.

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

HN6[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

"Racketeering activity" means any of a large number of specified acts which are chargeable under state law, indictable under federal law, or constitute an offense under federal bankruptcy, securities, or drug laws. *18 U.S.C.S. § 1961(1)*.

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

HN7[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

"Pattern of racketeering activity" requires at least two acts of racketeering activity within a ten year period. *18 U.S.C.S. § 1961(5)*.

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

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

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

HN8[] Racketeer Influenced & Corrupt Organizations, Claims

To state a civil claim under the Racketeer Influenced and Corrupt Organization Act (RICO), *18 U.S.C.S. §§ 1961-68*, a plaintiff must allege a racketeering injury, which includes an injury different in kind from that occurring as a result of the predicate acts themselves. Such an injury as one caused by an activity which RICO was designed to deter. This type of injury occurs only where mobsters, either through legitimate or illegitimate businesses, cause systemic harm to competition and the market, and thereby injure investors and competitors.

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

HN9[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

A civil claim under the Racketeer Influenced and Corrupt Organization Act (RICO), *18 U.S.C.S. §§ 1961-68*, requires an allegation of some kind of proprietary injury caused by defendant's use of a pattern of racketeering activity in connection with a RICO enterprise, as opposed to an injury caused merely by the individual racketeering acts. Without an allegation of this distinct RICO injury, a civil RICO complaint is legally insufficient.

Counsel: Seymour Shainswit, New York, New York (Melanie L. Golden, Kronish, Lieb, Shainswit, Weiner & Hellman, New York, New York, of Counsel), for Plaintiffs-Appellants.

Max Gitter, New York, New York (William P. Farley, Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, of Counsel), for Defendants-Appellees.

Judges: Cardamone, Pratt, and Daniel M. Friedman, of the United States Court of Apppeals for the Federal Circuit, sitting by designation, Circuit Judge.

Opinion by: PRATT

Opinion

[*525] PRATT, Circuit Judge

The main issue on this appeal is one of considerable importance in view of the rapidly growing number of civil actions based on *18 U.S.C. § 1964(c)*, commonly known as "civil RICO". That issue is whether a plaintiff, in order to state a claim under *§ 1964(c)*, must allege a "separate, distinct racketeering enterprise injury", above **[**2]** and beyond the injury caused by the predicate acts of racketeering activity. Noting that the damage allegations in plaintiffs' RICO cause of action were identical to those in their common law fraud claims, the district court, *578 F. Supp. 1535*, concluded that no "separate, distinct racketeering enterprise injury" had been alleged, that the RICO claim was therefore legally deficient, and, there being no other basis for federal jurisdiction, that the complaint should be dismissed. Although this panel concludes that neither the language of the statute nor its legislative history imposes such a requirement, we are compelled to affirm the district court's judgment based on the two recently filed, controlling opinions in this court: *Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482*, slip op. (2d Cir. 1984), and *Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984)*. Both of these cases were argued before the case now before us. The filings of the opinions in all three cases were held up pending a vote by the entire court on a request made within the court for in banc consideration of all three cases. When the in banc request was denied, the opinions were filed, by agreement of the court, **[**3]** in the order in which they were completed. We publish this opinion to express our disagreement with the majority views of the panels in those two cases and to reaffirm the views expressed by Judge Cardamone in his dissents in *Sedima, S.P.R.L.*, and *Bankers Trust Co.* This opinion will also serve as a record of the dissents by Judge Cardamone and Judge Pratt to this circuit's denial of in banc consideration to *Sedima, S.P.R.L., Bankers Trust Co.*, and the instant case. Without necessarily accepting the rationale of this opinion, Judge Winter also dissents from the denial of in banc consideration.

BACKGROUND

This lawsuit arises out of the sale of the brokerage firm of Bruns, Nordeman, Rea & Co. ("Bruns") to Bache, Halsey, Stewart, Shields, Inc. ("Bache"). Plaintiffs and defendants were all general partners of Bruns. Defendants Rea and Coleman were the managing directors of Bruns; the other defendants, along with Rea and Coleman, comprised the executive committee which formulated Bruns's policies, exercised exclusive control over its affairs, and negotiated the sale to Bache.

Plaintiffs allege that until it was too late in the sale negotiations to help them, defendants **[**4]** did not reveal that Bache had refused to complete the sale unless each **[*526]** partner of Bruns, including the plaintiffs, signed the purchase agreement; that defendants Rea and Coleman made payments, in the form of severance pay, to the other members of the executive committee in order to induce certain misrepresentations to plaintiffs; that defendants negotiated for themselves "sweetheart" employment arrangements with Bache, simultaneously misrepresenting to plaintiffs that these arrangements could not be altered; and that defendants made no effort to explore the merits of another offer to buy Bruns.

The complaint sets forth three causes of action, two of which are pendent state law claims based on common law fraud and breach of fiduciary duty. The civil RICO claim asserts that Bruns constituted an "enterprise" under *18 U.S.C. § 1961(4)*; that by virtue of their positions defendants "conducted and participated in the affairs" of Bruns within the meaning of *§ 1962(c)*; that defendants engaged in a fraudulent scheme of misrepresentations and concealments during their negotiations with Bache; that defendants conducted Bruns's affairs through "a pattern of racketeering activity", **[**5]** as that term is used in *§ 1962(c)*; and that, as part of the pattern of racketeering activity and in furtherance of the fraudulent scheme, defendants committed the predicate acts of using mail and wire facilities in violation of *18 U.S.C. §§ 1341* and *1343*.

Plaintiffs allege "injury in their business and property" in that (1) had they been aware from the beginning that their consent was necessary to consummate the sale to Bache, they would have been able to bargain for and receive sums comparable to those received by members of the executive committee from Rea and Coleman; (2) these payments caused the committee members receiving them to refrain from seeking a higher price from an alternate purchaser; (3) had defendants negotiated in good faith on behalf of all the partners, instead of just themselves, each plaintiff could have obtained employment arrangements superior to those that they actually received; and (4) the consideration Bache paid to the partnership was substantially reduced, because Bache absorbed the cost of funding the lucrative employment arrangements negotiated by defendants for themselves. Plaintiffs seek the treble damages and attorney's fees authorized by *18 U.S.C.* ***[**6]*** *§ 1964(c)*.

Defendants moved in the district court to dismiss the complaint pursuant to *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim upon which relief can be granted. Alternatively, they sought an order compelling plaintiffs to arbitrate the controversy as provided in the partnership agreement. The district court rejected most of defendants' arguments: it concluded that, on the allegations of the complaint, Bruns was an "enterprise", that the sale to Bache was part of the "affairs" of the enterprise, and that defendants had engaged in a "pattern of racketeering activity", all within the meaning of those terms in the RICO statute. However, on the sole ground that plaintiffs were required, but failed, to allege "a separate, distinct racketeering enterprise injury", the district court dismissed the complaint. It did not reach the arbitration question.

On appeal, therefore, we are presented with the narrow issue of whether, in order to state a claim under *§ 1964(c)*, a plaintiff must allege "a separate, distinct racketeering enterprise injury". We are *not* considering whether plaintiffs must allege a connection to organized crime, *cf. Moss v. Morgan Stanley, 719 F.2d* ***[**7]*** *5, 21 (2d Cir. 1983)*, *cert. denied*, *465 U.S. 1025, 104 S. Ct. 1280, 79 L. Ed. 2d 684 (1984)*, whether plaintiffs must show some "competitive injury" as a result of defendants' actions, *cf. Schacht v. Brown, 711 F.2d 1343, 1356-58 (7th Cir. 1983)*, *cert. denied*, *464 U.S. 1002, 104 S. Ct. 508, 78 L. Ed. 2d 698, 104 S. Ct. 509 (1983)*; *Bennett v. Berg, 685 F.2d 1053, 1059 (8th Cir. 1982)*, *aff'd in part and rev'd in part on other grounds*, *710 F.2d 1361* (en banc), *cert. denied*, *464 U.S. 1008, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983)*, or whether the statute requires a criminal conviction of the predicate offenses, or of a RICO offense, before a civil RICO claim can be maintained, *see Sedima, S.P.R.L. v. Imrex Co.*, slip op. at ; **[*527]** *cf. USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 95 n.1 (6th Cir. 1982)*; *Farmers Bank of Delaware v. Bell Mortgage Corp., 452 F. Supp. 1278, 1280 (D. Del. 1978)*.

DISCUSSION

In 1970 congress enacted the Organized Crime Control Act, Pub. L. No. 91-452, 84 Stat. 941. Title IX thereof, codified at *18 U.S.C. §§ 1961-68*, is entitled ***HN1***[] "Racketeer Influenced and Corrupt Organization Act" (RICO) and prescribes criminal **[**8]** penalties, *18 U.S.C. § 1963*, as well as civil remedies, *18 U.S.C. § 1964*, for violation of its substantive provisions, *18 U.S.C. § 1962*. The case before us concerns the private civil remedies under *§ 1964(c)*, particularly treble damages and attorney's fees.

Our analysis must begin with the statutory language. *Lewis v. United States, 445 U.S. 55, 60, 63 L. Ed. 2d 198, 100 S. Ct. 915 (1980)*. ***HN2***[] If unambiguous that language controls, absent "clearly expressed legislative intent to the contrary". *United States v. Turkette, 452 U.S. 576, 580, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981)* (quoting *Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 64 L. Ed. 2d 766, 100 S. Ct. 2051 (1980))*. Further, in construing this statute we should keep in mind that congress intended that its provisions "shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970); *see also United States v. Turkette, 452 U.S. at 587*.

RICO's private civil remedies are authorized by *§ 1964(c)*, which provides:

> ***HN3***[] Any person injured in his business or property by reason of a violation of *Section 1962* of this chapter may sue **[**9]** therefor in any appropriate United States district court and shall recover three fold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Section 1962(c), the substantive provision that plaintiffs' claim was violated here, provides:

> ***HN4***[] 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.

Congress has carefully defined for us some of the unfamiliar terms it used:

> ***HN5***[] "Enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. *§ 1961(4)*. ***HN6***[]

> "Racketeering activity" means [any of a large number of specified acts which are chargeable under state law, indictable under federal law, or constitute an offense under federal bankruptcy, securities, or drug laws]. § 1961(1). ***HN7***[]
>
> "Pattern of racketeering activity" requires at least **[**10]** two acts of racketeering activity [within a ten year period]. § 1961(5).

When these provisions and definitions are applied to the instant complaint, it is apparent that plaintiffs have sufficiently alleged those facts required by the statutory language -- that they were injured in their business and property by the conduct of the defendants, who violated § 1962 by conducting the enterprise's affairs through a pattern of racketeering activity. The alleged pattern of racketeering activity was a repeated use of the mails and the wires, in furtherance of defendants' underlying scheme to defraud plaintiffs by concealing from them, until the last possible moment, the true conditions for the sale of Bruns.

The court below, however, construed the phrase "by reason of a violation of § 1962", contained in § 1964(c), as requiring plaintiffs to allege "something more" than injury from defendants' predicate acts of mail and wire fraud. The "something more" was characterized as a "separate, distinct racketeering enterprise injury". The two recent decisions by panels of this court referred to at the beginning of this **[*528]** opinion address this same issue and essentially agree **[**11]** with the district court in this case. In *Sedima, S.P.R.L. v. Imrex Co.*, a divided panel of this court held that, in order ***HN8***[] to state a civil RICO claim, a plaintiff must allege a "racketeering injury" which it defined as including an "injury different in kind from that occurring as a result of the predicate acts themselves". *741 F.2d at 496*. The panel identified such an injury as one "caused by an activity which RICO was designed to deter." *Id.* More specifically, it held that this type of injury occurs only where "mobsters", either through legitimate or illegitimate businesses, "cause systemic harm to competition and the market, and thereby injure investors and competitors." *741 F.2d at 496*.

In *Bankers Trust Co. v. Rhoades*, another divided panel of this court held that ***HN9***[] a civil RICO claim requires an allegation of some kind of "proprietary injury" caused by defendant's use of a pattern of racketeering activity in connection with a RICO enterprise, as opposed to an injury caused merely by the individual racketeering acts. The panel concluded that, without an allegation of this "distinct RICO injury", a civil RICO complaint is legally insufficient. 741 F.2d Slip op. at **[**12]** . In addition to this circuit's recent decisions, some district courts have imposed a similar restriction on civil RICO, sometimes in the form of a "standing" requirement, *e.g., Dakis on behalf of the Dakis Pension Plan v. Chapman, 574 F. Supp. 757, 761 (N.D. Cal. 1983)*; *Barker v. Underwriters at Lloyd's London, 564 F. Supp. 352, 358 (E.D. Mich. 1983)*; *Johnsen v. Rogers, 551 F. Supp. 281, 284-85 (C.D. Cal. 1982)*; *Harper v. New Japan Securities International, Inc., 545 F. Supp. 1002, 1007-08 (C.D. Cal. 1982)*; *Alton v. Alton*, No. 82 Civ. 0795, slip op. at 5-6 (S.D.N.Y. July 9, 1982), *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co., 527 F. Supp. 206, 208-09 (E.D. Mich. 1981)*, but other district courts have rejected such a restriction, *see, e.g., Wilcox v. Ho-Wing Sit, 586 F. Supp. 561*, slip op. at 17-18 (N.D. Cal. 1984); *Ralston v. Capper, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983)*; *Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231, 1240-41 (S.D.N.Y. 1983)*; *Seville Industrial Machinery Corp. v. Southmost Machinery Corp., 567 F. Supp. 1146, 1157 (D.N.J. 1983)*; *Eisenberg v. Gagnon, 564 F. Supp. 1347, 1352-53 (E.D. Pa. 1983)*; **[**13]** *Windsor Associates, Inc. v. Greenfeld, 564 F. Supp. 273, 278-79 (D. Md. 1983)*.

To us, the language of § 1964(c) is clear. It contains no requirement for a "racketeering enterprise injury"; nor does it limit the protected injury to one sustained "by reason of" the racketeering enterprise; it grants civil relief for "injury", which logically includes *any* injury, "by reason of a violation of § 1962".

Despite the clarity of congress's language, defendants argue that, since RICO's primary purpose is to eradicate organized crime, it is directed only against "racketeers" such as hoodlums and thugs, and not against businessmen engaged in "garden variety fraud", as alleged in this case. However, defendants and others who advocate this position ignore the larger purposes of RICO. While RICO's primary focus may have been on organized crime, when considering the statute congress also recognized that fraud is a pervasive problem throughout our society, *see* Statement of Findings and Purpose, Organized Crime Control Act of 1970, 84 Stat. 922-23 (1970); Blakey, *The*

RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg, *58 Notre Dame L. Rev. 237, 245-48 (1982)*, which **[**14]** causes billions of dollars in economic loss each year. *Id. at 342-48*. Congress further acknowledged that existing state and federal law was not capable of dealing with this problem. *United States v. Turkette, 452 U.S. at 586*.

Thus, in order to deter and help eliminate fraud from interstate commerce, congress included in its *§ 1961(1)* definition of predicate acts of racketeering activity not only criminal activity which had formerly been "within the police power of the State", thereby essentially federalizing certain specific state crimes, *id. at 586-87* (citing legislative history), but also the common federal crimes of fraud, such as **[*529]** mail fraud, wire fraud, bankruptcy fraud and securities fraud. Congress was well aware that in so doing, it was altering the federal-state balance in these areas, elevating "garden variety" common law fraud claims to the status of federal offenses, and subjecting violators to enhanced criminal penalties and severe civil remedies. *Id.* Since congress unquestionably had the power to do this, "the courts are without authority to restrict the application of the statute." *Id. at 587* (citation omitted). Yet, restriction is precisely **[**15]** what some courts, like defendants and the court below, seek to impose through an artificial standing requirement on plaintiffs who seek relief under *§ 1964(c)*.

Further, the statute is not aimed at "racketeers"; indeed, the word "racketeer" is not used in the statute except in its title. Instead, it is aimed at "racketeering", and even then only in the context of "racketeering activity", which congress has defined carefully and precisely in terms of conduct. When congress provided severe sanctions, both civil and criminal, for conducting the affairs of an "enterprise" through a "pattern of racketeering activity", it provided no exception for businessmen, for white collar workers, for bankers, or for stockbrokers. If the conduct of such people can sometimes fairly be characterized as "garden variety fraud", we can only conclude that by the RICO statute congress has provided an additional means to weed that "garden" of its fraud.

It seems almost too obvious to require statement, but fraud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm. As we view RICO, fraud by anyone, when furthered by multiple use of the mails, **[**16]** constitutes a "pattern of racketeering activity". And when that pattern is used to conduct the affairs of an "enterprise", congress intended to provide the victims with the private civil RICO remedies of treble damages and attorney's fees for all injuries caused by the defendant's conduct.

By construing the "by reason of" language to require more than injury resulting from the predicate acts, courts simply assume that congress could not have intended to provide treble damages and attorney's fees to persons "whose only injury stems directly from the predicate acts." *Harper v. New Japan Securities International, Inc., 545 F. Supp. at 1007*; *see also* *Johnsen v. Rogers, 551 F. Supp. at 285*; *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co., 527 F. Supp. at 208-09*. As a practical matter, however, the only injury suffered by an injured party in most cases will flow from the predicate acts; the enterprise is merely the means or vehicle through which those acts are accomplished. To require injury to result from "something more" than the predicate acts is to sterilize civil RICO as a weapon against the conduct congress sought to curtail.

Moreover, it is not true that **[**17]** absent a "racketeering enterprise injury" a claim under *§ 1964* represents no more than a claim brought under the statutes which define the predicate acts. *United States v. Forsythe, 560 F.2d 1127, 1135 (3d Cir. 1977)*; *cf.* *Johnsen v. Rogers, 551 F. Supp. at 285*; *North Barrington Development, Inc. v. Fanslow, 547 F. Supp. 207, 211 (N.D. Ill. 1980)*; *Harper v. New Japan Securities International, Inc., 545 F. Supp. at 1007-08*. What distinguishes a civil RICO claim from an ordinary fraud claim is that RICO requires a "pattern of racketeering activity" (two acts within 10 years) used to conduct the affairs of an "enterprise." *See* *United States v. Forsythe, supra.* The existence of the "enterprise" is a *sine qua non* of a RICO claim, and "at all times remains a separate element which must be proved", *United States v. Turkette, 452 U.S. at 583*. By requiring "proof of a fact other than the facts required to prove the predicate acts of racketeering", *Bennett v. Berg, 685 F.2d at 1060*, RICO transforms conduct that is already criminal under other statutes into a federal RICO crime with its severe maximum penalties of 20 years in prison and a $25,000 fine. Similarly, **[**18]** with equal force, **[*530]** and for the same deterrent purpose, the statute transforms ordinary common law fraud claims into federal civil RICO claims, with enhanced remedies of treble damages and attorney's fees.

Those district courts, like the one below, which have dismissed complaints for failure to allege a separate and distinct "racketeering enterprise injury", have not provided guidance as to what constitutes such an injury. *See* *Ralston v. Capper, 569 F. Supp. at 1580*. One court has posited that a "racketeering enterprise injury" might occur "if a civil RICO defendant's ability to harm the plaintiff is enhanced by the infusion of money from a pattern of racketeering activity into the enterprise." *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co., 527 F. Supp. at 209*. But this example does little to define a "racketeering enterprise injury", and it does even less in terms of limiting the statute's reach, because almost every defendant's ability to inflict harm on a plaintiff would be enhanced by the fruits of the racketeering activity. It follows then that almost every complaint that alleges a *§ 1962* violation and a concomitant injury would satisfy this test. **[**19]** The difficulty in understanding or even defining a "racketeering enterprise injury" is more fully demonstrated in Part III of Judge Cardamone's dissenting opinion in *Bankers Trust Co. v. Rhoades*, 741 F.2d slip op. at .

Defendants and others have decried the use of RICO in "far-reaching civil contexts" where it has the potential to "tarnish the reputations" of ostensibly legitimate businesspersons. We are unmoved by the argument. By defining "racketeering activity" in functional rather than status terms, congress sought to avoid serious constitutional hazards. If defendants are surprised or offended that their "garden variety" fraudulent conduct is now statutorily characterized as "racketeering", they should address their grievance to congress, which clearly and specifically included mail, wire, and securities frauds as predicate acts of "racketeering activity" under *§ 1961(1)*. *See also* Blakey, *supra*, at 268-70. Since such conduct is more frequently associated with "white collar" crime than with "organized crime", as those terms are generally used in the everyday world, we conclude that congress wanted RICO to reach, among other illegal conduct, precisely those kinds **[**20]** of activities that are at issue in this case.

The legislative history of Title IX does not support a contrary interpretation of the statute. When it enacted RICO, congress was on notice that the statute had potentially far-ranging effects. Some members of the house who opposed the statute argued:

> Title IX * * * seeks to stymie organized crime's growing infiltration of legitimate business.
>
> But it runs amuck. It embodies poor draftsmanship, and it employs penalties and investigative procedures which are both abusive and pregnant with the potential for abuse.

H.R. Rep. No. 1549, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News, 4007, 4081 (dissenting views of Reps. Conyers, Mikva, and Ryan); *see also* 116 Cong. Rec. 35204-05 (1970) (remarks of Rep. Mikva). Despite this opposition, however, congress chose to enact the statute as written, and we would exceed our proper function were we to rewrite its provisions in order to restrict its application. *United States v. Turkette, 452 U.S. at 587*.

A few courts have seized upon references to ***antitrust law*** in RICO's legislative history, specifically to § 4 of the Clayton Act, *15 U.S.C. § **[**21]** 15*, which contains language similar to that in *§ 1964(c)*, as evidence that congress, in enacting RICO, intended to impose proof requirements on RICO plaintiffs similar to those imposed on antitrust plaintiffs. *See* *Johnsen v. Rogers, 551 F. Supp. at 285*; *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co., 527 F. Supp. at 208-09*. While RICO's legislative history does contain some references to antitrust principles, attempts to impute the restrictive standing requirements of ***antitrust law*** to RICO, **[*531]** based on similar language in both statutes, are flawed.

Section 4 of the Clayton Act, *15 U.S.C. § 15*, enables a person "injured in his business or property by reason of anything forbidden in the antitrust laws [to recover treble damages] and the cost of suit, including a reasonable attorney's fee." To recover under this provision, " antitrust injury" must be proved, which is "injury of the type antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1971)*.

Relying on this language in *Brunswick*, some courts have required **[**22]** that a plaintiff demonstrate a distinct RICO injury in order to state a civil RICO claim. *See* *Johnsen v. Rogers, 551 F. Supp. at 285* (plaintiff must allege "a commercial injury caused by the conducting of an 'enterprise's affairs through a pattern of racketeering activity.'"); *Harper v. New Japan Securities International, Inc., 545 F. Supp. at 1007* (plaintiff must allege "injury of the type the RICO statute was intended to prevent"); *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co., 527 F. Supp. at 208*. (although RICO does not require a competitive injury as that term is defined by antitrust cases, plaintiff must allege a "racketeering enterprise injury").

But the antitrust analogy has several defects. While RICO copied the treble damages and attorney's fee language of § 4, this was simply "another example of the antitrust remedy being adapted for use against organized criminality." 116 Cong. Rec. 35295 (1970) (remarks of Rep. Poff); *see also* Note, *Civil RICO: The Temptation and Impropriety of Judicial Restriction*, 95 Harv. L. Rev. 1101, 1112 (1982). Moreover, these concepts that were borrowed from the Clayton Act, treble damages and injunctive relief, **[**23]** pertain to remedies rather than what is necessary to establish a claim under RICO.

Senator McClellan, one of the sponsors of the bill, stated:

> There is, however, no intention here of importing the great complexity of ***antitrust law*** enforcement into this field. Nor is there any intention of using the antitrust laws for a purpose beyond the legislative intent at the time of their passage.
> The many references to antitrust cases are necessary because the particular equitable remedies desired have been brought to their greatest development in this field, and in many instances they are the primary precedents for the remedies in this bill.

115 Cong. Rec. 9567 (1969).

> Senator Hruska echoed these remarks:
> Patterned closely after the Sherman Act, [RICO] provides for private treble damage suits, prospective injunctive relief, discovery procedures and all the other devices which bring to bear the full panoply of our antitrust machinery in aid of the businessman competing with organized crime.

115 Cong. Rec. 6993 (1969).

Moreover, the Antitrust Section of the American Bar Association argued against a proposal which would have amended the Sherman **[**24]** Act to provide for civil RICO remedies, and instead recommended the enactment of separate statutes, contending that the use of antitrust laws to combat organized crime

> could create inappropriate and unnecessary obstacles in the way of persons injured by organized crime who might seek treble damage recovery. Such a private litigant would have to contend with the body of precedent -- appropriate in a purely antitrust context -- setting strict requirements on questions such as "standing to sue" and "proximate cause."

115 Cong. Rec. 6995 (1969).

This recommendation, adopted by congress, recognized that the application of antitrust commercial injury standing requirements would not be appropriate in the RICO context. *Kimmel v. Peterson, 565 F. Supp. 476, 494 (1983)*.

[*532] ***Antitrust law*** has very little relevance to RICO, as each area of law serves different purposes. "Congress did not see the objectives of RICO and antitrust laws as coterminous." *Bennett v. Berg, 685 F.2d at 1059*. Antitrust regulation is designed to promote market place competition and is increasingly focused on market efficiency rather than harm suffered by individual businesses. **[**25]** *See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 n.21, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*; *Schacht v. Brown, 711 F.2d at 1358*; *Ralston v. Capper, 569 F. Supp. at 1580*. RICO, on the other hand, is not concerned with either market efficiency or promoting competition, but instead is designed to inflict severe financial injury on those who commit crimes in operating an enterprise or who use an enterprise to insulate themselves from less severe penalties. *See* 115 Cong. Rec. 9567 (remarks of Sen. McClellan); Note, *supra*, at 1112-14.

As Judge Posner of the Seventh Circuit has noted, "analogies to Section 4 of the Clayton Act are forced", *Cenco Inc. v. Seidman & Seidman, 686 F.2d 449, 457* (7th Cir.), *cert. denied*, *459 U.S. 880, 103 S. Ct. 177, 74 L. Ed. 2d 145 (1982)*. Still another court has observed:

> [RICO] is precisely designed to *ruin* those individuals and enterprises it is aimed at. It is not designed to increase their efficiency or protect them from insolvency. Thus, the rationale behind the antitrust standing concerns have [sic] no applicability here.

Ralston v. Capper, 569 F. Supp. at 1580 (citation **[**26]** omitted).

Standing in antitrust cases has been strictly limited in order to confine treble damages to extreme situations and to avoid ruining violators and reducing market place competition. However, because RICO's essential aim is to strip violators of "the fruits of [their] ill-gotten gains", *United States v. Turkette, 452 U.S. at 585*; *see also* 115 Cong. Rec. 602 (1970) (remarks of Sen. Hurska), such concerns are not present under RICO.

In short, a limitation of RICO standing to those who suffer a "racketeering enterprise injury", whether based on similar language in antitrust laws, analogous antitrust concepts, or merely a judicial desire to restrict the statute's scope, not only would run counter to the intent expressed by congress when it enacted RICO, but also would "lead to the anomalous result of denying standing to direct victims of racketeering activity." *Seville Industrial Machinery Corp. v. Southmost Machinery Corp., 567 F. Supp. at 1157*. As Judge Duffy of the Southern District of New York has pointed out:

> A brokerage enterprise infiltrated by organized crime and engaged in defrauding its customers * * * might injure no one but the customers of **[**27]** the enterprise. There would be no injury above and beyond that caused by the predicate acts of fraud forming the "pattern of racketeering activity." Such conduct, however, would violate RICO and would lie near the center of Congress' concern. In addition, *§ 1964(c)* simply provides that "any person * * * injured by reason of a violation of *§ 1962*" may invoke RICO's civil remedies. I can imagine no construction of those words which would exclude from their coverage the primary victims of such a scheme and which would render such defendants immune from civil sanctions.

Mauriber v. Shearson/American Express, Inc., 567 F. Supp. at 1240.

While it may appear that congress, by enacting RICO, has "created a runaway treble damage bonanza for the already excessively litigious", *Schacht v. Brown, 711 F.2d at 1361*, congress has also spoken in clear and unambiguous terms. Although RICO is a complex statute, we find it to have been carefully drafted, and congress knowingly adopted provisions of potentially far-reaching application. Efforts by various courts across the country to restrict the statute's application seem to be based more on "judicial discomfort with the broad **[**28]** sweep of RICO", *Kimmel v. Peterson, 565 F. Supp. at 493 n.21*, than on a close reading of the statute's language or an **[*533]** accurate study of its legislative history. We think that any restriction of RICO along the lines urged by defendants must come from congress, not the judiciary. It is not our proper role to superimpose additional requirements for establishing a RICO claim on what is a clearly delineated statutory cause of action. As the Seventh Circuit concluded in *Schacht*:

> The legislature having spoken, it is not our role to reassess the costs and benefits associated with the creation of a dramatically expansive, and perhaps insufficiently discriminate, tool for combating organized crime. *United States v. Turkette, 452 U.S. at 586-87, 101 S. Ct. at 2530-31 (1981)*.

711 F.2d at 1361.

We therefore conclude that the district court erred when it dismissed plaintiffs' complaint for failing to allege a "separate, distinct racketeering enterprise injury".

As an alternative ground for dismissal, defendants below moved to compel arbitration of plaintiffs' claims, based on an arbitration clause in the partnership agreement. Although the district **[**29]** court did not rule on that part of defendants' motion, plaintiffs now urge us to hold that their civil RICO claims are not subject to arbitration. Since we are compelled to uphold the dismissal of plaintiffs' complaint, we do not have to reach this issue.

CONCLUSION

The judgment of the district court is affirmed on the authority of *Sedima, S.P.R.L. v. Imrex Co.* and *Bankers Trust v. Rhoades*.

Clark Equip. Co. v. Lift Parts Mfg. Co.

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

July 31, 1984

No. 82 C 4585

Reporter

1984 U.S. Dist. LEXIS 24675 *; 223 U.S.P.Q. (BNA) 944 **

CLARK EQUIPMENT COMPANY, a Delaware corporation, Plaintiff-Counterdefendant, v. LIFT PARTS MFG. CO., INC., a Delaware corporation, Defendant-Counterclaimant.

Core Terms

dealers, counterclaims, allegations, motion to dismiss, infringement, trademark, boxes, first amended complaint, replacement part, consent decree, antitrust, argues, lift, affirmative defense, motion to strike, circumstances, confidential, manufactured, appearance, unmarked, concealment, defenses, truck, summary judgment motion, Lanham Act, impression, collected, documents, stricken, copied

LexisNexis® Headnotes

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Trademark Law > ... > Federal Unfair Competition Law > False Designation of Origin > General Overview

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

HN1[] **Federal Unfair Competition Law, Lanham Act**

The law is clear that a defendant may be contributorily liable under the Lanham Act, only if it intentionally induced dealers to infringe a plaintiff's trademark, or the defendant continued to supply dealers with unmarked boxes and parts after it knew or had reason to know that they were engaging in infringing activities.

Trademark Law > ... > Federal Unfair Competition Law > Lanham Act > General Overview

Trademark Law > Causes of Action Involving Trademarks > Infringement Actions > General Overview

HN2[] **Federal Unfair Competition Law, Lanham Act**

A defendant is not subject to the proscriptions of the Lanham Act simply because it may have anticipated or intended "to permit" the ensuing trademark infringement.

Business & Corporate Compliance > ... > Federal Unfair Competition Law > Trade Dress Protection > Causes of Action

Trademark Law > ... > Trade Dress Protection > Infringement Actions > Functionality Defense

Trademark Law > ... > Federal Unfair Competition Law > Trade Dress Protection > General Overview

HN3[] **Trade Dress Protection, Causes of Action**

Appearance of boxes is not mandated by the function of replacement parts contained therein; it is "trade dress." A party's trade dress is infringed only when it is copied.

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

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Trade Secret Determination Factors > General Overview

HN4[] **Trade Secrets & Unfair Competition, Trade Secrets**

The inquiry into whether information is a trade secret depends on a variety of factors including: (1) the extent to which the information is known by others in the field; (2) the extent to which the information is known by the business' employees; (3) The extent to which the employer takes measures to guard the secrecy of the information; (4) the value of the information to the employer and his competitor; (4) the value of the information to the employer and his competitor; (5) the amount and effort or money spent in developing the information; and (6) the ease or difficulty in acquiring or duplicating the information.

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

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Misappropriation Actions > General Overview

HN5[] **Trade Secrets & Unfair Competition, Trade Secrets**

Where it is shown that the subject information was obtained by wrongful means, Illinois courts are not receptive to arguments by defendants that they could have, if they wished, obtained the same information by lawful means.

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraud

Governments > Legislation > Statute of Limitations > General Overview

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

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

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

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN6[] Tolling of Statute of Limitations, Fraud

Fed. R. Civ. P. 9(b) mandates that circumstances constituting fraud be stated with particularity.

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

Torts > ... > Fraud & Misrepresentation > Nondisclosure > Elements

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

Torts > Business Torts > Fraud & Misrepresentation > General Overview

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

HN7[] Defenses, Demurrers & Objections, Affirmative Defenses

Concealment of facts can give rise to liability in tort under Illinois law only if a plaintiff alleges with particularity, inter alia, specific facts and circumstances sufficient to impose a duty on a defendant to make disclosures.

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

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

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

Governments > Fiduciaries

HN8[] Defenses, Demurrers & Objections, Affirmative Defenses

In order to invoke the fraudulent concealment doctrine as a basis for distinct liability in tort it must appear from the complaint that something more is involved than a party's lack of awareness that it is being victimized by a tort-feasor, at least where no fiduciary relationship is involved.

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

Torts > ... > Fraud & Misrepresentation > Nondisclosure > General Overview

Torts > Procedural Matters > Statute of Limitations > General Overview

HN9[] Tolling of Statute of Limitations, Fraud

To toll a limitations period under the fraudulent concealment theory, a plaintiff is required to show (1) that defendant wrongfully concealed its actions from plaintiff; (2) that plaintiff failed to discover the operative facts that are the basis of its cause of action within the limitations period; and (3) that plaintiff acted with due diligence until discovery of these facts.

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

Copyright Law > ... > Civil Infringement Actions > Defenses > General Overview

Civil Procedure > Pleading & Practice > General Overview

Copyright Law > Copyright Infringement Actions > Civil Infringement Actions > General Overview

HN10[] **Pleadings, Rule Application & Interpretation**

A reply to an answer is permitted under *Fed. R. Civ. P. 7* only when specifically ordered by the court.

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

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

HN11[] **Settlements, Consent Judgments**

Res judicata and collateral estoppel presuppose an adjudication by a court on the merits of a controversy.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Entry of Judgments > General Overview

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN12[] **Estoppel, Collateral Estoppel**

A consent decree in essence is a contract between the parties; it does not reflect a court's determination of the underlying merits. Therefore, a consent decree is not the proper basis for invoking the doctrines of res judicata and collateral estoppel.

Antitrust & Trade Law > Clayton Act > Defenses

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

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

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

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

HN13[] **Clayton Act, Defenses**

It is well settled that defenses such as unclean hands and in pari delicto have limited applicability in an antitrust context. They are available to a plaintiff only if the plaintiff can establish that the defendant jointly participated with it in the scheme that is the basis of the defendant's antitrust counterclaims; that the defendant may have implemented a similar scheme is not enough.

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

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

HN14[] **Private Actions, Standing**

It is well established that a direct competitor who is a participant in a relevant market has standing to bring an antitrust action.

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

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

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

HN15[] **Entitlement as Matter of Law, Genuine Disputes**

A motion for summary judgment should be granted only if the movant establishes that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. For purposes of such motion, the record, of course, is to be construed in the light most favorable to the nonmovant.

Opinion by: [*1] LEIGHTON

Opinion

[944]** Before the Honorable George N. Leighton U.S. District Judge

Memorandum

This is an action by Clark Equipment Company (Clark), a manufacturer and distributor of lift trucks and their replacement parts, against Lift Parts Mfg. Co. (LPM), a competitor which distributes but does not manufacture replacement parts for lift trucks. In its first amended complaint, Clark claims that it has been injured by LPM's alleged violations of federal copyright laws, federal trademark laws, federal unfair competition law, and Illinois statutory and common law. LPM has filed a first amended counterclaim alleging, inter alia, that Clark has administered its Master Parts System in a manner that violates antitrust laws. The cause is before the court on three motions by LPM: one to dismiss specified portions of the first amended complaint, another to strike as insufficient various defenses asserted in Clark's answer to the first amended counterclaim, and a third for summary judgment on Clark's copyright infringement claim. For the following reasons, the motion to dismiss and the motion to strike are granted in part and denied in part, whereas, the motion for summary judgment is denied **[*2]** in its entirety. **[**945]**

I

A

The first objection raised by LPM with respect to the motion to dismiss is directed at paragraph 37 of Clark's first amended complaint in which it is alleged that LPM, in violation of section 43(a) of the Lanham Act, sold lift truck parts to unnamed Clark dealers "in unmarked boxes without any LPM Trademarks or identification appearing on the box or on the part." It is further alleged in paragraph 37 that "the purpose and intent of this procedure was to permit these products to be palmed off as Clark brand parts. . . ." Clark, in essence, is attempting to impose accessorial liability on LPM for subsequent trademark infringement that may have occurred when dealers placed Clark trademarks on the unmarked boxes and parts that were obtained from LPM. However, ***HN1***[] the law is clear that LPM may be contributorily liable under the Lanham Act only if it intentionally induced the dealers to infringe Clark's trademark, or it continued to supply the dealers with the unmarked boxes and parts after it knew or had reason to know that they were engaging in infringing activities. See *Inwood Laboratories v. Ives Laboratories, 102 S.Ct. 2182, 2188 (1982)*; *Warner & Co. v. Eli **[*3]** Lilly & Co., 265 U.S. 526 (1924)*. ***HN2***[] LPM is not subject to the proscriptions of the Lanham Act simply because it may have anticipated or, as is alleged in this case, intended "to permit" the ensuing trademark infringement. See *Inwood Laboratories, 102 S.Ct. at 2188 n.13*. Accordingly, paragraph 37 of Clark's first amended complaint is dismissed without prejudice.

The allegations in paragraph 37 are realleged in paragraphs 42 and 44 of the first amended complaint as the basis of respective claims under the Illinois Uniform Deceptive Trade Practices Act, Ill.Rev.Stat. ch. 121-1/2, § 312, and the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill.Rev.Stat., ch. 121-1/2, § 262. As recognized in *Duo-Tint Bulb & Battery Co. v. Moline Supply Co., 46 Ill. App. 3d 145, 360 N.E.2d 798, 804 (1977)*, Illinois law may impose a labeling requirement on a distributor to insure that buyers are not purchasing its products under the impression that the goods are those of another manufacturer when "functional aspects dictate the physical characteristics of . . . competing articles such that they become identical in appearance." For purposes of this motion, the court presumes that the physical **[*4]** appearance of various lift truck replacement parts are primarily a product of their intended functions; a brake shoe manufactured by LPM for a particular lift truck model should, by in large, approximate the appearance of a comparable brake shoe manufactured by Clark. Therefore, it is conceivable that Clark may be able to prove a set of facts establishing that LPM should be required under Illinois law to place its trademark on the replacement parts it sells to Clark dealers to insure that consumers are not buying the parts under the impression that they were manufactured by Clark. [1] Therefore, the motion to dismiss is denied insofar as it is directed at allegations incorporated in paragraphs 42 and 44 pertaining to LPM's failure to place identifying marks on replacement parts sold to Clark dealers.

A different **[*5]** result is in order, however, with respect to the unmarked boxes that the replacement parts come in. The ***HN3***[] appearance of the boxes is not mandated by the function of replacement parts contained therein; it is "trade dress." See *Duo-Tint Bulb & Battery, 360 N.E.2d at 804*.A party's trade dress is infringed only when it is copied.Id. Clark replacement parts presumably come in boxes bearing the Clark trademark; the blank boxes provided by LPM, in and of themselves, therefore, do not infringe Clark's trade dress because they are not copies of Clark boxes. The unmarked boxes can only become infringing if subsequently the Clark trademark is placed on them by the dealers. In essence, therefore, this aspect of the claim is a reprise of the claim for contributory infringement brought under the Lanham Act: Clark is attempting to impose liability on LPM for infringements

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[1] LPM argues that "consumers of lift truck replacement parts obviously do not base their purchasing decisions on the appearance of such parts." This contention, however, nowhere finds support in the amended complaint, the pleading before the court; moreover, it is not a proper subject of judicial notice. It obviously is a defense that should be asserted in LPM's answer.

perfected by the dealers. As was the case with federal law, LPM should be held liable under Illinois law for the acts of others only if it fairly can be said that it instigated or knowingly acquiesced in their conduct.

Accordingly, the court finds that the allegation that LPM somehow intended to "permit" such infringing activity **[*6]** is also insufficient under Illinois law to impose liability on LPM. Consequently, the motion to dismiss is granted without prejudice insofar as it is directed at allegations, incorporated in paragraphs 42 and 44, that LPM sold parts to Clark dealers in unmarked boxes. **[**946]**

B

Paragraph 38 of the first amended complaint also, according to LPM, fails to state a claim upon which relief may be granted under the Lanham Act. This paragraph alleges that LPM has used the Clark trademark in LPM catalogs and has photoccopied and distributed various Clark parts materials bearing the Clark trademark. It is asserted in paragraph 39 that these acts were done so as to create a false impression as to the origins of the materials and were likely to confuse recipients. LPM argues that, as a matter of law, plaintiff fails to allege circumstances which would create a likelihood of confusion; for instance, LPM contends, Clark's trademark was employed in LPM catalogs to advertise that LPM replacement parts are equivalent to certain Clark parts, a use that undoubtedly is acceptable. See, e.g., *B.H. Bunn Co. v. AAA Replacesment Parts Co., 451 F.2d 1254, 1265-67 (5th Cir. 1981)*. But on this motion to dismiss **[*7]** the allegations of the complaint must be construed favorably to Clark; the court should not dismiss a claim on the basis of factual defenses that LPM may later be able to establish. Applying the appropriate standard, the court finds without hesitancy that Clark can conceivably establish, within the framework of the allegations, a set of facts establishing that LPM used the Clark Trademark in a manner creating a likelihood of confusion. Therefore, the motion to dismiss is denied insofar as it seeks dismissal of paragraph 38 of Clark's first amended complaint.

The allegations of paragraph 38 are incorporated into paragraphs 42 and 44 of the first amendedm complaint as the basis of claims under the Illinois Fraud and Deceptive Business Practices Act and the Uniform Deceptive Trades Practices Act. Clark's purported failure to plead circumstances which would create a likelihood of confusion is also the asserted basis for dismissing the incorporated allegations. However, the court's prior discussion applies with equal forces to the likelihood-of-confusion issue as it relates to Illinois law. The motion to dismiss, therefore, is also denied insofar as it is directed at allegations **[*8]** incorporated in paragraphs 42 and 44 from paragraph 38.

C

Raised in conjunction with the present motion is LPM's argument that paragraphs 1(f) and 52-56 should be dismissed for failure to state a claim for misappropriation of trade secrets under Illinois law. The gravamen of these paragraphs is that LPM wrongfully induced Clark employees or former employees to breach confidentiality agreements by giving dealer marketing plan materials and related marketing information to LPM that had been collected, compiled, and analyzed by Clark at great cost and expense and distributed only to a small number of Clark employees under confidential and restrictive conditions. LPM argues that it follows as a matter of law that Clark's claim in this regard must fail because it is not alleged that each dealer treated the information they provided Clark as confidential prior to divulgence. ***HN4***[] The inquiry into whether information is a trade secret depends on a variety of factors including:

(1) the extent to which the information is known by others in the field; (2) the extent to which the information is known by the business' employees; (3) the extent to which the employer takes measures to guard **[*9]** the secrecy of the information; (4) the value of the information to the employer and his competitor; (4) the value of the information to the employer and his competitor; (5) the amount and effort or money spent in developing the information; and (6) the ease or difficulty in acquiring or duplicating the information.

Lincoln Towers Insurance Agency v. Farrell, 99 Ill. App. 3d 353, 425 N.E.2d 1034, 1037 (1981). That Clark dealers may not have treated the information as confidential prior to providing Clark is of arguable relevance only to the first and last of the factors salient to the determination whether the allegedly pirated information is protected by Illinois law; and, even with respect to these factors, the significance of the consideration is not readily determinable at the pleading stage when facts underlying the claim have not been fleshed out. Since the information collected, compiled, and analyzed by Clark came from its dealers, LPM contends that, of necessity, it must be known by others in the field. This argument disregards, however, the fact that the extent of an individual dealer's knowledge of the marketing information is limited to that which it provided Clark, **[*10]** in essence, to one piece of the overall puzzle. No dealer, presumably, is in possession of the entirety of the dealer marketing information. Moreover, LPM would require the court to assume that the allegedly purloined documents consisted entirely of raw data collected from dealers; it appears from the complaint, however, that they also contained market analysis done by Clark at great expense.Such analysis conceivably would involve Clark's mental impressions; consequently, even if the dealers collectively pooled the information, it would not of necessity provide an exact equivalent **[**947]** of the marketing plans compiled by Clark and allegedly misappropriated by LPM.

That the dealers may have provided Clark information that they themselves may not have treated as confidential also arguably is of significance to a determination of the ease or difficulty with which LPM itself could have acquired or duplicated the information contained in the subject documents. If the information was not considered confidential by the dealers, LPM argues, it could have collected the data from them. Construing matters favorably to Clark, however, the court cannot presume that, therefore, LPM necessarily could **[*11]** have created an equivalent of the Clark marketing plan and related documents with little difficulty. Clark maintains that such a compilation requires a considerable expenditure of time, effort, and money; moreover, as previously pointed out, the documents may have contained analysis and mental impressions that are uniquely attributable to Clark. In making the argument against Clark's claim for misappropriation of trade secrets, LPM also disregards the fact that ***HN5***[] where it is shown, as is alleged here, that the subject information was obtained by wrongful means, Illinois courts are not receptive to argments by defendants that they could have, if they wished, obtained the same information by lawful means. See, e.g., *Crocan Corp. v. Sheller-Globe Corp., 385 F. Supp. 251, 254 (N.D. Ill. 1974)*; *ILG Industries v. Scott, 49 Ill. 2d 88, 273 N.E.2d 393, 396 (1971)*; Affiliated Hospital Products v. Baldwin, 57 Ill. App. 3d 800, *373 N.E.2d 1,000, 1,006 (1978)*. In short, the court cannot say beyond doubt that Clark can prove no set of facts establishing that the information contained in the marketing documents is not entitled to protection from misappropriation under Illinois law. The motion **[*12]** to dismiss, therefore, is denied to the extent it is directed at paragraphs 1(f) and 52-56 of the first amended complaint.

D

The next subjects of LPM's motion to dismiss are paragraphs 1(h) and 63-64 of the first amended complaint. In these paragraphs, Clark alleges that LPM "fraudulently concealed" the facts and circumstances of wrongs detailed in previous paragraphs by entering into confidentiality agreements with its dealers, by destroying, suppressing or not maintaining accurate records, and by paying off informants and suppliers of materials through secretive transactions. Though it is not clear from the complaint, Clark maintains in its briefs in opposition to the motion to dismiss that these allegations serve to state a claim for tortious fraudulent concealment and to toll any applicable statutes of limitation. In either case, the averments are required to comply with ***HN6***[] the mandate of *Rule 9(b), Fed.R.Civ.P.*, that circumstances constituting fraud be stated with particularity. See *Pitts v. Unarco Industries, Inc., 712 F.2d 276, 279* (7th Cir.), cert. denied, *104 S.Ct. 509 (1983)*.

HN7[] Consequently, concealment of facts can give rise to liability in tort under Illinois law only **[*13]** if a plaintiff alleges with particularity, inter alia, specific facts and circumstances sufficient to impose a duty on a defendant to make disclosures. See, e.g., *Manning v. Ashland Chemical Co., 498 F. Supp. 1382, 1383 (N.D. Ill. 1980)*. Clark maintains that the existence of a duty to disclose on the part of LPM may fairly be implied in this case because LPM, "by [its] conduct, contribute[d] to [Clark's] misapprehension . . . as to a material matter and intentionally fail[ed] to correct the misapprehension." *Tcherepnin v. Franz, 393 F. Supp. 1197, 1217 (N.D. Ill. 1975)*; *Manning v. Ashland Chemical Co., supra.* Clark, however, never specifies the nature of the material matter as to which it was misled. The only possibility that can be gleaned from a review of the complaint is that it did not know that LPM was engaging in tortious activity that affected its interests. But ***HN8***[] in order to invoke the fraudulent concealment doctrine as a basis for distinct liability in tort it must appear from the complaint that something more is involved than a party's lack of awareness that it is being victimized by a tortfeasor, at least where, as here, no fiduciary relationship is involved. See **[*14]** *Fure v. Sherman Hospital, 64 Ill. App. 3d 259, 380 N.E.2d 1376, 1380 (1978)*.

The court concludes, accordingly, that as presently drafted, the complaint does not adequately describe facts and circumstances that would impose on LPM a duty to disclose its misdeeds.

The subject paragraphs also do not allege facts and circumstances constituting fraudulent concealment sufficient to toll applicable statutes of limitations. ***HN9***[] To toll a limitations period under this theory, Clark is required to show (1) that LPM wrongfully concealed its actions from Clark; (2) that Clark failed to discover the operative facts that are the basis of its cause of action within the limitations period; and (3) that Clark acted with due diligence until discovery of these facts. See, e.g., *Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975)*. Although Clark pleads the first requirement, the latter two are conspicuously absent from the complaint. Therefore, since they cannot support either of the fraudulent-concealment **[**948]** theories advanced by Clark, paragraphs 1(h) and 63-64 of the amended complaint are dismissed without prejudice.

The last aspect of LPM's motion to dismiss calls upon the **[*15]** court to determine which, if any, of Clark's claims can support an award of punitive damages. Feeling that consideration of the availability of punitive damages at this stage is premature, the court hereby reserves this issue for trial. Clark is granted leave to file a second amended complaint within 35 days.

II

LPM moves pursuant to *Rule 12(f), Fed.R.Civ.P.*, to strike as insufficient certain defenses asserted by Clark in its answer to LPM's first amended counterclaims. The first focus of the motion to strike is paragraph 67 of the answer in which Clark defends against LPM's antitrust counterclaims by asserting that violations of ***antitrust law***, such as those alleged by LPM, cannot insulate LPM from liability for copyright infringement. As conceded by Clark, this response is an "affirmative defense" in name only. It does not attack the validity, or lack thereof, of LPM's antitrust counterclaim; rather it is a digression aimed at the misuse defense raised by LPM in its answer to Clark's amended complaint. ***HN10***[] A reply to an answer is permitted under *Rule 7, Fed.R.Civ.P.*, only when specifically ordered by the court; this has not been done in this case. Therefore, as a matter of **[*16]** pleading, paragraph 67 is not properly before the court. It is ordered stricken.

Paragraphs 69-71 are the next points of attack of the motion to strike. It is asserted in paragraph 69 that a consent decree and release entered into by LPM bars the company, pursuant to the doctrines of res judicata and collateral estoppel, from raising its antitrust counterclaims. ***HN11***[] Res judicata and collateral estoppel, however, presuppose an adjudication by a court on the merits of a controversy. See *County of Cook v. MidCon Corporation, 574 F. Supp. 902 (N.D. Ill. 1983)*. ***HN12***[] But a consent decree, in essence is a contract between the parties; it does not reflect a court's determination of the underlying merits. Therefore, a consent decree is not the proper basis for invoking the doctrines of res judicata and collateral estoppel.Paragraph 69, therefore, is ordered stricken.

That this is more or less a technical distinction is made apparent in paragraphs 70 and 71 in which the terms of the consent decree and release are invoked in their own right as the basis for barring the counterclaims raised by LPM. LPM objects on grounds that the consent decree and release should not bar recovery for injuries **[*17]** it sustained after their execution. Since it is undisputed that they were executed in 1963, and it is plain from LPM's counterclaims that it, at least in part, is seeking recovery for injuries sustained after such date, LPM argues convincingly that the consent decree and release cannot properly be asserted as a basis for totally denying the recovery it seeks. Accordingly, paragraphs 70 and 71 are stricken, and Clark is given leave to amend these allegations to reflect the understanding that the consent decree and release cannot bar claims asserted by LPM arising after the date on which they were executed.

LPM next finds fault with the affirmative defense asserted in paragraph 74 of Clark's answer to the antitrust counterclaims. There Clark alleges that LPM must be denied equitable relief because of its unclean hands and inequitable conduct. Clark informs the court that the basis for the assertion of these defenses is LPM's attempt to copyright a "Clark catalog" that copied materials pirated from Clark, materials which, on the other hand, LPM claims were copyrighted by Clark in violation of the antitrust laws. ***HN13***[] It is well settled that defenses such as unclean hands and in pari **[*18]** delicto have limited applicability in an antitrust context. See, e.g., *General Beverage Sales Co.-Oshkosh v. East Side Winery, 396 F. Supp. 590, 593 (E.D. Wis. 1975)*. They are available to

Clark only if it can establish that LPM jointly participated with it in the scheme that is the basis of LPM's antitrust counterclaims; that LPM may have implemented a similar scheme is not enough. See *Premier Electrical Construction Co. v. Miller-Davis Co., 422 F.2d 1132, 1138* (7th Cir.), cert. denied, *400 U.S. 828 (1970)*; *General Beverage Sales, supra.* Accordingly, the affirmative defense raised in paragraph 74 of Clark's answer to LPM's counterclaims is stricken.

LPM also takes exception to paragraph 75 in which Clark asserts that LPM's counterclaims are barred by conduct contemptuous of the 1963 consent decree between the parties. On February 22, 1983, the Honorable Bernard M. Decker of this district court denied relief to Clark in contempt proceedings against LPM for allegedly violating the 1963 consent decree. LPM argues, and Clark concedes, that Judge Decker's order bars this affirmative defense. Accordingly, it is ordered that paragraph 75 be stricken without prejudice to the defense's **[*19]** renewal in the event Judge Decker's ruling is overturned on appeal.

The final objection raised by LPM in connection with the motion to strike is against **[**949]** paragraph 77 in which Clark suggests that LPM's damage recovery may be limited by standing considerations. LPM points out that ***HN14***[] it is well established that a direct competitor who is a participant in a relevant market has standing to bring an antitrust action. Clark, however, does not oppose this general proposition; instead it argues that there are various factual considerations which may limit any recovery by LPM in this case. For instance, Clark points out that LPM has taken the position in prior litigation that it did not come into existence until it was spun off from Echlin Manufacturing Co. in 1978 and, consequently, shares no identity with the Lift Parts Mfg., Inc., that entered into the 1963 consent decree. If this is the case, LPM possibly can be denied recovery with respect to any damages sustained by separate entities during periods when it was not in existence. The court concludes that the affirmative defense asserted in paragraph 77 raises a question of fact which Clark is entitled to assert; consequently, the motion **[*20]** to strike must be denied insofar as it is directed at this paragraph. See *Taylor v. Orton, 216 F.2d 62, 64 (7th Cir. 1954)*. Clark is granted leave to file amended affirmative defenses to LPM's counterclaims within 35 days.

III

LPM's motion for summary judgment is directed at copyright infringement claims raised in Counts 30 through 34 of the first amended complaint.Clark maintains that substantial portions of its Master Parts System, a protected unpublished work under the Copright Act of 1976, have been copied, reproduced, plagiarized, and even recopyrighted by LPM. For purposes of this motion, LPM does not deny having done the copying; instead it argues that Clark's Master Parts System is not entitled to copyright protection (1) because it is comprised of part number information that by its very nature cannot be copyrighted and, alternatively, (2) because it has been "generally" published.

HN15[] The motion for summary judgment should be granted only if LPM establishes that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. *Rule 56(c), Fed.R.Civ.P.* For purposes of this motion, the record, of course, is to be construed in the light **[*21]** most favorable to Clark. See Trulson v. Trane Company, No. 83-1189, slip op. at 2 (7th Cir. April 19, 1984).

In arguing its first ground for summary judgment, LPM characterizes the Master Parts System as consisting of little more than part number information generated by Clark at nominal cost in an arbitrary manner aimed more so at stifling competition than facilitating the expeditious replacement of lift truck parts.LPM maintains, accordingly, that the Master Parts System is not a product of the industry or the inventiveness which the copyright laws are intended to reward. Granting copyright protection to Clark's compilation, LPM further argues, only would serve to promulgate profound anticompetitive effects.

When the record before the court is construed favorably to Clark, however, the factual underpinnings of LPM's position collapse. It appears that the Master Parts System is a great deal more than a compilation of part numbers; it, in addition, contains thousands of technical illustrations, groupings, correlations and arrangements that were developed by Clark at a cost of millions of dollars over a period of 22 years. [2] Before **[**950]** numbers, standing alone, can be copyrighted, **[*22]** it is the development of the Master Parts System, it was necessary for Clark dealers to scan a myriad of space-consuming, separate parts booklets in order to service the needs of their customers. Because of the system, these dealers now can obtain from a single, compact source necessary information about replacement parts in a fraction of the time formerly required. Clark maintains, and for purposes of the present motion the court must agree, that LPM could have obtained the substantial equivalent of the information contained in the Master Parts system from alternative sources; moreover, through industry, LPM could have independently developed its own parts identification system with its own illustrations, arrangements, groupings, and correlations. [3] Therefore, the court finds that it cannot say on the basis of this record that, as a matter of law, the Master Parts System is not entitled to copyright protection either as an inventive arrangement or as an industrious collection. See, e.g., *17 U.S.C. §§ 101* and *103*; *National Business Lists, Inc. v. Dun & Bradstreet, Inc., 552 F. Supp. 89 (N.D. Ill. 1982)*; *Schroeder v. William Morrow & Co., 566 F.2d 3 (7th Cir. 1977)*; *Toksvig v. Brace **[*23]** Publishing Co., 181 F.2d 664 (7th Cir. 1950)*.

[*24] Summary judgment also must be denied with respect to the alternative ground proposed by LPM.After reviewing the record and the submissions of the parties, the court finds that numerous facts genuinely in dispute preclude it from making a determination that Clark has relinquished the protection of the copyright laws by generally publishing its Master Parts System. See generally 3 *Nimmer, Copyright § 12.10* (1983). The motion for summary judgment, therefore, is denied in its entirety.

IV

In summary, LPM's motion to dismiss the first amended complaint is granted with respect to paragraphs 1(h), 37, 63, and 64; moreover, paragraphs 42 and 44 are dismissed insofar as they incorporate allegations from paragraph 37 that LPM sold parts to Clark dealers in unmarked boxes. LPM's motion to strike insufficient defenses asserted in Clark's answer to LPM's first amended counterclaims is granted with respect to paragraphs 67, 69, 70, 71, 74, and 75. In all other respects, the motion to dismiss and the motion to strike are denied. Clark is granted leave to file within 35 days of the date hereof a second amended complaint and amended affirmative defenses to LPM's first amended counterclaims. **[*25]** LPM's motion for summary judgment is denied in its entirety.

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[2] LPM's motion and its initial supporting memorandum sought summary judgment as to the entirety of Clark's copyright infringement claim on the ground that part number information cannot be copyrighted; the general publication theory was clearly asserted as an alternative, independent ground for summary judgment on the copyright claim. As described in the main text, however, when the record is construed in Clark's favor it appears that LPM copied a great deal more than part number information. Consequently, the extent of the copyright protection due part number information, standing alone, cannot be dispositive of the infringement claim. Recognizing this, LPM in its reply memorandum shifts gears and asserts, in effect, that it intended to advance the parts-number ground as a basis for partial summary judgment on the infringement claim. It would be fundamentally unfair if the court allowed LPM to revise the scope and underlying theory of its motion in a reply memorandum to which Clark had no opportunity to respond; it is too late for LPM to argue that it wants something other than that which it originally requested. However, even if the court were to address separately the issue of whether part numbers, standing alone, can be copyrighted, it is doubtful that the issue would be resolved in LPM's favor. The gravamen of its argument is that the part number information cannot be copyrighted by Clark as an industrious collection because it was self-generated. There is no case law to support this novel proposition; indeed, by consistently affording copyright protection to self-generated compilations like telephone directories, courts have by implication rejected LPM's position on numerous occasions. See, e.g., *Leon v. Pacific Telephone & Telegraph Co., 91 F.2d 484 (9th Cir. 1937)*; *Central Telephone Co. of Virginia v. Johnson Publishing Co., 526 F. Supp. 838 (D. Colo. 1981)*; *Southwestern Bell Telephone Co. v. Nationwide Independent Directory Service, Inc., 371 F. Supp. 900 (W.D. Ark. 1974)*. The court, however, reserves final judgment on this issue for trial.

[3] LPM maintains that these considerations actually militate in favor of summary judgment. Since there is a tremendous disparity between Clark's expenses and what it would cost LPM to obtain or generate similar information, it reasons that granting copyright protection to Clark would have pronounced anti-competitive effects. There is, however, nothing in the record establishing either the extent of costs LPM would incur if it compiled its own information or the existence of the anticompetitive effects it describes. The court, of course, cannot grant summary judgment in LPM's favor based on bare conjecture and speculation.

So ordered

Southern Pac. Communications Co. v. American Tel. & Tel. Co.

United States Court of Appeals for the District of Columbia Circuit

March 20, 1984, Argued ; July 31, 1984

No. 83-1864

Reporter

740 F.2d 1011 *; 1984 U.S. App. LEXIS 20012 **; 238 U.S. App. D.C. 340; 1984-2 Trade Cas. (CCH) P66,132

SOUTHERN PACIFIC COMMUNICATIONS COMPANY, et al., Appellants v. AMERICAN TELEPHONE & TELEGRAPH COMPANY, et al.

Prior History: **[**1]** Appeal from the United States District Court for the District of Columbia. (Civil Action No. 78-00545).

Core Terms

collateral estoppel, district court, relevant market, estoppel, parties, anti trust law, relitigating, antitrust, prima facie, antitrust action, consent decree, jury verdict, Clayton Act, interconnection, courts, decree, final judgment, prior judgment, Modification, collateral, preclusive, estopped, waived, application of collateral estoppel, preclude relitigation, motion to dismiss, consent judgment, monopoly power, jury finding, settlement

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

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

See 15 U.S.C.S. § 16(a).

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 > Relief From Judgments > General Overview

HN2[] **Estoppel, Collateral Estoppel**

Fed. R. Civ. P. 60(b)(6) provides a district court discretion to grant relief from a judgment for any reason justifying relief.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN3[] Estoppel, Collateral Estoppel

The preferable approach for dealing with the offensive use of collateral estoppel is not to preclude its use in the federal courts, but to grant trial courts broad discretion to determine when it should be applied.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN4[] Standards of Review, Abuse of Discretion

In reviewing the propriety of the district court's determinations both to deny Fed. R. Civ. P. 60(b)(6) relief and to deny offensive use of collateral estoppel, this court is bound by the abuse of discretion standard.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN5[] Estoppel, Collateral Estoppel

Collateral estoppel may be applied to a trial court finding even while the judgment is pending on appeal.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN6[] Estoppel, Collateral Estoppel

Collateral estoppel serves three main purposes. It protects litigants from the burden of relitigating an issue which the other party has already litigated and lost. It promotes judicial economy by preventing needless litigation. Finally, it fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN7[] Estoppel, Collateral Estoppel

At least when it is possible to raise collateral estoppel claims prior to trial, the court does not think that it unduly burdens litigants by requiring them to raise the claims or to forego them forever.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN8[] Estoppel, Collateral Estoppel

Fed. R. Civ. P. 60(b) cannot be employed simply to rescue a litigant from strategic choices that later turn out to be improvident.

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Monopolies & Monopolization, Attempts to Monopolize

The definition of the relevant market has no independent significance under the Sherman Act. It relates only to the determination of whether a defendant possesses monopoly power.

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

Collateral estoppel, under which a prior judgment operates as an absolute bar to relitigation of the issues estopped, is governed by common law principles.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN11[] **Antitrust & Trade Law, Clayton Act**

The Clayton Act, *15 U.S.C.S. § 16(a)*, limits the discretion of the courts to decide whether to give effect to a prior judgment. The section, however, accords prior judgments only prima facie effect, thus, creating a rebuttable presumption with respect to those issues determined in the prior judgment.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Settlements > Settlement Agreements > General Overview

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN12[] **Estoppel, Collateral Estoppel**

Some courts give collateral estoppel effect to consent judgments. The courts have allowed such effect only when it is clear that the parties intended the stipulation of settlement and judgment entered thereon to adjudicate once and for all the issues raised in that action. The consent decree must contain far-reaching, preclusive language.

Antitrust & Trade Law > Clayton Act > Scope

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

HN13[] **Antitrust & Trade Law, Clayton Act**

The Clayton Act, *15 U.S.C.S. § 16(a)*, by its terms, applies to consent judgments entered after testimony has been taken. Although the judgment need not make a specific finding of liability, the judgment must be to the effect that a defendant has violated the antitrust laws.

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN14[] Settlements, Antitrust Procedures & Penalties Act

With increasing frequency, parties to antitrust agreements are inserting into consent agreements non-liability clauses. The court does not believe that the mere appendage of such a clause should automatically make 15 U.S.C.S. § 16(a) inapplicable; such a per se rule would contravene the congressional mandate contained in the statute. The question in each case must be whether the judgment, considered as a whole, is to the effect that the defendant has violated the antitrust laws.

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George L. Saunders, Jr., with whom Michael S. Yauch, C. John Buresh, Stewart A. Block, Howard J. Trienens and Raymond Brenner were on the brief, for Appellees. Julie D. Nelson also entered an appearance for Appellees.

Judges: Wald and Edwards, Circuit Judges, and Swygert, [*] Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit. Opinion for the Court filed by Senior Circuit Judge Swygert.

Opinion by: SWYGERT

Opinion

[*1014] SWYGERT, Senior Circuit Judge:

This appeal arises out of an antitrust action brought by Southern Pacific Communications Company and Transportation Microwave Corporation ("SPCC") against American Telephone and Telegraph Company and the local Bell Operating Companies ("AT & T"). **[**2]** Following a bench trial, the district court entered judgment for AT & T and this court affirmed. *SPCC v. AT & T, 556 F. Supp. 825 (D.D.C. 1982)*, *aff'd*, *740 F.2d 980 (D.C. Cir. 1984)*. Prior to our affirmance, SPCC had moved the district court, pursuant to *Fed. R. Civ. P. 60(b)(6)*, [1] to vacate the judgment. The motion was denied. *SPCC v. AT & T, 567 F. Supp. 326 (D.D.C. 1983)*. We now affirm the district court's denial of SPCC's *Rule 60(b)* motion to vacate.

I

The facts of the antitrust action underlying this appeal are fully set forth in *SPCC v. AT & T*, *supra*, 740 F.2d 980, slip op. at 4-11. We will discuss only the additional facts relevant to SPCC's *Rule 60(b)* motion.

1. *SPCC's Rules 60(b) Motion*

[3]** The district court issued a Memorandum Opinion and Order entering judgment for AT & T and dismissing the case with prejudice on December 21, 1982. In February 1983 SPCC moved the district court, pursuant to *Fed. R. Civ. P. 60(b)(6)*, to vacate the judgment in light of judgments in two other antitrust actions against AT & T, *MCI Communications Corp. v. AT & T*, No. 74-C-633 (N.D. Ill. 1980), *aff'd in part and rev'd in part*, *708 F.2d 1081 (7th Cir.)*, *cert. denied*, *464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)* ("the *MCI* case"); and *United States v. AT*

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[*] Sitting by designation pursuant to 28 U.S.C. § 294(d) (1982).

[1] *Fed. R. Civ. P. 60(b) (6)* provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for . . . any . . . reason justifying relief from the operation of the judgment.

& T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd summarily sub nom.* Maryland v. United States, 460 U.S. 1001, 103 S. Ct. 1240, 75 L. Ed. 2d 472 (1983).

SPCC claims that the jury verdict in the *MCI* case precludes relitigation by AT & T of five factual issues. [2] The first issue is the definition of the relevant market. [3] **[**5]** The other four issues are whether AT & T willfully maintained its monopoly power by: (1) negotiating interconnection contracts in bad faith and then abandoning the contract process in bad faith to file tariffs with state regulatory commissions; [4] (2) improperly denying FX and CCSA interconnections; **[**4]** [5] (3) providing inappropriate or ineffective equipment and procedures for interconnection; [6] and (4) refusing to **[*1015]** provide interconnections outside strictly limited geographical areas.

SPCC also claims that the judgment in *United States v. AT & T, supra, 552 F. Supp. 131*, together with the court's denial in that case of AT & T's motion to dismiss the government's suit, *United States v. AT & T, 524 F. Supp. 1336 (D.D.C. 1981)*, conclusively establish that AT & T monopolized the relevant market of intercity telecommunications service in violation of section 2 of the Sherman Act by: (1) refusing to provide FX and CCSA interconnections; (2) providing inappropriate or inefficient equipment and procedures for interconnection; (3) pricing access to local distribution facilities in a discriminatory manner; [7] (4) negotiating interconnection contracts and then filing tariffs with state regulatory commissions in bad faith; and (5) pricing Telpak and Hi/Lo without regard to cost. [8] According to SPCC, AT & T is precluded from relitigating these issues under section 5(a) of the Clayton Act, which **[**6]** provides:

> ***HN1***[] A final judgment or decree . . . rendered in any . . . proceeding brought by . . . the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel. . . .

15 U.S.C. § 16(a) (1982).

2. *The MCI Case*

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[2] In *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979)*, the Supreme Court held that a plaintiff may, when appropriate, preclude a defendant from relitigating issues that the defendant litigated and lost against another plaintiff. This practice, which SPCC seeks to use in this case, is called offensive collateral estoppel. Offensive use of collateral estoppel is distinguished from defensive use of collateral estoppel. The latter occurs when a defendant seeks to preclude a plaintiff from relitigating an issue that the plaintiffs has litigated and lost against another defendant. *See id. at 326 n.4*. Although offensive and defensive collateral estoppel are quite similar, the former raises certain considerations that are not raised by the latter. *See id. at 329-31*.

[3] The relevant market is the market in which an entity's power is measured to determine whether the entity is a monopolist for ***antitrust law*** purposes. The relevant market is generally defined in both geographic and product terms. *See United States v. E. I. duPont De Nemours & Co., 351 U.S. 377, 394-96, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*; L. Sullivan, *Handbook of the Law of Antitrust* 41-74 (1977). For a discussion of SPCC's claim, *see SPCC v. AT & T, supra*, 740 F.2d 980, slip op. at 32-34.

[4] For a discussion of this claim, *see SPCC v. AT & T, supra*, 740 F.2d 980, slip op. at 46-47.

[5] *See id.*, slip op. at 4 n.3,47.

[6] *See id.*, slip op. at 47-48.

[7] *See id.*, slip op. at 48.

[8] *See id.*, slip op. at 7 n.5, 37.

In 1974 MCI filed a complaint against AT & T in the United States District Court for the Northern District of Illinois under section 4 of the Clayton Act, *15 U.S.C. § 15* ***[**7]*** *(1982)*, alleging monopolization and conspiracy in restraint of trade. The case was tried to a jury between February and June 1980. Fifteen of MCI's monopolization charges were ultimately submitted to the jury which was instructed to make a separate finding of liability as to each charge but permitted to award damages in a lump sum. The jury found in favor of MCI on ten of the fifteen charges and awarded MCI $600 million in damages. After losing various posttrial motions, AT & T filed notice of appeal in August 1980. In September 1980 MCI filed notice of cross-appeal. On January 12, 1983 the United States Court of Appeals for the Seventh Circuit issued its opinion sustaining in part and reversing in part the jury verdict and remanding the case for a new trial on the issue of damages. *MCI v. AT & T, 708 F.2d 1081 (7th Cir.)*, *cert. denied*, *464 U.S. 891, 104 S. Ct. 234, 78 L. Ed. 2d 226 (1983)*.

SPCC filed its complaint against AT & T on March 27, 1978. In February 1982 SPCC made a motion *in limine* for an order defining legal issues under section 2 of the Sherman Act. In one of its briefs filed in connection with the motion, SPCC argued that the jury verdict in the **[**8]** *MCI* case precluded AT & T from relitigating the issue of the relevant market. Plaintiffs' Reply Memorandum on Section 2 of the Sherman Act, at 2-3 (filed Feb. 17, 1982). This issue, among others, was referred to two Special Masters. On April 22, 1982 the Special Masters ruled:

> In *MCI v. AT & T* a finding of fact was made by the jury as to the relevant market. The finding was in response to a charge to the jury reciting that MCI contended the relevant market was "inter-city business and data communication services in the United States during the period from 1969 through mid-1974," consisting of "private line services, and other services which can be used instead of private line services, such as WATS and business long distance." That finding is the basis of a judgment now on appeal. **[*1016]** If that finding is not reversed on appeal, it may be relied on by SPCC. The issue is obviously substantially the same, and should be treated as such unless AT & T can suggest some reason why it should not be regarded as the same issue. On the premise that it is the same issue, the finding is preclusive against AT & T, *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 58 L.* ***[**9]*** *Ed. 2d 552, 99 S. Ct. 645 (1979)*, unless AT & T can show "compelling circumstances" permitting it to relitigate this issue. . . . If the finding in *MCI v. AT & T* is reversed, or compelling reasons are shown why the finding should not be preclusive here, then the definition of the market in this case is a question of fact to be determined afresh according to accepted antitrust legal standards.

Opinion of the Special Masters at 5-6 (filed Apr. 22, 1982) (hereinafter "Special Masters' April 22 opinion").

AT & T appealed the Special Masters' April 22 Opinion and, in response, SPCC filed a motion to adopt the Opinion with modifications, Plaintiffs' Motion to Adopt, with Modifications, the Special Masters' April 22 Opinion, at 7-9 (filed May 3, 1982). The district court deferred consideration of the appeal pending trial. Order Holding in Abeyance Special Masters' 4-22-82 Opinion (May 6, 1982). Trial in the case commenced on May 10, 1982 and lasted for more than thirty days. In July 1982 SPCC filed proposed conclusions of law, in which SPCC proposed that AT & T be estopped from challenging the definition of the relevant market adopted by the jury in the *MCI* case. Plaintiffs' **[**10]** Proposed Findings of Fact and Conclusions of Law, at 355 (filed July 21, 1982). On December 21, 1982 the district court issued a Memorandum Opinion and Order entering judgment for AT & T. Without reference to the Special Masters' April 22 Opinion, the court defined the relevant market as interstate, intercity private line services to customers other than the federal government. *SPCC v. AT & T, supra, 556 F. Supp. at 871-77*.

3. *The Government Case, United States v. AT & T*

In 1949 the United States filed an antitrust action against Western Electric Company and AT & T in the United States District Court for the District of New Jersey. *United States v. Western Electric Co.*, C.A. No. 17-49 (D.N.J.). The action resulted in a consent decree entered in 1956. *United States v. Western Electric Co.*, 1956 Trade Cas. (CCH) para. 68,246 (D.N.J. 1956) (Final Judgment). The 1956 decree limited the business that defendants could engage in but did not direct any divestiture or other structural relief originally sought by the government. In 1974 the United States filed a second antitrust action against AT & T, Western Electric Company, and Bell Telephone Laboratories in **[**11]** the United States District Court for the District of Columbia. Trial commenced in the action in January 1981. After the conclusion of the government's case-in-chief, the defendants moved to dismiss the action on a number of grounds. The motion was denied by the court on September 11, 1981. *United States v. AT & T, supra, 524 F. Supp. 1336*. Defendants commenced their case-in-chief in August 1981 and were scheduled to complete the presentation of their evidence in January 1982. The trial was scheduled to terminate in February after presentation of the government's rebuttal evidence. However, on January 8, 1982 the parties filed a stipulation with the United States District Court for the District of New Jersey agreeing to entry of a consent decree. The decree purported to be a modification of the 1956 judgment and was designated "Modification of Final Judgment" ("MFJ"). Simultaneously with the filing in the New Jersey court, the parties sought to enter the MFJ as a settlement of the action in the United States District Court for the District of Columbia and to file a dismissal of the action. The District of Columbia court, however, ordered that the dismissal be reviewed and **[**12]** approved by the court. The actions were consolidated in the District of Columbia court. The court determined that any settlement was subject to the provisions of the **[*1017]** Tunney Act, *15 U.S.C. § 16 (1982)*, which requires compliance with specified procedures before entering a consent judgment in an action brought by the United States under the antitrust laws. After adhering to the Tunney Act procedures, including making a finding that the judgment was in the public interest, the court entered the MFJ with certain modifications in August 1982. *United States v. AT & T, supra, 552 F. Supp. 131*.

The MFJ as modified by the court required the defendants to divest themselves of their local operating companies. *Id. at 226-27*. The MFJ provides: "Neither this Modification of Final Judgment nor any of its terms or provisions shall constitute any evidence against, an admission by, or an estoppel against any party or BOC." *Id. at 228*. In its opinion approving the MFJ, the court discussed the applicability of section 5(a) of the Clayton Act, *15 U.S.C. § 16(a) (1982)*: "The statute establishes a presumption usable in private litigation only on the basis of a judgment 'to **[**13]** the effect that a defendant has violated the antitrust laws.'" *552 F. Supp. at 211*. The court noted that neither its opinion nor the MFJ included a finding or an admission that AT & T violated the antitrust laws. In view of the MFJ's "unequivocal position" that it did not constitute evidence or an estoppel against or an admission by any party, the court stated, "it would appear to this Court that the judgment herein would not have a prima facie effect in private litigation." The court, however, following the suggestion of the Department of Justice, declined to make a final decision on the applicability of section 5(a). The court stated that the ultimate decision whether to apply section 5(a) to the MFJ in future private antitrust actions rests with the courts in which the actions are brought. *Id.*

4. *The District Court Decision*

In a written opinion and order issued on July 7, 1983 the district court denied SPCC's *Rule 60(b)* motion. *SPCC v. AT & T, supra, 567 F. Supp. 326*. The court found that SPCC had waived its collateral estoppel claims with respect to the *MCI* case. *Id. at 329-30*. With respect to the denial of AT & T's motion to dismiss the government's **[**14]** case, the court found that the ruling was not a final resolution of the issues involved and thus could not be the basis of a collateral estoppel claim. *Id. at 328*. The court refused to give collateral estoppel effect to the MFJ because the MFJ specifically provided that it should not be given such effect. *Id.* The court found that section 5(a) of the Clayton Act was inapplicable because the consent decree "did not constitute a judgment to the effect that AT & T violated the antitrust laws." *Id. at 329*. Finally, the court held that even if the MFJ could be understood to contain a finding that AT & T violated the antitrust laws, section 5(a) provided only that it be admitted as prima facie evidence against AT & T. The court concluded that the outcome of the litigation would have been the same if the MFJ had been admitted against AT & T because evidence submitted by AT & T successfully rebutted any prima facie effect of the MFJ. *Id.*

II

HN2[] *Fed. R. Civ. P. 60(b)(6)* provides a district court discretion to grant relief from a judgment for any reason justifying relief. *See SEC v. Clifton, 226 U.S. App. D.C. 173, 700 F.2d 744, 746 (D.C. Cir. 1983)*. In the instant case, **[**15]** SPCC requested, pursuant to *Rule 60(b)(6)*, that the district court vacate its findings and apply offensive collateral estoppel to findings contained in two other judgments against AT & T. In *Parklane Hosiery Co. v. Shore, supra*, the Supreme Court concluded that ***HN3***[] "the preferable approach for dealing" with the offensive use of collateral estoppel was "not to preclude" its use in the federal courts, "but to grant trial courts broad discretion to determine when it should be applied." *439 U.S. at 331*. Thus, ***HN4***[] in reviewing the propriety of the district court's determinations both to deny *Rule 60(b)(6)* relief and to deny offensive use of collateral estoppel, this court is bound by the abuse of discretion standard.

[*1018] III

1. *Waiver*

The district court found that SPCC waived its collateral estoppel claims with respect to the *MCI* case. *SPCC V. AT & T, supra, 567 F. Supp. at 329-30*. Although SPCC mentioned to the district court on more than one occasion that it might seek to preclude relitigation of certain issues determined adversely to AT & T in the *MCI* case, *see, e.g.*, Plaintiffs' First Statement of Contentions and Proof, at 2-3 (filed Nov. 24, 1980); **[**16]** Plaintiffs' Second Statement of Contentions and Proof, vol. 1, at 3 (filed Aug. 10, 1981), SPCC never moved to preclude any issues other than the issue of the relevant market and never even informed the court of the additional issues it was contemplating having precluded. We conclude that the court did not abuse its discretion in finding that SPCC waived these claims. *Cf.* *Grantham v. McGraw-Edison Co., 444 F.2d 210, 217 (7th Cir. 1971)* (per curiam) (Memorandum on Petition for Rehearing) ("A party normally may not rely on an estoppel which was available to him in the trial court but which was not raised prior to appeal.").

SPCC claims that it felt constrained by the Special Masters' April 22 Opinion to wait for the Seventh Circuit's decision to issue before seeking to preclude relitigation of the MCI jury findings. The Opinion stated that SPCC could rely on the jury finding as to the relevant market "if that finding is not reversed on appeal. . . ." We note that the federal rule and the rule in this circuit is that ***HN5***[] collateral estoppel may be applied to a trial court finding even while the judgment is pending on appeal. *See* *Huron Holding Corp. v. Lincoln Mine Operating Co.* ***[**17]*** *, 312 U.S. 183, 189, 85 L. Ed. 725, 61 S. Ct. 513 (1941)*; *Nixon v. Richey, 168 U.S. App. D.C. 172, 513 F.2d 430, 438 n.75 (D.C. Cir. 1975)*; 1B J. Moore, *Federal Practice* para..416[3] (2d ed. 1983). Thus, SPCC should have been permitted to press its collateral estoppel claims at trial. Nevertheless, if the Special Masters' April 22 Opinion operated to bar SPCC from seeking the application of collateral estoppel until the Seventh Circuit's decision issued, SPCC should not be held responsible for the misapplication of the law. SPCC was bound by the law of the case as formulated by the district court unless and until it was corrected on appeal after a final judgment. We conclude, however, that the Special Masters' April 22 Opinion did not prohibit SPCC from pursuing its collateral estoppel claims and, to the extent that SPCC believed the Opinion operated as such a bar, that belief was unreasonable.

First, the discussion of collateral estoppel in the Special Masters' Opinion is ambiguous. The reference to the pending appeal of the *MCI* jury verdict could be interpreted to mean that the appellate court's decision would be considered only if and when it issued; if the district **[**18]** court issued its decision on SPCC's complaint before the Seventh Circuit issued its decision in the *MCI* case, the district court would be required to give collateral estoppel effect to the jury verdict provided the propriety of giving such effect was established by SPCC; if, however, the Seventh Circuit issued its decision before the district court issued its decision, the district court obviously would be required to give collateral estoppel effect only to those findings upheld by the Seventh Circuit. Under this interpretation of the Special Masters' April 22 Opinion, an interpretation which comports with the federal rule, *see* 1B J. Moore, *Federal Practice, supra*, para..416[3], SPCC remained free to pursue its collateral estoppel claims at trial.

The foregoing approach to collateral estoppel presents a potential dilemma for every litigant seeking to preclude litigation of certain issues on the basis of a prior judgment that is pending on appeal. If a litigant relies on the trial court judgment for proof of a contested issue and the judgment is rendered in the litigant's case, the litigant has no remaining proof on the issue. The remedy for this problem, however, **[**19]** is to permit the litigants to reopen their case after a reversal to present their evidence on the issue, or to **[*1019]** permit the litigants to submit independent proof on the issue at the same time they argue for the application of collateral estoppel. The remedy is not to refrain from raising collateral estoppel claims until the prior judgment has been affirmed on appeal. *See* *Grantham v. McGraw-Edison Co., supra, 444 F.2d at 216-17* (party barred from raising estoppel for first time on appeal even though judgment relied upon for estoppel was pending on appeal during trial). More important than the ambiguity of the Special Masters' April 22 Opinion, however, the district court never adopted the Opinion. The court deferred consideration of the Opinion pending trial. Order filed May 6, 1982. Thus, whatever the Special Masters' April 22 Opinion held, SPCC was not bound by it.

HN6[] Collateral estoppel serves three main purposes. It protects litigants from the burden of relitigating an issue which the other party has already litigated and lost. *See* Parklane Hosiery, supra, 439 U.S. at 326. It promotes judicial economy by preventing needless litigation. [9] *See id.* Finally, **[**20]** it "fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." Montana v. United States, 440 U.S. 147, 154, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979). Although the application of collateral estoppel to the *MCI* judgment in the instant case arguably serves the purpose of consistency, it serves neither of the other purposes of the doctrine. The time and expense of relitigating the issues has already been borne by the parties and the court. HN7[] At least when it is *possible* to raise collateral estoppel claims prior to trial, as it was here, we do not think that we unduly burden litigants by requiring them to raise the claims or to forego them forever. *See also* Safe Flight Instrument Corp. v. McDonnell-Douglas Corp., 482 F.2d 1086, 1089 (9th Cir.), *cert. denied*, *414 U.S. 1113, 94 S. Ct. 843, 38 L. Ed. 2d 740 (1973)*; Grantham v. McGraw-Edison Co., supra, 444 F.2d at 216-17; Donald v. J. J. White Lumber Co., 68 F.2d 441, 442 (5th Cir. 1934); Carman Industries, Inc. v. Wahl, 472 F. Supp. 877, 879 (D.N.J. 1976) ("waiver has been found where a party has chosen to relitigate rather than assert the benefit of a prior adjudication of **[**21]** an issue in dispute").

Finally, we are concerned, as was the district court, *see* SPCC v. AT & T, supra, 567 F. Supp. at 330, that SPCC may have made a strategic decision to present its own evidence on the issues rather than to pursue possible **[**22]** collateral estoppel claims with respect to the *MCI* jury verdict. HN8[] "Rule 60(b) cannot . . . be employed simply to rescue a litigant from strategic choices that later turn out to be improvident." Good Luck Nursing Home, Inc. v. Harris, 204 U.S. App. D.C. 300, 636 F.2d 572, 577 (D.C. Cir. 1980). *See also* Ackermann v. United States, 340 U.S. 193, 198, 95 L. Ed. 207, 71 S. Ct. 209 (1950). SPCC's failure to even mention the findings which, if affirmed by the Seventh Circuit, it desired to have precluded suggests that SPCC was making a deliberate decision not to seek collateral estoppel of these issues. The earnestness of SPCC's claim that it felt constrained to wait for the appellate court's decision before it raised its collateral estoppel claims is further undermined by the fact that SPCC continued to seek to preclude relitigation of the jury finding on the relevant market even though the Seventh Circuit opinion affirming this finding had not yet issued. *See* Plaintiffs' Proposed Findings of Fact and Conclusions of Law, at 355 (filed July 21, 1982). If SPCC truly believed that collateral estoppel would be applied only after the Seventh **[*1020]** Circuit issued a decision, **[**23]** we do not understand why SPCC continued to seek to preclude relitigation of this one issue.

2. *Definition of the Relevant Market*

We are unable to conclude, however, that SPCC waived its collateral estoppel claim regarding the *MCI* jury finding on the relevant market. SPCC filed a motion *in limine* to preclude relitigation of the relevant market issue, filed a motion to adopt the opinion of the Special Masters which found collateral estopped applicable to the *MCI* jury finding on the relevant market, and filed a proposed conclusion for law that AT & T be estopped from relitigating the relevant market issue.

We find, however, that error, if any, committed by the district court in failing to adopt the *MCI* jury verdict with respect to the definition of the relevant market is harmless. HN9[] The definition of the relevant market has no independent significance under the Sherman Act. It relates only to the determination of whether a defendant possesses monopoly power. *See* United States v. E. I. duPont De Nemours & Co. supra, 351 U.S. at 394-95; L. Sullivan, *Handbook of the Law of Antitrust, supra*, at 41. In *SPCC v. AT & T, No. 83-1102, supra*, slip op. **[**24]** at 34-36, this court rejected the analysis underlying the district court's conclusion that AT & T did not possess monopoly power. We affirmed the judgment of the district court solely on the basis that SPCC failed to prove AT & T's willful maintenance of its monopoly power. *Id.*, slip op. at 36-53. Because the definition of the relevant market is

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[9] In Parklane Hosiery, supra, the Supreme Court recognized that offensive use of collateral estoppel could be employed in a manner that, in fact, promotes judicial diseconomy. 439 U.S. at 329-30. Offensive collateral estoppel may encourage plaintiffs to "wait and see" while other plaintiffs engage in test litigation against a common adversary because plaintiffs will never be bound by a previous judgment against another plaintiff but, with offensive use of collateral estoppel, may rely on another plaintiff's favorable judgment. *See id.* Nevertheless, the promotion of judicial economy remains a goal of offensive collateral estoppel. The Court decided to leave to the district courts the task of protecting against abuse of the doctrine. *See* id. at 331.

irrelevant to the analysis of willful maintenance of monopoly power, we need not determine the propriety of the district court's definition of the relevant market. *See* 28 U.S.C. § 2111 (1982).

IV

Waiver has not been raised with respect to SPCC's collateral estoppel claims based upon the judgment entered in the government's suit against AT & T. The MFJ was approved by the district court in August 1982. United States v. AT & T, supra, 552 F. Supp. 131. Although the district court did not issue its Memorandum and Order in SPCC's action until December 1982, the trial, including the submission by the parties of their proposed findings of fact, was completed in July 1982. It is not argued and the district court did not find on this record that SPCC waived its estoppel claims based on the MFJ. Rather, the court refused to **[**25]** give any effect to the decision denying AT & T's motion to dismiss the government's action because the decision was not a final judgment on the merits. SPCC does not argue to this court, at least, that the denial of AT & T's motion to dismiss contained any findings entitled to either collateral estoppel or prima facie effect. *See* Appellant's Opening Brief, No. 83-1864, at 38. Therefore, we need not address this issue. The court refused to grant either collateral estoppel or prima facie effect to the MFJ because the language contained in the judgment expressly stated that it was not to have any such effect. We conclude that this decision was not an abuse of the court's discretion.

SPCC appears to try to root a collateral estoppel argument in the 1980 amendment to section 5(a) of the Clayton Act, 15 U.S.C. § 16(a). *See* Appellant's Opening Brief, No. 83-1864, at 42-43. The amendment provides: "Nothing in this section shall be construed to impose any limitation on the application of collateral estoppel. . . . " Act of Sept. 12, 1980, Pub. L. 96-346, § 5(a), 94 Stat. 1157. We believe that the correct approach is to analyze collateral estoppel and section 5(a) separately. **[**26]** ***HN10***[] Collateral estoppel, under which a prior judgment operates as an absolute bar to relitigation of the issues estopped, is governed by common law principles. *See,* Parklane Hosiery Co. v. Shore, supra, 439 U.S. at 326-31; 1B J. Moore, *Federal Practice, supra*, para..441. ***HN11***[] Section 5(a) of the Clayton Act, in so far as it reflects a congressional determination that prior antitrust judgments shall have **[*1021]** carryover effect in subsequent litigations, limits the discretion of the courts to decide whether to give effect to a prior judgment. The section, however, accords prior judgments only prima facie effect, thus creating a rebuttable presumption with respect to those issues determined in the prior judgment. *See* McCook v. Standard Oil Co. of California, 393 F. Supp. 256, 259-60 (C.D. Cal. 1975). Because the rules for and result of applying collateral estoppel and section 5(a) are different, we shall treat each in turn.

1. *Collateral Estoppel*

HN12[] Some courts have given collateral estoppel effect to consent judgments. *But see* Seaboard Air Line R.R. v. George F. McCourt Trucking, Inc., 277 F.2d 593, 597 (5th Cir. 1960); *cf.* United States v. International **[**27]** Building Co., 345 U.S. 502, 506, 97 L. Ed. 1182, 73 S. Ct. 807 (1953) (unless a consent judgment entered in tax case is shown to involve a judicial determination of question of fact and law, "the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties"); Otherson v. Department of Justice, I.N.S., 228 U.S. App. D.C. 481, 711 F.2d 267, 274 (D.C. Cir. 1983) ("Generally speaking, when a particular fact is established not by judicial resolution but by stipulation of the parties, that fact has not been 'actually litigated' and thus is not a proper candidate for issue preclusion."). The courts have allowed such effect only when "it is clear that the parties intended the stipulation of settlement and judgment entered thereon to adjudicate once and for all the issues raised in that action." Yachts America, Inc. v. United States, 230 Ct. Cl. 26, 673 F.2d 356, 362, *cert. denied*, *459 U.S. 839, 74 L. Ed. 2d 81, 103 S. Ct. 86 (1982)*; Green v. Ancora-Citronelle Corp., 577 F.2d 1380, 1383 (9th Cir. 1978). *See generally* 1B J. Moore, *Federal Practice, supra*, paras. 444[1], [3]. The consent **[**28]** decree must contain "far-reaching, preclusive language." Yachts America, Inc. v. United States, supra, 673 F.2d at 362; *cf.* Otherson v. Department of Justice, I.N.S., supra, 711 F.2d at 274 n.6 ("Preclusion is appropriate when the stipulation clearly manifests the parties' intent to be bound in future actions."); Kaspar Wire Works, Inc. v. Leco Engineering & Machine, Inc., 575 F.2d 530, 539-40 (5th Cir. 1978). The language contained in the MFJ was anything but far-reaching or preclusive. The judgment expressly stated that it did not constitute a finding of liability against AT & T and that it was to have no estopping effect. The district court did not abuse its discretion in respecting the express intent of the parties to the MFJ.

The district court's refusal to allow the use of collateral estoppel is further supported on the ground that it would be unfair to AT & T to give estopping effect to the MFJ. The MFJ settled a complicated antitrust action involving a fast-changing communications market. We will not pretend to be able to understand the various, complex considerations of the parties to the settlement. We recognize only that AT & T could have agreed to the **[**29]** settlement for a variety of reasons and not necessarily because AT & T was convinced that the government could establish an antitrust violation. *Cf.* *United States v. AT & T, supra, 552 F. Supp. at 152* ("The divestiture of the Operating Companies, combined with the entry of AT & T into new competitive markets, will be an enormous undertaking . . . with a potential for substantial private advantage. . . ."). This is precisely the type of unfairness that the Supreme Court warned should result in a refusal to allow offensive use of collateral estoppel. *See* *Parklane Hosiery Co. v. Shore, supra, 439 U.S. at 330-31*; *cf.* *United States v. International Building Co., supra, 345 U.S. at 505-06* ("As the case reaches us, we are unable to tell whether the [consent decree] was based on the merits or on some collateral consideration. . . . But unless we can say that [the judgments] were an adjudication of the merits, the doctrine of [collateral **[*1022]** estoppel] would serve an unjust cause. . . .").

2. *Section 5(a)*

HN13[] Section 5(a) of the Clayton Act, by its terms, applies to consent judgments entered after testimony has been taken. *See United States v. National* ***[**30]*** *Ass'n of Broadcasters, 553 F. Supp. 621, 623 n.5 (D.D.C. 1982)*; *Michigan v. Morton Salt Co., 259 F. Supp. 35, 61 (D. Minn. 1966)*, *aff'd sub nom.* *Hardy Salt Co. v. Illinois, 377 F.2d 768 (8th Cir.)*, *cert. denied*, *389 U.S. 912, 19 L. Ed. 2d 260, 88 S. Ct. 238 (1967)*; *Sablosky v. Paramount Film Distributing Corp., 137 F. Supp. 929, 935 (E.D. Pa. 1955)*. *But see* *Cinema Service Corp. v. Twentieth Century-Fox Film Corp., 477 F. Supp. 174, 178 (W.D. Pa. 1979)* (consent decree in government civil antitrust suit is not admissible in antitrust treble damage action). Although the judgment need not make a specific finding of liability, *see Michigan v. Morton Salt Co., supra*, 529 F. Supp. at 62, the judgment must be "to the effect that a defendant has violated the antitrust laws," *id.*; *15 U.S.C. § 16(a)*. ***HN14***[] With increasing frequency, parties to antitrust agreements are inserting into consent agreements nonliability clauses such as that contained in the MFJ. We do not believe that the mere appendage of such a clause should automatically make section 5(a) inapplicable; such a per se rule would contravene the congressional mandate contained in the statute. The question **[**31]** in each case must be whether the judgment, considered as a whole, is "to the effect that" the defendant has violated the antitrust laws. *See also Michigan v. Morton Salt Co. supra, 259 F. Supp. at 62* (recital in consent decree that decree was entered before the taking of any testimony and without adjudicating any question of law or fact does not prevent "the courts from considering whether it would be consistent with the purpose of § 5(a) to allow the decree to exempt a defendant from the prima facie rule").

The MFJ contains no liability findings. The only mention of liability is the nonliability clause. Although the district court which approved the MFJ considered the evidence of an antitrust violation, the court expressly stated that its observations were based on incomplete evidence and were not intended to be a final determination on the liability of AT & T. *United States v. AT & T, supra, 552 F. Supp. at 161-63*. The court also explicitly expressed doubt about the applicability of section 5(a) to the MFJ. *Id.* at 211. As we noted earlier, AT & T could have had motives for consenting to the MFJ unrelated to the question whether AT & T was guilty or believed it **[**32]** was guilty of any antitrust violations. On these facts, we conclude that the district court did not err in finding that the MFJ was not a judgment to the effect that AT & T violated the antitrust laws.

Because we conclude that the district court did not err in denying SPCC's request to apply section 5(a) to the MFJ, we need not address the question whether AT & T successfully rebutted any prima facie effect of the MFJ.

V

We sustain the district court's denial of SPCC's *Rule 60(b)(6)* motion on the ground that any error involving the definition of the relevant market was harmless. SPCC waived its other estoppel claims with respect to the MCI case, and the MFJ entered in the government's case was entitled to neither collateral estoppel nor prima facie effect. The judgment is AFFIRMED.

3 P.M., Inc. v. Basic Four Corp.

United States District Court for the Eastern District of Michigan, Southern Division

August 1, 1984

Civil Action No. 79-74416

Reporter

591 F. Supp. 1350 *; 1984 U.S. Dist. LEXIS 24639 **; 1984-2 Trade Cas. (CCH) P66,181

3 P.M., INC., Plaintiff, v. BASIC FOUR CORPORATION, SORBUS, INC., and MANAGEMENT ASSISTANCE, INC., Defendants

Core Terms

quota, dealer, defendants', economic power, alleges, products, terminated, sales, seller, matter of law, tying product, competitors, territory, Counts, possessed, Sherman Act, tie-in, tying arrangement, installation, manufactured, dealership, provisions, customers, buyers, terms, summary judgment motion, branch office, distributor, trademark, prices

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) requires only that a plaintiff set forth a short and plain statement of the claim showing that the pleader is entitled to relief.

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

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

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

HN2[] **Tying Arrangements, Clayton Act**

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Such an agreement can be found to violate section 1 of the Sherman Act, 15 U.S.C.S. § 1, and/or section 3 of the Clayton Act, 15 U.S.C.S. § 14. The Clayton Act can be violated only if the tying arrangement involves two distinct products; in contrast, the Sherman Act can be violated if the tying arrangement involves either products or services.

Antitrust & Trade Law > Sherman Act > Claims

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

HN3[] **Sherman Act, Claims**

Under either *section 1* of the Sherman Act, *15 U.S.C.S. § 1*, or *section 3* of the Clayton Act, *15 U.S.C.S. § 14*, a tying arrangement constitutes a per se antitrust violation if three elements are established. First, there must be two separate products or services, with the purchase of one (the "tying product") conditioned upon the purchase of the other (the "tied product"). Second, the seller must possess sufficient economic power in the market for the tying product so that competition in the market for the tied product is appreciably restrained. Finally, a "not insubstantial" amount of commerce in the market for the tied product must be affected.

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

HN4[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Market power is defined as the ability of a single seller to raise price and restrict output, and the necessary inquiry is described as follows: The proper focus of concern is whether the seller has the power to raise prices or impose other burdensome terms, such as a tie-in, with respect to any appreciable number of buyers within the market.

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

HN5[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Economic power in the market for the tying product can be established in one of three ways. First, it may be shown that the defendant occupies a dominant position in the market for the tying product. Second, it may be shown that the tying product is "unique." Finally, it may be shown that a number of the defendant's customers have accepted the tie-in, that there is no explanation other than the defendant's economic power for their willingness to do so, and that the defendant possesses the power to raise prices.

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

HN6[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The mere existence of a trademark does not give rise to a presumption that the holder of the trademark possesses economic power in the relevant market.

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

HN7[] Price Fixing & Restraints of Trade, Tying Arrangements

It is not sufficient to show economic power in the market for plaintiff to establish that defendants' customers accepted the alleged tie-ins. Plaintiff also bears the burden of proving that defendants possessed "power over price," and there must be an absence of evidence that the customers accepted the alleged tie-ins for other reasons.

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

HN8[] Price Fixing & Restraints of Trade, Tying Arrangements

Vague terms of quantity will only establish proof of economic power provided (1) there is also evidence of the seller's power over price and (2) there is no evidence of any other explanation such as price competition for the willingness of the customers to accept the seller's tie-in.

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

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

HN9[] Tying Arrangements, Per Se Rule

A finding that an alleged tying arrangement is not a per se violation usually does not end the court's inquiry, as a plaintiff may also attempt to prove that a tying arrangement violates the rule of reason. Under this theory, a plaintiff is required to establish the facts peculiar to the business involved, its condition before and after the alleged restraint was applied, the nature and history of the alleged restraint, the reason for adopting the alleged restraint, and its actual or probable effect.

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

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

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

HN10[] Summary Judgment, Motions for Summary Judgment

Fed. R. Civ. P. 56(e) provides that when a motion for summary judgment is made and supported as provided in the rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN11[] **Antitrust & Trade Law, Sherman Act**

A manufacturer does not violate the Sherman Act, *15 U.S.C.S. § 1 et seq.*, merely by replacing one distributor with another, or even by taking over a distributorship itself.

Torts > Business Torts > Fraud & Misrepresentation > General Overview

HN12[] **Business Torts, Fraud & Misrepresentation**

In order to sustain its claim of fraud, plaintiff must establish the following elements: 1. Defendant made a false representation; 2. Defendant knew or believed that the representation was false; 3. Defendant intended to induce plaintiff to act in reliance upon the misrepresentation; 4. Plaintiff justifiably relied upon the misrepresentation; and 5. Plaintiff suffered damages as a result.

Counsel: **[**1]** Paul Monicatti, Esq., Troy, Michigan, William I. Rutherford, Esq., St. Louis, Missouri, for Plaintiff.

Carl H. von Ende, Esq., Birmingham, Michigan, Gerald Walpin, Esq., New York, New York, for Defendant.

Judges: Pratt

Opinion by: PRATT

Opinion

[*1353] MEMORANDUM OPINION AND ORDER

Plaintiff 3 P.M., Inc. ("3PM") brought this action against defendants Basic Four Corporation ("B/4"), Sorbus, Inc. ("Sorbus"), and Management Assistance, Inc. ("MAI"), alleging four violations of the Sherman and Clayton Acts [1] and bringing pendent state claims of fraud and breach of contract. Now before the Court are defendants' motion for summary judgment as to all counts of plaintiff's complaint, and plaintiff's cross-motion for summary judgment as to Counts I and II of its complaint. For the following reasons, the Court hereby grants defendants' motion in full and denies plaintiff's cross-motion.

The following facts are undisputed. 3PM sells, installs, and services small **[**2]** business computer systems in the Detroit metropolitan area. MAI is a holding company which owns all of the stock in both B/4 and Sorbus. [2] Sorbus installs and maintains computer systems, including those manufactured by B/4. B/4 designs and manufactures computer systems. Its systems consist of a Central Processing Unit along with one or more "peripheral" items, such as video display terminals and printers, which are sold as a unitary system under the B/4 trademark. Some of the peripherals are not manufactured by B/4, but are rather purchased by B/4 from other manufacturers and then resold as part of the B/4 system. B/4's practice was to charge a "foreign device fee" for each such peripheral, allegedly for the cost of adapting the peripheral for use in the B/4 system.

[1] *15 U.S.C. § 1 et seq.*; *15 U.S.C. § 12 et seq.*

[2] In October, 1980, B/4 and Sorbus merged into and became divisions of MAI. However, the defendants were separate corporations when this suit was instituted, and at all times relevant to the allegations in plaintiff's complaint.

B/4 markets its **[**3]** products both through company-owned branch sales offices and through independent dealers. B/4 assigns each independent dealer the exclusive right to sell B/4 systems within a designated territory, subject to provisions included in a dealer agreement.

On March 25, 1977, B/4 and 3PM executed a dealer agreement under which 3PM became the B/4 dealer in the Detroit metropolitan area. The agreement included the following provisions:

> 2. (C) Whenever the Dealer has a potential order for installation of Products outside the Territory, the Dealer shall register with the Seller in writing the name of the potential customer and shall advise the Seller, to the extent known, of the terms of any such prospective sale . . .
>
> * * * *
>
> (D) Whenever the Seller has a potential order for Products from an existing or potential user of Systems involving the installation of Products within and outside the Territory and such sale is consummated between the customer and a party unaffiliated with Dealer, the Seller shall notify the Dealer . . .
>
> * * * *
>
> 6. (A) This agreement may be cancelled:
>
> * * * *
>
> (2) By the Seller:
>
> * * * *
>
> (d) At its discretion, if the Dealer fails to meet the Purchase **[**4]** Quota established in Schedule D hereto for any of the successive six (6) month periods commencing with the "Purchase Quota Commencement Date" specified in Schedule D hereto, the cancellation to be effective thirty (30) days after delivery of notice to the Dealer as to its failure to meet the Purchase Quota, provided that such notice is **[*1354]** delivered within sixty (60) days after the end of any such six (6) month period . . .
>
> * * * *
>
> 10. (A) The Dealer shall promote the sale and distribution of Products in the Territory and provide adequate support, which efforts shall include the following:
>
> * * * *
>
> (2) To provide an adequate size, caliber and trained sales force to promote and maximize the sale of the Products. . . .
>
> * * * *
>
> 16. . . . the Dealer will, and will use its best efforts to require purchasers from it of Products to, make arrangements with Sorbus for the installation and maintenance of Products during at least the two (2) year period commencing with delivery to a user . . .
>
> * * * *
>
> 23. The Dealer shall not purchase from any source other than the Seller any item manufactured or sold by the Seller except for the purchase of any Product installed in **[**5]** the Territory.
>
> 29. (A) The entire Agreement between the Seller and Dealer covering the Products is set forth herein and any amendment or modification shall be in writing and shall be executed by duly authorized representatives in the same manner as this Agreement.

Schedule D to the agreement included the following quota provisions:

Quota Year	**First Six Month Purchase Quota Period**	**Second Six Month Purchase Quota Period**
Year 1	$210,000	$280,000
Year 2	$437,500	$437,500
Year 3	$647,500	$647,500

* * * *

3. . . . Eligibility of accepted orders for (quota) credit as to products sold by Dealer and installed outside the Territory shall be at Seller's sole discretion.

The dealer agreement was executed only after rather protracted negotiations. The draft of the agreement initially sent to 3PM contained para. 6(A)(2)(d) as set forth above, and quota requirements which were higher than those eventually included in the agreement. After reviewing the proposed draft, Robert Yanover and George Squillace, 3PM's president and vice-president, met with B/4 officials. Yanover specifically requested that para. 6(A)(2)(d) be deleted from the agreement, **[**6]** and that the quota requirements be "substantially reduced". Yanover Deposition at 338-9. B/4 officials agreed to reduce the quota figures to those set forth above. B/4 officials further stated that B/4 planned to have long-term relationships with its dealers, and that the quotas contained in the agreement were attainable.

However, B/4 emphatically refused to delete para. 6(A)(2)(d) from the agreement. B/4 also refused to include a provision, requested by Yanover, to the effect that 3PM would not be terminated if it was using its best efforts. Yanover Deposition at 339. Despite B/4's refusal to make these requested changes in the agreement, 3PM executed the dealer agreement and began promoting the sales of B/4 products.

3PM attained its quota for the first six-month period set forth in the agreement, which ended December 31, 1977. However, its sales in the second six-month period declined dramatically. Its total sales for this six-month period were only $63,662.00, a figure which was approximately 23% of the quota requirement. During the last three months of this period, moreover, 3PM did not employ a single full-time salesperson.

B/4 was aware of this dramatic decrease in sales, **[**7]** and it warned 3PM that it was required to meet the quota requirements in the agreement. On July 28, 1978, within the 60-day period required by para. 6(A)(2)(d) of the agreement, B/4 notified 3PM that it was terminating 3PM's dealership because of 3PM's failure to achieve the quota requirements. The termination led to 3PM's institution of this action.

Three events which occurred during 3PM's tenure as a B/4 dealer are relevant to certain portions of 3PM's complaint. The first involved 3PM's dealings with the R.L. Polk Company, a firm which had its headquarters in 3PM's Detroit sales territory. 3PM learned that Polk was considering a purchase of five computer systems, for **[*1355]** use in its regional offices. 3PM sought to register Polk as a "national account" [3] with B/4. B/4 refused this request, and instead permitted 3PM to compete with its Nashville dealer for the Polk sale. B/4 arranged a demonstration which was presented to Polk, but no sale ever resulted.

[8]** The second involved a sale by B/4's Atlanta branch to RCA Distributing Corp. of a computer system to be installed in the Detroit territory. 3PM assisted with the sale and installation of this system, and was initially promised 50% of the sale price as credit toward its quota requirement. However, B/4 ultimately awarded 3PM only 40% of the price as quota credit.

Finally, 3PM requested B/4 to permit it to sell to customers in Florida, well outside its sales territory. B/4 refused this request.

A. COUNTS I AND II

In Count I of its complaint, 3PM alleges that the inclusion of para. 16 in the dealer agreement violated the Sherman and Clayton Acts. 3PM alleges that defendants were able to include this paragraph in the agreement as a result of their economic power in the market for interactive mini-computers. 3PM alleges that because of this paragraph, it was unable to compete with defendants in the market for computer servicing and maintenance, and that a not insubstantial amount of interstate commerce was restrained as a result.

In Count II, 3PM alleges that para. 23 of the dealer agreement was a similar violation. 3PM alleges that this paragraph was included because of defendants' **[**9]** economic power in the market for interactive mini-

[3] This was pursuant to para. 2(C) and (D) of the dealer agreement, which regulated the sales of B/4 products to customers outside of a dealer's exclusive territory.

computers. It alleges that because of para. 23, it was prevented from buying peripherals from defendants' competitors, at prices far less than those charged by defendants. It alleges that a not insubstantial amount of interstate commerce was similarly restrained by this provision of the agreement.

As an initial matter, the parties disagree as to what type of antitrust violations are alleged in these counts. Defendants contend that Count I alleges merely an ancillary restraint, while Count II alleges an exclusive dealing arrangement. 3PM contends that both Counts allege tying arrangements. The Court will adopt 3PM's characterization of the complaint. [4] Even when the complaint is read to allege tying arrangements, however, the Court finds that defendants are entitled to judgment on Counts I and II as a matter of law.

[10]** A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pacific Railroad Co. v. United States, 356 U.S. 1, 5-6, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. [5] Such an agreement can be found to violate *§ 1* of the Sherman Act, *15 U.S.C. § 1*, and/or *§ 3* of the Clayton Act, *15 U.S.C. § 14*. The Clayton Act can be violated only if the tying arrangement involves two distinct products; in contrast, the Sherman Act can be violated if the tying arrangement involves either products or services.

HN3[] Under either act, [6] a tying arrangement **[**11]** constitutes a *per se* antitrust violation **[*1356]** if three elements are established. First, there must be two separate products or services, with the purchase of one (the "tying product") conditioned upon the purchase of the other (the "tied product"). Second, the seller must possess sufficient economic power in the market for the tying product so that competition in the market for the tied product is appreciably restrained. Finally, a "not insubstantial" amount of commerce in the market for the tied product must be affected. *See In Re Data General Corp. Antitrust Litigation, 490 F. Supp. 1089, 1100 (N.D. Cal. 1980)*.

Defendants contend that none of these elements are present in the case at bar, as a matter of law. 3PM, on the other hand, **[**12]** contends that all three have been established as a matter of law. The Court finds that 3PM has produced no evidence that defendants possessed economic power in the market for the tying product, and that these counts must therefore be dismissed.

The requirement that the seller possess sufficient economic power was most recently explained by the Supreme Court in *Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)*(*Fortner I*) and *United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977)*(*Fortner II*). Plaintiff in *Fortner* brought an action under the Sherman Act, alleging that in order to obtain loans in excess of $2,000,000 from defendant, to be used to purchase and develop certain land, it had been required to purchase prefabricated homes manufactured by defendant to be erected on this land. It alleged that the prefabricated homes were sold at unreasonably high prices. On defendant's motion, the district court granted summary judgment in favor of defendant. It found that defendant did not have sufficient economic power in the market for credit, and that the agreements **[**13]** involved did not restrain a substantial amount of commerce in the market for prefabricated homes.

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[4] ***HN1***[] *Fed.R.Civ.P. 8(a)* requires only that a plaintiff set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." As discussed *infra*, 3PM's complaint adequately alleges the elements of a tying arrangement.

HN2[]

[5] Thus Count II can be regarded as alleging a tying arrangement, even though para. 23 of the dealer agreement does not *require* the purchase of the peripheral units which defendants offered for sale. This provision of the agreement forbade 3PM to purchase such units from any of defendants' competitors.

[6] Although the Sherman and Clayton Acts were earlier considered to set forth differing standards in this regard, it is now well accepted that the same standards apply under both Acts. *See, e.g. Moore v. James H. Matthews & Co., 550 F.2d 1207 (9th Cir. 1977)*.

In *Fortner I*, the Court reversed the district court's grant of summary judgment. The Court first found that the agreements at issue *did* restrain a substantial amount of commerce in the market for the tied product, holding that the relevant figure was the *total* volume of sales tied by the policy being challenged, not merely that portion of the total accounted for by the plaintiff. The Court then found that there were factual disputes as to whether defendant possessed sufficient economic power in the market for the tying product, and that the grant of summary judgment was therefore improper.

The Court defined ***HN4***[] market power as "the ability of a single seller to raise price and restrict output" and described the necessary inquiry as follows:

> The proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.

394 U.S. at 503-4. The Court noted that plaintiff had produced evidence to the effect that defendant's competitors sold similar **[**14]** prefabricated homes at a price which was $400 less than defendant's price, and that credit on defendant's advantageous terms was not available from any other source at the time the loans were executed. The Court found that this evidence could tend to prove that defendant had "unique economic advantages over (its) competitors", explaining that defendant "may well have had a substantial competitive advantage in providing this type of financing because of economies resulting from the nationwide character of its operations." *Id. at 505-6*. The Court held that these disputed facts were sufficient to preclude a grant of summary judgment.

On remand, the district court conducted a bench trial and found that the defendant's acts did indeed violate *§ 1* of the Sherman Act. The district court concluded that defendant did possess the requisite economic power in the market for the tying product.

This ruling was also appealed; in *Fortner II*, a unanimous Court reversed the judgment which had been entered in favor of plaintiff. The Court first reviewed the evidence which plaintiff had introduced to establish that defendant possessed economic power in the market for credit. Plaintiff **[*1357]** **[**15]** had established that defendant had entered into similar tying arrangements with many other customers. Plaintiff had further established that defendant charged a noncompetitive price for its prefabricated homes. Finally, plaintiff had established that the terms of defendant's loan were unique [7] and that a loan on similar terms could not be acquired from any other source at the time in question.

The Court held that this evidence was insufficient as a matter of law to support a finding that defendant possessed economic power in the market for credit. The Court found that economic power could not be inferred from the fact that plaintiff and others had accepted the alleged **[**16]** tie-in and paid a noncompetitive price for the tied product, explaining:

> Fortner contends that acceptance of the package by a significant number of customers is itself sufficient to prove the seller's economic power. But this approach depends on the absence of other explanations for the willingness of buyers to purchase the package.

429 U.S. at 618, n. 10.

The Court further held that the requisite uniqueness was not established by plaintiff's showing that defendant's competitors *did not* offer credit on similar terms, but rather that plaintiff was required to show that defendant's competitors *could not* offer credit on such terms. The Court stated:

> The question is whether the seller has some advantage not shared by his competitors in the market for the tying product.
>
> * * * *

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[7] The terms of this loan were unique in three respects. First, the loan covered 100% of the cost of acquiring and developing certain real estate. Second, the loan was not guaranteed by any of the shareholders or officers of the plaintiff corporation. Finally, the loan was offered at an unusually low rate of interest. *Fortner II, 429 U.S. at 616*.

> Without any evidence that [defendant] had some cost advantage over its competitors - or could offer a form of financing that was significantly differentiated from that which other lenders could offer if they so elected - the unique character of its financing does not support the conclusion that [defendant] had the kind of economic power which Fortner had the burden of **[**17]** proving in order to prevail in this litigation.

Id. at 620-22.

After *Fortner I* and *Fortner II*, ***HN5***[] economic power in the market for the tying product can be established in one of three ways. First, it may be shown that the defendant occupies a dominant position in the market for the tying product. Second, it may be shown that the tying product is "unique", as that term has been further defined in *Fortner II*. Finally, it may be shown that a number of the defendant's customers have accepted the tie-in, that there is no explanation other than the defendant's economic power for their willingness to do so, and that the defendant possesses the power to raise prices. *See e.g., In Re Data General Corp. Antitrust Litigation, supra, 490 F. Supp. at 1111-2*.

In both Count I and Count II of its complaint, 3PM alleges that the tying product in this action is the B/4 series of interactive mini-computers. *See* complaint at paras. 11, 17. Accordingly, the Court must determine whether 3PM has produced any evidence on these motions which tends to prove under any of these three theories that defendants possessed economic power in the market for interactive mini-computers.

[18]** 1. *Dominant Market Position*

In its initial brief, 3PM conceded that it does not even know what defendants' share of this market is, and that it was therefore not attempting to show that defendants occupied a dominant position in this market. In any event, defendants have produced evidence that their share of the Detroit area market for interactive mini-computers was less than 1% at the times relevant to this action. 3PM's only response on this issue is an affidavit from John H. Tipton, in which he asserts that B/4's share of the California market for small business computers was 10% in 1977. The California market, however, is irrelevant to the claims **[*1358]** raised in 3PM's complaint. [8] The Court finds that no material disputes of fact remain in this regard, and that defendants did not have a dominant position in the Detroit market as a matter of law.

[19]** 2. *Uniqueness of Tying Product*

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[8] *See* complaint at paras. 7, 9, 10, and 12:

> Plaintiff has been for many years in the business of servicing and marketing computers for various businesses within the Detroit metropolitan area.
>
> * * * *
>
> Basic/Four Corporation agreed that plaintiff would become the distributor for Basic/Four computer equipment in the Detroit market area.
>
> * * * *
>
> Sorbus' ability to install and maintain Basic/Four equipment in the Detroit area was inadequate in a number of respects . . .
>
> * * * *
>
> The purpose and effect of the requirement for the use of Sorbus by plaintiff was financially to benefit Sorbus and its parent company MAI and to establish a customer base for Sorbus, Inc. in the Detroit area to the detriment of plaintiff.

3PM has attempted to establish that defendants possessed economic power in the market for the tying product primarily by asserting that the B/4 products were unique at the time in question. For example, 3PM asserts that B/4's software was "exceptionally easy to program." Plaintiff's initial memorandum at 13. 3PM has relied heavily on defendants' promotional literature as "evidence" of this uniqueness. The Court has serious doubts that defendants' sales literature can properly be utilized to create a dispute of fact. Even assuming that this proposition has been established, however -- i.e. that B/4's equipment had capabilities which were unmatched by the equipment of any of defendants' competitors -- this does not establish that the B/4 units were "unique" as that term was defined in *Fortner II*.

As discussed above, under *Fortner II*, plaintiff's burden is not satisfied by showing that none of defendants' competitors offered a similar product at the time in question. Indeed, it was undisputed in *Fortner II* that none of the defendant's competitors offered credit on similarly advantageous terms. The Court held that this showing was insufficient **[**20]** to establish economic power.

3PM's burden, rather, is to prove that none of defendants' competitors *could have* produced products which would perform the functions performed by defendants' products, because defendants possessed some advantage not shared by their competitors. [9] 3PM has not even attempted to make such a showing. In fact, the only evidence on this record which is relevant to this issue suggests that defendants' competitors *could have* produced similar products, and had actually begun to produce such products subsequently. Robert Yanover, 3PM's president, testified at his deposition that 3PM now sells equipment manufactured by one of B/4's competitors which is the "functional equivalent" of the B/4 equipment which 3PM earlier sold. Yanover Deposition at 70. In addition, William Bittick, a programer for 3PM, has stated in an affidavit that "other computer manufacturers are now offering new business basic programming languages patterned after the Basic/Four Business Basic Language." [10] 3PM has produced no evidence which tends to show that none of defendants' **[*1359]** competitors could have offered similar products during the period at issue. The Court therefore **[**21]** finds that no material disputes of fact remain in this respect.

[22]** In a further attempt to establish that the B/4 units were unique, 3PM asserts that only these units were sold under the B/4 trademark, that some of B/4's software is protected by copyright, and that defendants possess trade secrets which were used in producing the B/4 units. Even if these assertions are accepted as true, however, they are insufficient to establish the economic power which is required by *Fortner II*.

The majority view is that ***HN6***[] the mere existence of a trademark does not give rise to a presumption that the holder of the trademark possesses economic power in the relevant market. *Capital Temporaries, Inc. v. Olsten Corp., 506 F.2d 658 (2d Cir. 1974)*; *Carpa, Inc. v. Ward Foods, Inc., 536 F.2d 39 (5th Cir. 1976)*; *Northern v. McGraw-Edison Co., 542 F.2d 1336 (8th Cir. 1976)*, *cert. denied*, *429 U.S. 1097, 97 S. Ct. 1115, 51 L. Ed. 2d 544 (1977)*. A contrary rule has been applied only in the Ninth Circuit, and the application of that rule has been questioned even within that Circuit. *See* *Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971)*, *cert. denied*,

[9] *See* II E. Kintner, *Federal* ***Antitrust Law*** at 238 (1980):

> Under the rule of *Fortner II*, inquiry into the uniqueness of a given product must focus on whether the seller in the tying market has the ability either to charge a price or impose a burden that he would not be able to extract in a competitive market. Without a showing of either (1) some cost advantage on the part of the seller, or (2) a characteristic of the tying item that sufficiently differentiates the product so that no competitor could offer the product if he so chooses, the uniqueness of the product will not support a finding of economic power. Thus, the mere fact that a product is attractive will not establish sufficient economic power. (Footnotes omitted.)

[10] Bittick asserts that none of these other manufacturers offered such products until 1978, and that the other products were still inferior to those manufactured by defendants at the time of his affidavit. These statements may create a factual dispute as to whether defendants' competitors *did* produce substantially equivalent products. As discussed above, however, this is not the pertinent inquiry. 3PM is required to establish that defendants' competitors *could not* produce equivalent products, and Bittick's statements do not tend to prove this proposition.

405 U.S. 955, 92 S. Ct. 1172, 31 L. Ed. 2d 232 (1972); *c.f.* *Krehl v. Baskin-Robbins Ice* **[**23]** *Cream Co., 78 F.R.D. 108 (C.D. Cal. 1978)*.

Similarly, the fact that some of B/4's software is copyrighted does not establish that defendants possessed economic power. *See In Re Data General Corp. Antitrust Litigation, supra, 490 F. Supp. at 1112* ("The sole fact of the existence of a copyright notice has not been held sufficient to prove economic power"). In arguing to the contrary, 3PM relies upon *United States v. Loew's, Inc., 371 U.S. 38, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962)*. In *Loew's*, the Court held that each of a number of copyrighted motion pictures was a unique product, and that the defendants who sold or licensed these films therefore possessed economic power. However, this finding was not based merely upon the fact that each film was copyrighted; rather, the Court found that each of the films "varied in theme, in artistic performance, in stars, in audience appeal, etc.". *Id. at 48*. [11] Thus the copyrighted nature of the B/4 software, standing alone, similarly fails to establish that the B/4 units were "unique" as that term has been defined in *Fortner II*.

[24]** Finally, 3PM's contention that the existence of trade secrets confers economic power upon defendants is completely unsupported by authority. Defendants have presented unrebutted authority to the contrary, and this contention is clearly not well-founded. *In Re Data General Corp. Antitrust Litigation, supra, 490 F. Supp. at 1113-4* ("It has never been held that trade secrets protection is sufficient to create a presumption of economic power.").

In sum, neither the existence of the B/4 trademark, the copyrighted character of B/4's software, nor the existence of trade secrets relieves 3PM of its burden under *Fortner II* to prove that defendants possessed "some advantage not shared by (their) competitors in the market for the tying product." *Id., 429 U.S. at 620*, and that defendants' competitors therefore *could not have* produced a product which was similar to the B/4 unit. The existence of the trademark and the copyright are not irrelevant to 3PM's burden in this regard. For example, 3PM could perhaps carry its burden, or at least create a dispute of fact for the purposes of these motions, by producing evidence which tends to show that because defendants' products were **[**25]** sold under the B/4 trademark, competing products which performed the same functions but were not sold under the B/4 trademark would not be substantially similar products. [12] Similarly, 3PM **[*1360]** could perhaps carry its burden, or at least create a dispute of fact, by producing evidence which tends to show that because some of B/4's software was copyrighted, none of defendants' competitors *could have* created substantially similar products. *But see Data Cash Systems, Inc. v. JS&A Group, Inc., 480 F. Supp. 1063 (N.D. Ill. 1979)*, *aff'd*, *628 F.2d 1038 (7th Cir. 1980)* (copyright notices attached to computer software do not prevent others from developing functionally equivalent programs).

Either showing would tend to prove that defendants' products were "unique" under *Fortner* **[**26]** *II*; if 3PM had produced *any* evidence along these lines, the resulting factual dispute would preclude a grant of summary judgment. On this record, however, 3PM has produced no evidence whatsoever which would tend to prove these propositions, or which otherwise tends to prove that defendants' units were unique. The Court is therefore constrained to find that defendants' units were not unique, as a matter of law.

3. *Customers' Acceptance of Tie-in*

In *Fortner I*, the Court suggested that economic power in the market for the tying product could be established merely by showing that the alleged tie-in had been imposed on a large number of customers. In describing the degree of economic power which must be shown to establish *per se* liability, the Court stated:

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[11] *See Capital Temporaries, Inc. v. Olsten Corp., supra, 506 F.2d at 663*:

> The appellant misreads *Loew's* if he concludes that the mere existence of the copyrighted tying motion pictures was enough to create the tying. The *tied* films were also copyrighted . . . The tying was created by the attractiveness of some of the films, as contrasted to the inferior quality of the others also required to be purchased in the package.

[12] This would require a showing that the B/4 trademark has attained national preeminence, and is usually attractive as a result. *See Krehl v. Baskin-Robbins Ice Cream Co., supra; see generally* Kintner, *supra*, at 249.

> Market power is usually stated to be the ability of a single seller to raise price and restrict output, for reduced output is the almost inevitable result of higher prices. Even a complete monopolist can seldom raise his price without losing some sales; many buyers will cease to buy the product, or buy less, as the price rises. Market power is therefore a source of serious concern for essentially the same **[**27]** reason, regardless of whether the seller has the greatest economic power possible or merely some lesser degree of appreciable economic power. In both instances, despite the freedom of some or many buyers from the seller's power, other buyers -- whether few or many, whether scattered throughout the market or part of some group within the market -- can be forced to accept the higher price because of their stronger preferences for the product, and the seller could therefore choose instead to force them to accept a tying arrangement that would prevent free competition for their patronage in the market for the tied product. Accordingly, the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market.

394 U.S. at 503-4.

3PM has relied heavily upon this language, and has stressed the undisputed facts that the tie-in alleged in Count I was accepted by 27 of defendants' 29 dealers, while the tie-in alleged in Count II was accepted by all 29 dealers. 3PM contends that these facts alone establish that defendants possessed economic power in the market **[**28]** for the tying product.

However, after *Fortner II*, it is clear that these facts alone do not establish that defendants possessed economic power. [13] In *Fortner II*, the Court explicitly qualified the language quoted above in two respects. First, the Court indicated that even if the alleged tie-in has been accepted by a large number of buyers, this fact does not relieve the plaintiff of its burden to show that the seller possesses economic power in the sense of the power to raise prices. The Court quoted with approval from a commentator's analysis of the above-quoted language from *Fortner I*:

> One important question in interpreting the *Fortner* decision is the meaning of this language. Taken out of context, it might be thought to mean that, just as **[*1361]** the "host of tying arrangements" was "compelling evidence" of "great power" in *Northern Pacific*, so the inclusion of tie-in clauses in contracts with "any appreciable number of buyers" establishes market power. But the passage read in context does not warrant this interpretation. For the immediately preceding sentence makes clear that market power in the sense of power over price must still exist. If **[**29]** the price could have been raised but the tie-in was demanded in lieu of the higher price, then -- and presumably only then -- would the requisite economic power exist.

Dam, *1969 Supreme Court Review* at 25-26, quoted in *Fortner II, 429 U.S. at 620, n. 13*.

Second, as noted above, the Court noted that the buyers' acceptance of the tie-in is indicative of economic power only in the absence of any other explanation for their willingness to accept such an arrangement. *See Fortner II, 429 U.S. at 618, n. 10*.

Accordingly, after *Fortner II*, ***HN7***[] it is not sufficient that 3PM has established that defendants' dealers accepted the alleged tie-ins. 3PM also bears the burden of proving that defendants **[**30]** possessed "power over price", and there must be an absence of evidence that the dealers accepted the alleged tie-ins for other reasons. [14] **[**31]**

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[13] Indeed, it was undisputed in *Fortner II* that defendant had entered into the alleged tying arrangements with a large number of its customers. The Court held that this evidence was insufficient as a matter of law to establish that defendant possessed economic power in the market for the tying product.

[14] *See* 2 J. von Kalinowski, *Antitrust Laws and Trade Regulation* at § 6G.05[2] (1983):

> The number of tying arrangements that would constitute some evidence of economic power in the market for the tying product was referred to as *a host* of tying arrangements in *Northern Pacific* and as *any appreciable number* in *Fortner I. Fortner II* makes clear, however, that these ***HN8***[] vague terms of quantity will only establish proof of economic power

Because 3PM does not agree that it is required to establish the defendants' power over price, it has not even attempted to do so. *See* reply brief at 20. This renders insufficient as a matter of law 3PM's attempt to establish that defendants possessed economic power in the market for the tying product. [15]

In sum, 3PM has raised no disputes of fact which are relevant to a determination of the defendants' share of the relevant market, of the uniqueness *vel non* of the tying product, or of the defendants' economic power in the market for the tying product generally. Accordingly, 3PM has failed as a matter of law to establish that the tying arrangements alleged in Counts I and II of its complaint constitute *per se* violations of the antitrust laws. Counts I and II of its complaint must therefore be dismissed. [16]

[32]** **[*1362]** B. COUNTS III AND IV

The allegations set forth in Counts III and IV of 3PM's complaint involve defendants' enforcement of paras. 2(C), 2(D), and 3 of the dealer agreement. Para. 2(C) of the agreement regulated the pricing of items which 3PM sold to customers not within the territory, and otherwise governed such sales. Conversely, para. 2(D) governed the sales of B/4 products within 3PM's territory by other B/4 branches and dealers. Finally, as noted above, para. 3, included in Schedule D to the agreement, provided that if 3PM were to sell any B/4 products outside its territory, an award of quota credit for such sales would be "at (B/4's) sole discretion".

3PM alleges the same factual basis for both Count III and Count IV. It alleges that B/4 denied its request to register R.L. Polk Company as a national account, and instead arranged an unsuccessful sales presentation. It alleges that it assisted in the sale and installation of computer equipment for RCA Distributing Corp., as requested by B/4. It

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> provided (1) there is also *evidence* of the seller's power over price and (2) there is no evidence of any other explanation such as price competition for the willingness of the customers to accept the seller's tie-in. (original emphasis.)

[15] In addition, defendants have produced unrebutted evidence which offers other explanations for the buyers' willingness to accept the tie-ins alleged. *See* defendants' reply brief at 30, n. 19.

[16] ***HN9***[] A finding that an alleged tying arrangement is not a *per se* violation usually does not end the court's inquiry, as a plaintiff may also attempt to prove that a tying arrangement violates the rule of reason. *See* *Fortner I, 394 U.S. at 500*. Under this theory, a plaintiff is required to establish the facts peculiar to the business involved, its condition before and after the alleged restraint was applied, the nature and history of the alleged restraint, the reason for adopting the alleged restraint, and its actual or probable effect. *Chicago Board of Trade v. United States, 246 U.S. 231, 62 L. Ed. 683, 38 S. Ct. 242 (1918)*.

3PM's only comments on this issue suffer from the same infirmity which permeates much of its arguments on these motions: a propensity to allege every imaginable form of tying arrangement, coupled with a refusal to indicate clearly what is alleged or what evidence is proffered in support. In this regard, 3PM has consistently contended that the tying arrangements alleged are *per se* illegal, and has made no attempt whatsoever to present any evidence which would establish liability under the rule of reason. In the final paragraph of its reply brief, however, 3PM states:

> Plaintiff believes the claims here stated are properly characterized and correctly analyzed, and that these claims may be inexpensively decided without the necessity of submitting to the jury the issue of the unreasonableness of defendants' conduct and without the necessity of presenting market study evidence and expert witness evidence from economists. But should the Court conclude otherwise, it is respectfully requested that plaintiff be given the opportunity to submit such issues and to explore the availability of such evidence, and to present it, if needed.

Id. at 41.

HN10[] *Fed.R.Civ.P. 56(e)* provides:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.
>
> Defendants have here moved for summary judgment on all counts of 3PM's complaint. 3PM cannot avoid a grant of summary judgment merely by requesting an "opportunity . . . to explore the availability of . . . evidence", and the Court therefore must deny 3PM the "opportunity" requested.

alleges that it was promised 50% of the profit on the sale, but was ultimately awarded only 5%. 3PM also complains that it was promised a 50% quota credit but was granted **[**33]** only a 40% credit. Finally, it alleges that it requested of B/4 permission to solicit certain customers in Florida, and that such permission was denied.

COUNT III

In Count III, 3PM alleges that defendants violated *§ 1* of the Sherman Act by arbitrarily and unevenly enforcing these provisions of the agreement. It alleges that defendants enforced these provisions in such a manner as to favor company-owned branch offices over independent dealers. More particularly, 3PM alleges that defendants enforced these provisions in this manner so that they could terminate 3PM's dealership under para. 6(A)(2)(d) of the agreement and then replace 3PM with a company-owned branch office.

Even if 3PM's factual allegations are accepted as true, this conduct clearly did not violate the Sherman Act. It is well settled that ***HN11***[] a manufacturer does not violate the Sherman Act merely by replacing one distributor with another, or even by taking over a distributorship itself. In *Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283 (6th Cir. 1963)*, *cert. denied*, *375 U.S. 922, 11 L. Ed. 2d 166, 84 S. Ct. 267 (1963)*, plaintiff alleged that it had been terminated as a distributor for the Stroh Brewery **[**34]** Company. It alleged that the defendants, including Stroh, had conspired to cancel plaintiff's distributorship and award it to another of the defendants. All defendants moved to dismiss, and the district court granted their motion. The Court of Appeals affirmed, holding that plaintiff's allegations failed to state a claim under the Sherman Act. The Court noted:

> The present case does not involve price fixing. Nor does it involve an attempt to create a monopoly. The Stroh Brewery Company had one distributor in the territory under consideration before it terminated the plaintiff's franchise. It continued to have only one distributor thereafter.

318 F.2d at 287.

Ace Beer was applied in a case very similar to the case at bar in *B & B Oil & Chemical Co. v. Franklin Oil Corp., 293 F. Supp. 1313 (E.D. Mich. 1968)*. Plaintiff had been defendant's exclusive distributor in a specified territory. It alleged that two of its salesmen and defendant had conspired to take over one of plaintiff's most profitable accounts, and that it was ultimately terminated as a distributor. Plaintiff brought an action under *§ 1* of the Sherman Act as a result of the termination.

The court **[**35]** granted summary judgment in favor of defendant, finding that plaintiff **[*1363]** had failed to state a claim under the Sherman Act. The court stated:

> It is obvious at this point that what (defendant) did here was to eliminate the dealership of a distributor who enjoyed a lucrative account and take over the account itself.
> * * * *
>
> It is just at this point that plaintiff's case fails, even conceding the inequities charged, since the result of the defendants' activities is not destructive of competition but merely the substitution of one supply source for another, whether it be the manufacturer himself or another distributor.

293 F. Supp. at 1316-7; *accord*, *Aaron E. Levine & Co. Inc. v. Calkraft Paper Co., 429 F. Supp. 1039 (E.D. Mich. 1976)*.

It should be noted that 3PM's factual allegations in the case at bar are inconsistent with its claim that defendants enforced the dealer agreement in such a way as to favor branch offices over independent dealers. 3PM claims generally that branch offices were accorded preferential treatment, yet two of the three incidents upon which 3PM relies in support of this claim did not even involve branch offices. In its attempts **[**36]** to obtain the Polk sale, 3PM was required merely to compete with B/4's independent dealer in Nashville. Similarly, B/4's refusal to allow 3PM to solicit sales in Florida was designed to protect the territory of B/4's independent dealer in that area. Accordingly, these allegations do not tend to support 3PM's theory of liability under the Sherman Act.

Even if defendants *had* been pursuing a policy designed to replace independent dealers with branch offices, however, it is clear under *Ace Beer* and *B & B* that such a course of action does not offend the Sherman Act. [17] Defendants' motion for summary judgment as to Count III must therefore be granted.

[37]** COUNT IV

In Count IV, 3PM alleges that the same acts alleged in Count III constituted a breach of contract. 3PM alleges that defendants' arbitrary and uneven enforcement of the provisions described above prevented 3PM from meeting its quota requirements. It concludes that this interference and B/4's termination of its dealership were material breaches of the dealer agreement.

This count must also be dismissed as a matter of law. 3PM claims that defendants' alleged denial of quota credit for sales outside its territory was a breach of the dealer agreement, and claims that its termination for failure to achieve its quota requirements was the result of this breach. Yet it is undisputed that 3PM had no contractual *right* to receive any quota credit for out-of-territory sales, and that defendants therefore had no contractual duty to award such credit. The dealer agreement unambiguously provides that an award of quota credit for such sales was to be within defendants' "sole discretion", and 3PM has made no argument that this provision of the agreement is unenforceable for any reason. Because the parties' agreement did not require defendants to award any quota credit under these circumstances, **[**38]** defendants' alleged failure to do so cannot be regarded as a breach of that agreement. [18]

[39]** **[*1364]** Moreover, the factual basis which is asserted for this claim is clearly deficient. It is undisputed that defendants never prevented 3PM from making a sale to Polk; they merely required 3PM to compete with B/4's Nashville dealer for the sale. There is no indication that 3PM would have been denied quota credit if it had been able to make the sale to Polk.

3PM's complaint does not even allege that it was denied quota credit for the sale of RCA Distributing Corp.; it merely alleges that the allocation of profits was improper. Even if 3PM had alleged and established that the allocation of quota credit was improper, however, this would have awarded to 3PM only an additional 10% of the sale. [19] Even if this disputed amount were to be added to 3PM's sales for the second six-month period, its sales would still have been far less than the quota requirement.

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[17] The only contrary authority offered by 3PM is *Eiberger v. Sony Corp. of America, 622 F.2d 1068 (2d Cir. 1980)*. For two reasons, *Eiberger* does not aid 3PM in the case at bar. First, the acts alleged in *Eiberger* were significantly different from those alleged in the case at bar. *Eiberger* did not involve a practice which allegedly resulted in the termination of one distributor so that another could be appointed. Rather, it involved a restraint which prohibited *all* distributors from engaging in price competition. Second, the court in *Eiberger* noted that any liability under the Sherman Act resulting from territorial restrictions arose solely under the rule of reason. Plaintiff in that case had presented evidence which established that the alleged restraints maintained retail prices at an artificially high level, eliminated intrabrand competition, but did not enhance interbrand competition. Such a showing is a fundamental element of the offense which 3PM has attempted to allege, and it is an element as to which 3PM has presented no evidence whatsoever.

[18] 3PM relies upon 5 *Williston on Contracts* § 677 (3d Ed. 1961), which provides: "If a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure." 3PM contends that its failure to achieve the quota requirements was caused by defendants' refusal to award quota credit, and that defendants should not have taken advantage of that failure by terminating 3PM's dealership. However, the above quoted language is qualified in the following section: "An exception to this principle must be made where the hindrance is due to some action of the promisor which under the terms of the contract or the customs of business he was permitted to take." *Id*. at § 677A. Under the parties' agreement, defendants were granted discretion to deny quota credit for out-of-territory sales; they were accordingly not prevented from terminating 3PM on the ground that it had failed to meet its quota requirements.

[19] 3PM asserts that it received only 40% quota credit for this sale, while it should have received 50%. This represents a difference of only $2,111.04 in quota credit. Even if this additional quota credit had been granted to 3PM it would have fallen short of its quota requirement by more than $150,000.00.

[40]** In sum, the allegations in Count IV are clearly lacking in both legal and factual support. Defendants' motion for summary judgment as to this count must therefore be granted.

C. COUNTS V AND VI

In Counts V and VI, 3PM alleges that B/4 officials made four misrepresentations during the negotiations which led to the execution of the dealer agreement. 3PM alleges that B/4 officials stated that:

1. B/4 intended to have long-term relationships with all of its dealers, including 3PM;
2. B/4 would "protect" its dealers by enforcing the territorial provisions included in the dealer agreement;
3. 3PM would be able to attain the quota requirements set forth in the dealer agreement; and
4. B/4 would not terminate 3PM's dealership for failure to achieve its quota requirements, so long as 3PM was "progressing" in its sales of B/4 equipment.

Complaint at paras. 34, 43.

Defendants do not dispute that the first three statements were made. They do contend, however, that their officials did not make the fourth statement. This dispute of fact is immaterial to a resolution of defendants' motion for summary judgment on these counts. The Court finds that even if all the **[**41]** alleged statements *were* made, defendants are nevertheless entitled to judgment on these counts as a matter of law.

COUNT V

In Count V, 3PM alleges that it expended considerable money and effort to promote the sale of B/4 products, in reliance on B/4's statement that it would not be terminated for failure to achieve its quota requirements if it was progressing in its sales of B/4 products. Because of this alleged statement and reliance, 3PM contends that B/4 is estopped to terminate its dealership for failure to achieve its quota.

In order to set up such an estoppel, 3PM must establish that:

1. B/4 intentionally or negligently induced it to believe that it would not be terminated for failure to achieve its quota;

2. 3PM justifiably relied on B/4's statements; and

[*1365] 3. 3PM will be prejudiced unless B/4 is estopped to terminate 3PM's dealership.

Michigan National Bank of Detroit v. Kellam, 107 Mich. App. 669, 309 N.W.2d 700 (1981); *Berkeley Police Ass'n v. City of Berkeley, 76 Cal.App. 3d 931, 143 Cal.Rptr. 255 (1977)*. [20] The Court finds that even if this representation were made, and even if 3PM acted in reliance upon it in entering **[**42]** into the agreement and promoting B/4 sales, this reliance was clearly not justifiable. As noted above, Yanover and Squillace requested during the contract negotiations that 3PM's quota requirement be reduced and that B/4 delete from the agreement the provision which permitted B/4 to terminate 3PM's dealership if 3PM failed to meet its quota. B/4 did reduce the quota requirement, but it unequivocally insisted upon retaining the power to terminate 3PM for failure to achieve a provision requested by Yanover, to the effect that 3PM would not be terminated if it was using its best efforts on behalf of B/4.

Knowing that B/4 insisted upon retaining the power to terminate 3PM for failure to achieve quota, 3PM executed the written agreement which conferred this power upon B/4. Even if a B/4 official **[**43]** made a statement to the effect that B/4 did not intend to exercise this power, it was clearly unreasonable for 3PM to rely upon this statement in light of the provisions which were included in the written agreement. *Cf.* *Kearns v. Ford Motor Co., 203 U.S.P.Q.*

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[20] The parties' dealer agreement provided that "this Agreement and the rights and obligations of the parties hereto shall be governed by and construed in accordance with the laws of the State of California." *Id. at P 30*.

884 (E.D. Mich. 1978). Accordingly, 3PM has failed as a matter of law to establish the elements of the estoppel it has alleged, and defendants' motion for summary judgment as to Count V must be granted. [21]

[44]** COUNT VI

In Count VI, 3PM alleges that each of the four statements set forth above was made with the intent to induce 3PM to invest in a B/4 dealership, and that 3PM reasonably relied on them in entering into the dealer agreement. 3PM alleges that each of these representations was false, and was known to be false by B/4. [22] 3PM claims that it has suffered damages as a result of this alleged fraud.

HN12[] In order to sustain its claim of fraud, 3PM must establish the following elements:

1. Defendants made a false representation;

2. Defendants knew or believed that the representation was false;

3. Defendants intended to induce 3PM to act in reliance upon the misrepresentation;

4. 3PM justifiably relied upon the misrepresentation; **[**45]** and

5. 3PM suffered damages as a result.

Cormack v. American Underwriters Corp., 94 Mich.App. 379, 288 N.W.2d 634 (1979); *Crocker-Citizens National Bank v. Control Metals Corp., 566 F.2d 631 (9th Cir. 1977)* (applying California law). Examining each of the alleged misrepresentations in turn, the Court finds that 3PM has failed as a matter of law to make this showing as to each.

1. *B/4's Intent to Have Long-term Relationships with Dealers*

3PM has presented a great deal of evidence which indicates that even before it executed the dealer agreement, B/4 was **[*1366]** considering the possibility of opening a branch office in Detroit. Nevertheless, it is far from clear that the statement at issue here was false at the time it was made by B/4. As noted above, 3PM took the position during contract negotiations that the quotas included in the agreement were too high. On March 11, 1977, Donald Kirkwood [23] wrote a letter to Yanover and Squillace in which he stated:

> There is no benefit to Basic/Four Corporation, Walt Schramm or myself to assign unrealistic and unreachable quota objectives. It is our aim to have long term relationships with our dealers and, **[**46]** therefore, it is incumbent on us to be realistic in the demands we set forth. *Conversely, every marketing area in which we have plans to expand has an opportunity value and quota assignments must be made in accordance with these*. By establishing the goals at too low a marketing level we do not realize the potential that is expected, and we enter into a preferential quota restructing which is neither consistent with nor equitable to the other dealers in the program.

Plaintiff's Exhibit 20 (emphasis added). B/4 clearly did *not* represent that it intended to have long-term relationships with its dealers, no matter how poorly those dealers performed under the parties' agreement. Rather, B/4 consistently emphasized the importance of its dealers meeting the quota requirements.

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[21] In addition, 3PM's arguments in relation to Counts V and VI are anomalous in one other respect. The misrepresentation which was allegedly made by B/4 was that 3PM would not be terminated if its sales of B/4 products were "progressing". It is undisputed, however, that 3PM's sales were *not* progressing at the time of its termination. On the contrary, its sales had diminished dramatically, from a six-month period in which it surpassed its quota requirement to a period in which it achieved less than 23% of its quota. Accordingly, B/4's actions in terminating 3PM were not inconsistent with the representation it allegedly made.

[22] The gravamen of 3PM's claim in this Count is that B/4 did not intend to have a long-term relationship with 3PM as a dealer. 3PM contends that B/4 hoped to open a company-owned branch office in Detroit, and that 3PM's dealership was terminated so that this could be accomplished.

[23] Kirkwood was B/4's Regional Manager of Dealerships.

Indeed, this latter point is corroborated by the events which occurred during the parties' contract negotiations. Assuming *arguendo* that this statement was false and **[**47]** that 3PM entered into the dealer agreement in reliance upon it, such reliance was plainly unreasonable. Despite its unhappiness with the provision of the agreement which permitted B/4 to terminate 3PM for failure to meet its quota, 3PM knowingly executed an agreement which included this provision. [24] Even if a B/4 official made a statement during contract negotiations to the effect that B/4 intended to have a "long term relationship", 3PM could therefore not have reasonably believed that it would not be terminated no matter how poor its sales were. Because there remains no material dispute of fact with respect to this essential element of 3PM's claim, the Court finds that this alleged misrepresentation is not actionable as a matter of law.

2. *B/4's Intent to Enforce Territorial Provisions in Agreement*

3PM has apparently abandoned its claim that **[**48]** this alleged statement was an actionable misrepresentation, as it has not addressed it at all in its briefs on these motions. In any event, 3PM has produced no evidence that any such statement was false, or that 3PM acted in reliance upon it. Accordingly, no material disputes of fact remain, and this portion of Count VI must be dismissed as well.

3. *3PM's Ability to Attain Quota Requirements*

In his March 11, 1977 letter to Yanover and Squillace, Kirkwood stated:

> It would appear at this writing that your only reluctance is the quota assignment. Let me state again unequivocally that I am convinced this is a fair assignment and one which you can accomplish.
>
> * * * *
>
> My personal observation is that you established in your own minds, because of a lack of experience with Basic/Four and the small business systems market in Detroit, sales objectives that were far too low, and, therefore, the numbers which we have proscribed (sic) appear to you to be unreachable. Obviously we do not agree, and if you will consider the point that your quota is our quota you must realize that we are confident that you can attain the goals and, in fact, surpass them.

Plaintiff's Exhibit **[**49]** 20. 3PM characterizes this statement as a misrepresentation that **[*1367]** it would be able to achieve its quota, and contends that it entered into the dealership agreement in reliance upon it.

For two reasons, the Court finds that this statement did not constitute actionable fraud as a matter of law. First, 3PM has produced no evidence whatsoever that this statement was false -- i.e. that the quotas set by B/4 were *not* attainable. In fact, all of the evidence which appears in this record is to the contrary. It is undisputed that the branch office which replaced 3PM in Detroit surpassed the quota requirements which B/4 had earlier imposed on 3PM. Indeed, even 3PM was able to meet its quota requirement in its first six-month period under the dealer agreement. It is clear beyond dispute that 3PM's failure to meet its quota requirement in the second six-month period was not caused by the setting of an excessively high quota, but was rather caused solely by 3PM's poor performance under the agreement. 3PM has raised no dispute of fact on this issue, and the Court must find as a matter of law that the quotas set by B/4 were not unrealistic. [25]

[50]** Second, Kirkwood's letter merely set forth his opinion regarding 3PM's ability to meet the quota requirements; it was not a statement of fact. Such a statement of opinion cannot provide the basis for an action for fraud. *Connellan v. Himelhoch, 506 F. Supp. 1290 (E.D. Mich. 1981)* (applying Michigan law); *Hauter v. Zogarts, 14 Cal.3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975)*.

4. *B/4's Intent Not to Terminate 3PM if Sales Were Progressing*

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[24] The dealer agreement further provided that it could be terminated by either party, for any reason, at the end of its three-year duration. *Id. at P 5(B)*.

[25] 3PM has attempted to place into issue the method by which B/4 established quota requirements for each of its dealers. 3PM did not include in its complaint any claims along these lines, and its arguments in this regard are therefore irrelevant to any issue before the Court on these motions.

As noted above, there is a dispute of fact as to whether B/4 officials told 3PM that it would not be terminated as a dealer if its sales were progressing. This is an immaterial dispute, however; even if the statement were made, it did not constitute actionable fraud.

As an initial matter, it cannot be said that this "statement" was false. It is undisputed that 3PM's sales were *not* progressing when it was terminated; B/4's actions in terminating 3PM were therefore not inconsistent with its alleged earlier statements.

Furthermore, even if 3PM actually relied on this alleged statement in entering into the dealer agreement, its reliance was clearly unreasonable. As noted above, 3PM knowingly entered into an agreement under which **[**51]** it could be terminated if it failed to achieve its quota. 3PM could not have reasonably relied on an inconsistent oral statement, particularly after B/4 had expressly refused to include a similar provision in the agreement. 3PM has raised no material dispute of fact relating to this alleged statement, and the Court finds that it did not constitute fraud as a matter of law.

In sum, 3PM has failed as a matter of law to establish that any of the statements allegedly made by B/4 constituted an actionable fraud. Defendants' motion for summary judgment as to Count VI must therefore be granted.

D. Count VII

In Count VII, 3PM merely incorporates all of the allegations included in Counts I through VI. 3PM contends that all of the actions alleged in those counts constituted a conspiracy to restrain trade, in violation of *§ 1* of the Sherman Act. It is, at best, unclear what sort of antitrust violation is alleged in this count. [26] In any event, 3PM has presented no authority to the effect that this combination of alleged actions may be found to violate the Sherman Act, even though each individual action does not **[*1368]** violate the Act. Furthermore, the Court has found that each of the **[**52]** claims incorporated into Count VII is without merit as a matter of law. Defendants' motion for summary judgment as to Count VII is therefore granted.

E. CONCLUSION

3PM has not raised a material dispute of fact as to any of the claims set forth in its complaint. The Court therefore grants defendants' motion for summary judgment, and will dismiss all counts of 3PM's complaint.

IT IS SO ORDERED.

End of Document

[26] 3PM's characterization of this claim in its brief is equally cryptic: "Count VII is a composite of the previous six claims and relies upon their cumulative effect." *Id. at 3*.

Bogosian v. Gulf Oil Corp.

United States District Court for the Eastern District of Pennsylvania

August 1, 1984

Civil Action Nos. 71-1137, 71-2543

Reporter

596 F. Supp. 62 *; 1984 U.S. Dist. LEXIS 24655 **; 225 U.S.P.Q. (BNA) 88 ***; 1984-2 Trade Cas. (CCH) P66,153

Paul J. Bogosian, et al., Class Representatives v. Gulf Oil Corp., et al.

Core Terms

gasoline, plaintiffs', trademark, coercion, defendants', lessee-dealers, tie-in, summary judgment, lease, buyer, class action, cases, damages, conspiracy, motions, lessor, service station, seller, court of appeals, economic power, summary judgment motion, tying arrangement, decertification, self-interest, antitrust, fungible, genuine issue, class-wide, conditioning, deposition

LexisNexis® Headnotes

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

HN1[] **Summary Judgment, Entitlement as Matter of Law**

A district court may rule upon summary judgment motions under Fed. R. Civ. P. 56 in protracted cases, based on the developed record where the record is complete, proper notice has been given, and the party resisting the motion has a fair opportunity to present facts essential to justify its position.

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

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

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

HN2[] **Entitlement as Matter of Law, Genuine Disputes**

If the record reveals 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, then the judgment sought shall be rendered forthwith. Fed. R. Civ. P. 56(c).

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

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

Civil Procedure > ... > Summary Judgment > 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

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

In deciding a motion for summary judgment, the moving party bears the burden of proving that there are no genuine issues of fact, and doubts as to the existence of genuine issues of fact are to be resolved against the moving party. The non-moving party is entitled to have all inferences viewed in a light most favorable to the non-moving party.

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

HN4[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The "per se" unreasonableness rule in tying cases will be applied when there is a showing of sufficient economic power to impose an appreciable restraint on free competition in the tied product (assuming all the time, of course, that a "not insubstantial" amount of interstate commerce is affected). The proper focus of concern in determining whether a seller has sufficient economic power is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.

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

HN5[] **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 in the market for the tied item is restrained and the Sherman Act is violated.

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

HN6[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The court has condemned tying arrangements when the seller has some special ability -- usually called "market power" -- to force a purchaser to do something that he would not do in a competitive market. When "forcing" occurs, the court has found the tying arrangement to be unlawful.

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Ballard, Spahr, Andrews & Ingersoll, by Charles I. Thompson, Philadelphia, Pennsylvania, for Atlantic Richfield Co., Schnader, Harrison, Segal & Lewis, by Ira P. Tiger and Edward W. Mullinix, Philadelphia, Pennsylvania, for BP Oil Co. and Union Oil Co. of California.

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R. J. Decker, Houston, Texas, for Shell Oil Co.

Charles W. Matthews, Houston, Texas, for Exxon Corp.

Kaye, Scholer, Fierman, Hays and Handler, by Ira S. Sacks, New York, New York, for Texaco, Inc., for Defendants.

Judges: Vanartsdalen, J.

Opinion by: VANARTSDALEN

Opinion

[*89]** **[*64]** Opinion and Class Action Order No. 126

I. *Background*

[3]** VANARTSDALEN, J.:

Class Action Order No. 63, entered February 8, 1983, provided a detailed schedule for pretrial proceedings. That order, as amended, provided that "dispositive motions" were to be filed on a specified date, which was to be after the conclusion of discovery, excluding deposition discovery of certain trial "fact" witnesses. All remaining defendants [1] **[**4]** have filed, either **[*65]** jointly or individually, motions for summary judgment and decertification

[1] Of the original fifteen defendants, Sun Oil Company and Getty Oil Company entered into agreements of settlement that have been approved by the court. The remaining thirteen defendants are: Amerada Hess, Amoco Oil Company, Atlantic Richfield Company, BP Oil, Inc., Chevron Oil Company, Cities Service, Exxon Corporation, Gulf Oil Corporation, Mobil Oil Corporation, Phillips Petroleum Company, Shell Oil Company, Texaco, Inc., and Union Oil Company.

of the class. Extensive briefs have been filed and two days of oral argument were held on the motions. [2] To be decided is whether this case shall proceed to trial, and, if so, whether as a class action.

Subsequent to the opinion of the court of appeals in *Bogosian v. Gulf Oil Corporation, 561 F.2d 434 (3d Cir. 1977)*, *cert. denied*, *434 U.S. 1086, 55 L. Ed. 2d 791, 98 S. Ct. 1280 (1978)*, I certified a nationwide class of plaintiffs composed of all gasoline service station dealers who, during the class period of May 11, 1967 through December 31, 1977, leased their respective gasoline service stations from any of the fifteen defendants. The plaintiffs seek treble damages under section 1 of the Sherman Act, and injunctive relief. In the pending motions, defendants, not surprisingly, raise numerous issues, including many of the same issues raised in the original **[**5]** motions to dismiss and in opposition to class certification. However, because discovery is virtually complete, and a substantially full record, through depositions, pleadings, and responses to discovery requests, is available for review, defendants contend that it is abundantly clear that (1) plaintiffs cannot present sufficient evidence at trial to defeat a motion for a directed verdict; and (2) that individual issues are so extensive as to preclude an adjudication on a class-wide basis. **[***90]**

The court of appeals has ruled in *In Re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 257-259 (3d Cir. 1983)*, that ***HN1***[] a district court may rule upon summary judgment motions under Federal Rule of Civil Procedure 56 in protracted cases, based on the developed record where the record is complete, proper notice has been given, and the party resisting the motion has a fair opportunity to present facts essential to justify its position. Although plaintiffs have, to some extent, asserted that at trial they will have "more" or "different" evidence to present, plaintiffs do not contend that the record is not sufficiently established to rule on the motions. The plaintiffs do, of course, **[**6]** maintain that as to many of defendants' contentions, there are issues of material fact in dispute that must be determined by a jury at trial.

The essence of plaintiffs' claim is that the defendant oil company refiners as landowner-lessors in combination with each other impose illegal tie-in agreements upon the lessee service station dealers in the leasing of their respective service stations, by requiring the lessees to buy and sell only the gasoline supplied by their respective lessors.

A brief review of the thirteen-year procedural chronology of the case is in order. On December 19, 1973, I entered a memorandum opinion and order refusing to certify a class action on behalf of plaintiffs. *Bogosian v. Gulf Oil Corp., 62 F.R.D. 124 (E.D. Pa. 1973)*, *vacated*, *561 F.2d 434 (3d Cir. 1977)*, *cert. denied*, *434 U.S. 1086, 98 S. Ct. 1280, 55 L. Ed. 2d 791 (1978)*. Subsequently, on April 15, 1975, I granted the motions for summary judgment of defendants Exxon, Shell and Getty. [3] *Bogosian v. Gulf Oil Corp., 393 F. Supp. 1046 (E.D. Pa. 1975)*, *vacated*, *561 F.2d 434 (3d Cir. 1977)*, *cert. denied*, *434 U.S. 1086, 98 S. Ct. 1280, 55 L. Ed. 2d 791 (1978)*. On July 21, 1977, the **[**7]** Court of Appeals for the Third Circuit **[*66]** vacated and remanded both the denial of class certification and the grant of summary judgment. *Bogosian v. Gulf Oil Corp., 561 F.2d 434 (3d Cir. 1977)*, *cert. denied*, *434 U.S. 1086, 55 L. Ed. 2d 791, 98 S. Ct. 1280 (1978)*. I thereafter certified a class of "all present and all former gasoline service station lessee-dealers of any of the defendants who are or were lessee-dealers of any of the defendants at any time between May 11, 1967 and December 31, 1977" for damages, and injunctive relief for the present lessee-dealers. Class Action Order No. 1.

This is not the first time since the court of appeals' **[**8]** decision that defendants have sought summary judgment. On March 31, 1980 and again on April 12, 1983, I denied defendants' motions for partial summary judgment. Class Action Order Nos. 6 & 69. Both motions for partial summary judgment were asserted as to the plaintiffs' trademark claim. In the memorandum opinion accompanying Class Action Order No. 69, I did not foreclose the possibility of

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[2] Approximately 1,250 pages of memoranda in support of the motions, responses and replies were submitted to the court, with approximately five times that amount submitted in various appendices. I reviewed all of the memoranda in support of the parties' positions and parsed the appendices when necessary. June 25, 1984 was devoted to oral argument on the motions for summary judgment; the following day for the decertification motions.

[3] Summary judgment was granted in favor of Shell and Getty against both Paul J. Bogosian and Louis J. Parisi, the individuals who filed the original actions. Summary judgment in favor of Exxon was granted as to Bogosian but not Parisi because as an Exxon lessee-dealer, Parisi had a possible vertical tying claim against Exxon. *Bogosian, 393 F. Supp. at 1053*.

summary disposition at a future date. I decided that on the existing state of the record genuine issues of material fact remained in dispute.

According to Plaintiffs' Preliminary Statement of Claim, filed pursuant to Class Action Order No. 63, as amended, the plaintiffs charge that:

> Defendants, acting in concert, have undertaken over a long period of time a course of consciously parallel conduct to restrain competition in the sale of gasoline to their respective lessee-dealers, and in particular, to eliminate or substantially restrain price competition in the sale of their gasoline to lessee-dealers.
>
> Plaintiffs contend that the concerted action of defendants, as hereinafter described, gives rise to five separate and distinct, but related claims, as follows, each of which constitutes a violation **[**9]** of Section 1 of the Sherman Act:
>
> *Claim No. 1*: Defendants, acting in concert, have adopted and implemented various restrictive provisions in their leases, dealer supply agreements and other related agreements which have had the purpose and/or effect of requiring each branded lessee-dealer of a defendant to purchase all its gasoline from that lessee-dealer's lessor.
>
> *Claim No. 2*: Defendants, acting in concert, and under the guise of protecting their respective trademarks, have imposed overbroad restrictions on the economic freedom of their branded lessee-dealers to purchase gasoline at wholesale and at competitive prices, and that, even if lawful in themselves, in concert, defendants' trademark practices have been used to accomplish an unlawful end -- division of the wholesale market for gasoline and elimination or at least substantial restraint of price competition in the sale of gasoline to branded lessee-dealers of defendants.
>
> *Claim No. 3*: Defendants, acting in concert, have refused to sell gasoline to the branded lessee-dealers of other defendants.
>
> *Claim No. 4*: Each defendant, by a constellation of provisions contained in their **[***91]** package of leases and related agreements, **[**10]** tied the purchase of gasoline from the lessor to such lease and its related agreements.
>
> *Claim No. 5*: Each defendant created a tying arrangement whereby the lessee-dealer was required to purchase exclusively from the lessor all gasoline pumped through lessor's trademarked dispensers regardless of the source or quality of the gasoline furnished by the lessor.
> While each of the above claims are separate, they are also related; each claim supports and is a part of Claims Nos. 1, 2 and 3.

Considering the multitude of materials submitted on behalf of and in opposition to the dispositive motions, I will present only the defendants' general positions on both the motions for summary judgment and the motions to decertify the class. [4]

[11]** **[*67]** The defendants' joint motion for summary judgment contends that summary judgment is appropriate as outlined in their brief, inter alia, for the following reasons:

> 1. Plaintiffs' trademark claims raise no genuine issue of fact and are insufficient as a matter of law because branded gasoline is a single product; and plaintiffs have failed to raise a triable issue of fact concerning the existence of an unlawful horizontal conspiracy to impose a tie-in because each defendant acted in its own economic self-interest.
> 2. Plaintiffs have failed to establish the fact of injury or impact resulting from defendants' trademark practices because gasoline is not homogenous; there is no element of causation; plaintiffs failed to take into account

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[4] With both dispositive motions, the defendants jointly filed a motion addressing points common to all of the defendants. In addition, certain of the defendants filed individual motions emphasizing particular circumstances which such defendants contended would require summary disposition in their favor even if denied on behalf of all the defendants generally.

offsets; the use of Lundberg data is scientifically unsupportable and widely speculative; the margin requirements of the federal price controls preclude a finding of impact; the wholesale gasoline market was fully competitive; and plaintiffs' proposed damage formula involves an impermissible aggregate approach.

3. Plaintiffs have failed to demonstrate any genuine issue of material fact as to an alleged horizontal conspiracy to impose **[**12]** leasehold-gasoline tying arrangements because plaintiffs cannot demonstrate there is a tying arrangement at all; defendants lack the requisite economic power in the tying product, service station sites, to restrain competition in the tied product market, gasoline; the defendants' leases and supply agreements do not constitute unlawful tying arrangements; there is no direct or circumstantial evidence of a conspiracy; and plaintiffs have no theory of impact or damages to support their lease tie claims.

With regard to the motion for decertification, defendants' joint motion contends the class should be decertified for, inter alia, the following reasons:

1. Despite their representations to the Third Circuit, plaintiffs' method of proof is not class-wide in nature.
2. Plaintiffs' proposed proof of the alleged tie-in is not class-wide in nature.
3. Plaintiffs cannot establish market power on a class-wide basis.
4. Proof of fact of injury or impact would raise individual issues.
5. Plaintiffs do not have a legally permissible theory for proving the amount of damage to each class member on a common basis.

II. *Summary Judgment Standard*

Before addressing the merits of defendants' **[**13]** contentions, the appropriate standards of review need be set out.

HN2[] The summary judgment standard is well known: if the record reveals 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," then the "judgment sought shall be rendered forthwith." *Fed. R. Civ. P. 56(c)*. ***HN3***[] In deciding a motion for summary judgment, the moving party bears the burden of proving that there are no genuine issues of fact, and doubts as to the existence of genuine issues of fact are to be resolved against the moving party. The non-moving party is entitled to have all inferences viewed in a light most favorable to the non-moving party. *Hollinger v. Wagner Mining Equipment Co., 667 F.2d 402, 405 (3d Cir. 1981)*. The Court of Appeals for the Third Circuit has characterized the grant of summary judgment as a "drastic remedy." *Tomalewski v. State Farm Life Ins. Co., 494 F.2d 882, 884 (3rd Cir. 1974)*.

To the foregoing standards must be added the Supreme Court's admonition that in complex antitrust cases involving charges of conspiracy, summary procedures should only be used "sparingly":

> We believe that summary procedures should **[**14]** be used sparingly in complex antitrust **[***92]** **[*68]** litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which has so long been the hallmark of "even handed justice."

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962) (footnote omitted). The Court has recognized that *Poller* involves a "concededly rigorous standard." *Hospital Building Co. v. Trustees of REX Hospital, 425 U.S. 738, 746, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976)*. While both the Supreme Court and the Third Circuit Court of Appeals have allowed summary disposition in antitrust cases, the above citations make plain that the district court must be absolutely certain there is no issue of material fact to be decided by the fact finder.

III. *Summary Judgment Motions*

Although Plaintiffs' Preliminary Statement of Claim lists five claims, the **[**15]** primary thrust of plaintiffs' action involves three claims: (1) the refusal to deal claim (Claim No. 3 of Plaintiffs' Preliminary Statement of Claim); (2) the trademark claim (Claim Nos. 2 & 5); and (3) the lease claim (Claim Nos. 1 & 4). I will deal first with the question of conspiracy, which is involved in all three claims, then each claim seriatim, and lastly the questions of impact or fact of injury (damage) and damages.

1. *Conspiracy Claims*

In order to recover against non-lessor defendants on any of their claims, plaintiffs must prove a "contract," "combination" or "conspiracy" in restraint of trade by the defendants. [5] Plaintiffs contend that they can present evidence through expert testimony and material obtained through discovery that exhibits consciously parallel behavior that is not in the defendants' economic self-interest, and, in addition, that defendants had an opportunity to conspire. Defendants maintain that as a matter of law they acted in their economic self-interest and that plaintiffs have, at most, evidence of nothing more than parallel behavior coupled with a possible opportunity to conspire.

[16]** As a preliminary matter, it must be noted that throughout the voluminous briefs defendants referred extensively to deposition testimony of plaintiffs' expert witnesses in support of their motions for decertification and summary judgment. Reference to such testimony in the appendices superficially appears to confirm at least some of the defendants' contentions. In each instance, however, plaintiffs' responsive briefs cite other testimony by the same or another expert witness that supports plaintiffs' position. Considering that the only testimony of record was basically cross-examination by the defendants, it is not surprising to find many apparently contradictory statements in the several thousand pages of deposition testimony, spanning weeks of intensive questioning. [6] Such apparent contradictions or inconsistencies in the testimony do not mandate summary disposition. Rather, they create a classic example of issues of fact for the jury.

[17]** **[*69]** Plaintiffs, not surprisingly, do not have direct evidence of a conspiracy. Plaintiffs do, however, have certain circumstantial evidence. Plaintiffs offer the testimony of expert witnesses that the defendants engaged in consciously parallel action which the experts assert was against each defendant's rational economic self-interest. Defendants maintain that as a matter of economic logic the conduct engaged in by all was in their own self-interest. As the record presently stands, I cannot say that there is no genuine issue of material fact on the conspiracy issue.

The isolated portions of the testimony of plaintiffs' experts that defendants cite fail to recognize that the issue whether certain conduct is or was against one's economic self-interest is a matter of perspective. When viewed with the alleged conspiracy in place, it may be that the defendants' actions were in **[***93]** their own economic interest as the market existed because of the alleged unlawful acts of defendants. Plaintiffs maintain, however, that the market must be viewed as it would have been absent defendants' alleged illegal conduct. Given that hypothetical market structure, would it have been in defendants' **[**18]** economic self-interest to act as they did? On the present state of the facts, I cannot say that there is no issue of fact in dispute concerning what would have been in defendants' self-interest.

The plaintiffs also have circumstantial evidence concerning the Petroleum Industry Marketing Attorneys' (PIMA) meetings which began in the middle 1950's. This evidence at least raises a possible inference concerning the opportunity to conspire. Defendants are correct that an opportunity to conspire alone is insufficient to establish a conspiracy. The PIMA materials, however, combined with plaintiffs' expert witness testimony regarding consciously parallel behavior against the defendants' economic self-interests creates genuine issues of fact as to whether there was an agreement, conspiracy, or combination among defendants in restraint of trade.

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[5] In Class Action Order No. 103, I expressly ruled that individual vertical claims against lessor defendants had not been and would not be certified for class treatment. Because class representatives Bogosian and Parisi were, at one time, lessee-dealers of Exxon, Gulf and Arco, plaintiffs possibly retained individual vertical claims against those three defendants. However, I declined to certify a class against those three defendants. The result of Class Action Order No. 103 is that class representatives Bogosian and Parisi may be able to maintain individual vertical claims against their respective lessors. I have not decided as of this time whether such claims will be tried together with or separate from the class-action horizontal conspiracy claims, if tried at all.

[6] Nevertheless, I do not accept plaintiffs' argument that the court should not consider responses made by plaintiffs' experts in answer to defense counsels' questions that are unfavorable to plaintiffs' theories because it was only cross-examination.

2. *The Refusal to Deal Claim*

Recognizing that plaintiffs' primary claims involve the trademark and lease claims, suffice it to say that as the record stands there is a genuine issue of fact whether defendants' failure to solicit lessee-dealers of a competitor was a result of concerted action on behalf of defendants.

3. *The Trademark Claims*

[19]** Plaintiffs' two trademark claims are related but not dependent. First, plaintiffs claim that the use of the trademarks themselves is overbroad because defendants could protect their trademarks by less restrictive alternatives. Plaintiffs assert that an otherwise lawful use of trademarks to achieve the alleged unlawful end of supra competitive prices constitutes an antitrust violation. Second, plaintiffs claim defendants have created a tying arrangement by requiring lessee-dealers to purchase exclusively from the lessor all gasoline pumped through lessor's trademarked dispensers regardless of the source or quality of the gasoline.

Defendants, in their briefs and at oral argument, contend that summary judgment on the trademark claims is appropriate for any one of a number of reasons. Even if all of defendants' contentions were correct, it would affect only the second of plaintiffs' two trademark claims set out above. Plaintiffs would still be entitled to present their claim that defendants have used lawful trademarks to accomplish an illegal end, imposition of supra competitive prices on the market. Further, there are, at least on the present state of the record, genuine issues of **[**20]** fact as to two material issues: the "fungibility" issue and the "single product" question.

Plaintiffs concede that in order to prove their case on the trademark issue they must prove gasoline is fungible. Defendants cite and quote at least two of plaintiffs' expert witnesses who they maintain testified in deposition that all gasoline was not fungible. Plaintiffs counter with different quotations from the same witnesses **[*70]** in support of their contentions. Once again, such conflicting testimony creates a factual issue for resolution. In addition, there is a question concerning the definition of "fungibility." Defendants evidently contend that plaintiffs' experts have testified that all gas must be chemically identical to be fungible, while in other instances, such experts defined "fungible" to mean interchangeable in the perception of the consumers, *i.e.*, the consumer perceives no difference. It would be difficult for me to rule as a matter of law that all gasoline is or is not fungible, if the definition of the term as referred to by the experts is uncertain.

As a final note on fungibility, plaintiffs will offer extensive proof that the defendant oil companies themselves **[**21]** regularly exchange large quantities of gasoline, which gasoline is then resold under a different defendant's trademark. Plaintiffs evidently have proof that in certain instances such gasoline is sold to the public by the acquiring defendant without that defendant's additives or meeting its own specifications for gasoline sold under its trademark. If nothing else, such evidence at least raises a possible inference that the defendants either considered or acted as if all gasoline is fungible.

As to the trademark claims, another genuine issue of material fact exists on the present state of the record, concerning the relationship between the trademark itself and the trademarked product. If the trademark is not separate from the gasoline, then only a single product would be involved and there could logically be no tie-in arrangement. Plaintiffs contend under *Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971)*, *cert. denied*, *405 U.S. 955, 92 S. Ct. 1172, 31 L. Ed. 2d 232 (1972)*, and its progeny that there are two distinct products here involved. Defendants rely on *Redd v. Shell Oil Co., 524 F.2d 1054 (10th Cir. 1975)*, *cert.* ***[***94]*** *denied*, *425 U.S. 912, 47 L. Ed. 2d 762,* ***[**22]*** *96 S. Ct. 1508 (1976)*, and its progeny to distinguish this case from *Siegel*. [7] In both Class Action Orders Nos. 6 & 69, I denied defendants' motion for summary judgment on the trademark issue without deciding whether the instant defendants' trademarks were separate products, preferring to wait for a fully developed record. While the present state of the record is quite developed, I have decided again to defer resolution of this crucial issue until the record is complete upon presentation of plaintiffs' case in chief at trial.

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[7] I will not repeat the arguments of counsel or set out the cases here. For an analysis of the parties' respective positions and the applicable case law, *see* Class Action Orders Nos. 6 & 69.

It may very well be that this single product issue will be suitable for deciding as a matter of law. Nevertheless, given the particular circumstances present, it may be that there is at least one critical fact issue for the jury to decide, *i.e.*, are the defendants engaged in the business **[**23]** of operating a total service package or are they primarily engaged in the distribution of gasoline?

The final issue under plaintiffs' trademark claims currently existing on the state of the record involves plaintiffs' claim that there was a less restrictive alternative means than use of the trademark restrictions for enforcing defendants' quality control standards. Plaintiffs claim that defendants could have protected their respective gasoline products by setting specification standards for their products that a lessee-dealer would have to meet in order to sell gasoline under that defendant's trademark. The lessee-dealer would then be free to purchase the gasoline from any source and sell it under his lessor-defendant's trademark; provided the gasoline met the specifications established by the lessor. This claim by plaintiffs essentially involves a contention that defendants by agreement or concerted action have used their trademarks, which in themselves may be lawful, to achieve the unlawful result of imposing supra competitive prices on their lessee-dealers. On the current state of the facts, even if all defendants' points were correct, this issue would remain. Under the antitrust **[**24]** laws, even if all of the defendants had a valid trademark pursuant to which each defendant individually could legally require **[*71]** a lessee-dealer to purchase all his gasoline from the lessor trademark holder, the defendants could not jointly agree, combine or conspire to use their lawful trademarks to achieve an illegal purpose.

4. *The Lease Claim*

The gravamen of plaintiffs' lease claim is that the defendants, acting in concert, adopted and implemented a constellation of lease provisions that had the practical economic effect of requiring each lessee-dealer to purchase all of his gasoline from his lessor. One of defendants' primary contentions concerning the lease claim is that defendants as a matter of law do not possess the requisite economic power in the tying product, service station sites, to restrain competition in the allegedly tied product market, gasoline. [8] Application of the relevant case law to the current state of the record convinces me to the contrary.

[25]** The Supreme Court set out ***HN4***[] the appropriate standard for application of the "per se" unreasonableness rule in tying cases in *Northern Pacific Railway Company v. United States, 356 U.S. 1, 11, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. In *Northern Pacific* the Court stated:

> We do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product (assuming all the time, of course, that a "not insubstantial" amount of interstate commerce is affected).

Id. at 11. The "sufficient economic power" standard was further explained in *Fortner Enterprises, Inc. v. United States Steel Corp. (Fortner I), 394 U.S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)*, and *United States v. Loew's, Inc., 371 U.S. 38, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962)*. In *Fortner I*, the Court stated that "the proper focus of concern is whether the seller has the power to raise prices, or impose other burdensome terms such as a tie-in, with respect to any appreciable number of buyers within the market." *Fortner I, 394 U.S. at 504*. In *Loew's*, the Court opined: "Even absent a showing **[**26]** of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes." *Loew's, 371 U.S. at 45*.

Plaintiffs, during oral argument, stated that according to one of their sources of information the defendants at one time controlled **[***95]** in excess of eighty percent of the developed service station sites in the country. Surely, that data, if presented at trial, would permit a finding of sufficient economic power. Even absent such proof, there is support for a finding that defendants have sufficient economic power to appreciably restrain free competition. Under

[8] Defendants' other major contention is that the lease agreements do not tie the purchase of lessor's gasoline to the leasehold. As support, defendants cite plaintiffs' expert witness testimony. Plaintiffs, however, cite other testimony of those same expert witnesses in support of their position that the leases do have the practical effect alleged. Once again, the apparently conflicting testimony along with plaintiffs' other evidence reveals a record with genuine issues of fact regarding the practical economic effect of the defendants' leases.

the teaching of *Loew's*, the crucial economic power could be inferred from the combined total share of the national gasoline sales of all the defendants. That the defendants control a large share of the wholesale gasoline market provides them with an advantage in the market for retail service station outlets. Individuals seeking to operate a service station site as a lessee-dealer, might find it preferable and more desirable to become a lessee-dealer of a major oil company defendant rather than a lessee-dealer of an independent or a jobber. The "tying **[**27]** product's desirability to consumers" under *Loew's* involves obtaining a developed service station leasehold owned by a major oil company refiner.

Using the teaching of *Fortner I*, the defendants certainly have the power to impose burdensome terms such as a tie-in, with respect to an appreciable number of prospective lessee-dealers. This power comes in part from their status as major oil **[*72]** refiners as well as plaintiffs' evidence that many, if not all, of the defendants engaged their marketing departments in the study and acquisition of attractive service station sites. The potential power to restrain any appreciable number of prospective lessee-dealers by thirteen major oil companies, many of whom undertook market surveys of proposed service station sites, cannot be totally ignored.

5. *Impact or Fact of Damage*

It was obvious to anyone present at oral argument on the summary judgment motion that I have serious problems with a number of aspects of plaintiffs' case. These perceived problems are especially acute with regard to both proof of the fact of damage and amount of damage. Although I am presently ruling that the state of the record reveals issues of fact preventing **[**28]** summary judgment, if at trial some of these serious problems remain, plaintiffs may not be entitled to go to a jury.

Plaintiffs' expert witness on damages, Dr. Paul Davidson, has testified in deposition that in his opinion the lowest Dealer Tankwagon (DTW) price paid by any of the defendants' lessee-dealers would still have been higher than the price gasoline would have been sold in the freely competitive market as proposed by plaintiffs. On the present state of the record such testimony is sufficient to withstand summary disposition. Defendants have brought to light, however, the following: Dr. Davidson has evidently admitted that he has no way of proving the accuracy of his statement, and that implementation of plaintiffs' proposed competitive market would result in the charging of higher service-station rents, franchise fees and other offsets that plaintiffs' expert witness agrees he has not considered. Defendants contend that such additional charges to the lessee-dealers would have driven the cost of gasoline purchased in such a freely competitive market above the cost to lessee-dealers in the existing marketing system. The end result, according to defendants, is that plaintiffs **[**29]** cannot prove that they, as a class, suffered any damage.

I have not decided at this time whether an expert witness's unsupported opinion without more would be sufficient at trial for plaintiffs to go to the jury on the question of fact of damage. I have decided such testimony as disclosed by existing depositions is enough to withstand summary judgment. Plaintiffs are aware, however, that they must "prove" some injury to all members of the class to succeed at trial. *See* Bogosian, 561 F.2d at 454 ("so long as the common proof adequately demonstrates some damage to each individual"). The proper time to decide whether plaintiffs have "proved" injury or fact of damage sufficient to present a jury issue will come at trial, after plaintiffs have presented their case.

6. *Damages*

This aspect of plaintiffs' case troubles me the most. Putting aside for the moment defendants' contentions regarding plaintiffs' proposed calculation of damages, I have a basic problem with plaintiffs' apparent proposal to submit only a damage formula. Evidently, plaintiffs contemplate a bifurcated trial where they could prove liability and fact of damage separate from actual damages. If and when the jury **[**30]** found in plaintiffs' favor, the plaintiffs' damage formula would then be submitted to a jury in a separate proceeding. Plaintiffs would then determine how much gasoline each plaintiff class member purchased during the relevant period and inject the numbers into the damage formula.

Notwithstanding the court of appeals' suggestion that bifurcation may be appropriate, I have not as yet ruled on the propriety of such a procedure. If I decline to do so, plaintiffs must be prepared to prove a total damage figure as opposed to a "measure of damage" or "damage formula."

The defendants challenge, inter alia, plaintiffs' ability to prove damages because the **[***96]** data plaintiffs are using itself is suspect and it only covers twelve randomly selected cities for brief periods, all of which are after the 1974 federal price controls. Defendants further contend that plaintiffs **[*73]** could not possibly have suffered any damage during the period of mandatory price controls. Defendants also contend that the formula plaintiffs have chosen for calculating damages bears no relation to any supposed injury. Although defendants have raised a number of points that may have to be dealt with at trial if plaintiffs **[**31]** are to go to the jury, none of the contentions, individually or collectively, mandate summary judgment at this time. Plaintiffs, however, are on notice that at trial they must be able to "prove" damages in accordance with the applicable standards set out in antitrust cases.

IV. *Decertification Motions*

Although the defendants' individual and joint motions raise a number of issues concerning class decertification, I will deal only with the three most serious contentions.

1. *Class-wide Proof of Coercion*

In the *Bogosian* opinion the court of appeals held that "if plaintiffs are able to show that the lease agreements in use by all defendants have similar clauses which have the practical economic effect of precluding sale of other than the lessor's gasoline" then "the lease agreement itself conditions the sale of one product (here a lease) upon purchase of another" and "proof of coercion is not an element of plaintiffs' case." *561 F.2d at 452* (footnote omitted). Thus, under the law of the case, the vexatious questions of whether proof of coercion is a required element of a tie-in claim and, if so, whether such proof could be done on a class-wide basis or need be proved individually, **[**32]** were decided in plaintiffs' favor. [9] Defendants contend that the Supreme Court's recent decision in *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*, overrules the court of appeals' holding in *Bogosian* that "proof of coercion is not a required element of plaintiffs' case." *561 F.2d at 452* (footnote omitted). Thus, the "coercion" issue that had been temporarily laid to rest in this case once again has reared its troublesome head.

In *Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211* (3d Cir.), *cert. denied*, *429 U.S. 823, 97 S. Ct. 74, 50 L. Ed. 2d 84 (1976)*, the court of appeals specifically rejected the district court's statement that "'the Supreme Court has not set forth a coercion requirement in the tying cases.' 68 F.R.D. at 98." *Ungar, 531 F.2d at 1218*. After discussing the relevant Supreme Court cases, the court unambiguously **[**33]** stated:

> In view of these teachings, we simply cannot accept the district court's view that the Supreme Court has not set forth a coercion requirement in tying cases.

Ungar, 531 F.2d at 1219. In the very next paragraph, the court reiterated its view that coercion was an essential element of a tying case when it discussed the logical question concerning proof of the element of coercion in a class action tying claim:

> Saying that coercion is an element of a tying claim is, of course, not the same thing as saying that it must be established on an individual basis, but we think the two statements are logically related. . . . In the context of a class action, the question is whether "individual coercion" must be established by each plaintiff.

Id.

The court of appeals went on to conclude in *Ungar*:

> The district court erred in rejecting the individual coercion doctrine under the circumstances of this case. Where, as here, 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.

[9] Provided, of course, that plaintiffs could show the leases themselves had the practical economic effect alleged.

Id. at 1226. **[**34]**

As I read *Ungar*, it seems apparent that the court of appeals decided two things: coercion is a requirement or essential element **[*74]** of a tying claim, and in putative class action tie-in suits not based on express contractual provisions, the requirement of individual coercion prevents class treatment. Sixteen months after *Ungar*, however, the court of appeals in *Bogosian* stated:

> Relying upon *Ungar*, defendants appear to argue that coercion is a requirement of proof in all tying cases. Neither *Ungar* nor any other case has so held. . . .
> * * * *
>
> We therefore conclude that once a plaintiff proves that a defendant has conditioned the sale of one product upon the purchase of another there is no requirement that he prove that his purchase was coerced by the seller's requirement.

Bogosian, 561 F.2d at 449, 450. The court, per then Chief Judge Seitz, stated that the *Ungar* court held, *only on the facts present*, **[***97]** that coercion was a necessary element of a prima facie case and that each franchisee must prove coercion on an individual basis. However, the *Bogosian* court stated that in *Ungar* the court was "not articulating a separate **[**35]** legal element of proof" because "coercion is implicit when plaintiff proves the conditioning of sales of one product upon purchase of another." The *Bogosian* court read *Ungar* to have required coercion to be proven only because conditioning of the sale of one product upon purchase of another was not reflected in the agreement or in the operation of its terms. The *Bogosian* court went on to conclude that the "individual coercion doctrine" of *Ungar* had no application because *Ungar* expressly did not decide that doctrine's application to express contractual provisions, which may be the case in *Bogosian*.

The Supreme Court had the opportunity recently to consider per se tie-ins under the antitrust laws. In *Jefferson Parish*, the Court considered the validity of an exclusive contract between a hospital and a firm of anesthesiologists. In upholding the contract under the Sherman Act, the Court, after canvassing its seminal tie-in cases, stated:

> Our cases have concluded that the essential ***HN5***[] 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 **[**36]** 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. . . .
>
> Accordingly, we have condemned ***HN6***[] tying arrangements when the seller has some special ability -- usually called "market power" -- to force a purchaser to do something that he would not do in a competitive market. . . . When "forcing" occurs, our cases have found the tying arrangement to be unlawful.

104 S. Ct. at 1558, 1559 (citations and footnotes omitted).

Absent the Supreme Court's holding in *Jefferson Parish*, I, of course, would have no cause to reconsider the court of appeals' binding decision in *Bogosian*. If, however, *Jefferson Parish* changed the law of tie-ins, I would be duty bound to follow such shift in the law. The determination of whether *Jefferson Parish* has changed the law in this circuit involves re-examination of both *Ungar* and *Bogosian*.

At the outset, there are certain parts of the two cases that are difficult to reconcile. In *Ungar*, Judge Aldisert, writing for the majority, plainly stated **[**37]** that "coercion is an element of a tying claim." *531 F.2d at 1219*. In *Bogosian*, then Chief Judge Seitz, writing for the majority, stated with equal clarity that "once a plaintiff proves that a defendant has conditioned the sale of one product upon purchase of another there is no [coercion] requirement." *561 F.2d at 450*. [10] Also, in *Bogosian* the court focused upon the *act of the seller*:

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[10] The court in *Bogosian* attempted to distinguish *Ungar* by stating that *Ungar* had only decided on the facts present that coercion was a requirement in a tying case. Further, the facts of *Ungar* required coercion "only because the conditioning of the

> **[*75]** The antisocial conduct which the rule seeks to deter is the *act of the seller conditioning* sale of one product upon purchase of another. One can hardly imagine anything which would vitiate that purpose more than a requirement that a violation depends upon proof that the buyer bringing suit would not have purchased tied product but for the tie requirement. The issue is whether the seller acted in a certain way, not what the buyer's state of mind would have been absent the seller's action.

Bogosian, 561 F.2d at 450 (emphasis in original). In *Ungar*, however, the court had focused precisely on the *buyer's state of mind*:

> The practical effect of [the district court's decision] is to substitute proof of economic power for proof of tie-in. **[**38]** Proof of economic power, must perforce, focus on the seller; but proof of a tie-in must focus on the buyer because a voluntary purchase of two products is simply not a tie-in.

Ungar, 531 F.2d at 1224.

> It is only when the buyer's freedom to choose a given product is restricted that the tying doctrine comes into play: so long as "the buyer is free to take either product by itself there is no tying problem." [citation omitted] Moreover, we are aware of no principle that courts will not inquire into state of mind where that is relevant.

Id. at 1226. **[***98]**

[39]** Unfortunately, the *Jefferson Parish* opinion does not explicitly state whether coercion is a required element of a tying case. As I read the opinion, the Court's language is much more akin to the language in *Ungar* than that in *Bogosian* on the issue of coercion as a requirement in a tying case. Primary support for this position comes from the statement in *Jefferson Parish* 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*." 104 S. Ct. at 1558 (emphasis added). Although the Court uses the terms "forcing" or "force" rather than "coerce" or "coercion," the concept is the same. The Court clearly focuses upon the buyer's state of mind, *i.e.*, a product "the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Id*. This focus on the buyer represents the same concern as the *Ungar* court expressed: "Proof of a tie-in must focus on the buyer because a voluntary purchase **[**40]** of two products is simply not a tie-in." Ungar, 531 F.2d at 1224.

There are at least two other portions of the *Jefferson Parish* opinion that focus on the buyer's state of mind:

> When, however, the seller does not have either the degree or the kind of market power that enables him to *force customers to purchase a second, unwanted product* in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market.

104 S. Ct. at 1561 (citations omitted) (emphasis added).

> The question remains whether this arrangement involves the use of market power to *force patients to buy services they would not otherwise purchase*.

104 S. Ct. at 1566 (emphasis added). There is no indication in *Jefferson Parish* that the "force" or "forcing" to which the Court constantly referred would be "implicit when plaintiff proves the conditioning of sales of one product upon purchase of another," as the court stated was the case **[*76]** with "leverage or coercion" in Bogosian. See 561 F.2d at 450.

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sale of one product upon purchase of another was not reflected in an agreement or in the operation of its terms." 561 F.2d at 450. I have several problems with this. In *Ungar* the court did not speak of the coercion requirement in any limited sense. Further, it seems logically inconsistent to posit that coercion is only necessary when there is no express contractual tie but not when there is one. Rather, it seems consistent to posit that coercion is always a requirement but in certain cases it may be presumed or inferred because of the existence of an express contractual tie.

Based upon the above analysis, it is my view that *Jefferson Parish* **[**41]** may well have finally settled the question of whether proof of coercion or forcing is an element of a tying claim. If I decided as much, that part of the court of appeals' decision in *Bogosian* providing that proof of coercion is not an element of plaintiffs' case would no longer be controlling. There is, however, no need for me to make such a determination for even if I did, such a ruling alone would not require decertification of the class. As the court explicated in *Ungar*: "Saying that coercion is an element of a tying claim is, of course, not the same thing as saying that it must be established on an individual basis." *Ungar, 531 F.2d at 1219*.

In *Ungar*, the court expressly limited application of the "individual coercion doctrine" [11] to the situation where the plaintiffs placed no reliance on express contractual tie-ins. In *Bogosian*, the court noted that plaintiffs may be able to prove reliance on the lease agreements themselves, thus rendering the "individual coercion doctrine" of *Ungar* inapposite. Because *Jefferson Parish* did not involve a class action tying claim, the Court did not address how coercion could be proved (if it is indeed an element) **[**42]** in a class action. As such, there is no authority for me to disregard the court of appeals' prior rulings in this case. In other words, in order for me to decertify the class, as defendants contend, I must not only rule that *Jefferson Parish* requires proof of coercion in a tying claim, but also that such proof must always be done individually as to each class member, thus, effectively precluding litigation of tying claims by class action. Such a novel ruling in ***antitrust law*** must come from the court of appeals or the Supreme Court, not a trial court extrapolating a Supreme Court opinion dealing with a related issue. I will not, therefore, decertify the class for lack of class-wide proof of coercion.

[43]** 2. *Class-Wide Proof of Impact and Damages*

Although there are serious problems with both plaintiffs' proof of impact or fact of injury and damages, such problems do not warrant decertification of the class. I have already outlined these problems in discussing the motions for summary judgment and will not do so here. Defendants' arguments are primarily matters dealing with the substance **[***99]** or merits of plaintiffs' claims, and, therefore, do not require decertification. Suffice it to say that if the serious problems referred to earlier are not sufficiently addressed at trial, plaintiffs may not be entitled to have their case go to the jury.

V. *Conclusion*

After considering a veritable mountain of briefs and appendices and after two full days of oral argument, it is my conclusion, as stated in the foregoing opinion, that both the motions for summary judgment and decertification of the class must be denied. Considering everything involved in light of the court of appeals' and the Supreme Court's strict views upon the propriety of granting summary judgment in such cases as the present (and the court of appeals' prior opinion), I cannot say at this time that there are no genuine **[**44]** issues of material fact that can proceed on a class basis. As a final note, although I have reached the merits of both motions, Judge Weinfeld's cogent analysis in *United States v. Bethlehem Steel Corp., 157 F. Supp. 877, 879 (S.D.N.Y. 1958)*, albeit in a different context, rings true here as well:

> The Court does not reach the classical summary judgment question of whether there is a genuine issue as to any material fact. Upon further close study of the record, briefs and argument of counsel and considering the size of the industry, **[*77]** the vast amount of factual material to be analyzed and reviewed in reaching a decision, the multitude of problems in the case, the likely impact of a decision upon the [oil] industry in

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[11] The court in *Ungar* used the district court's definition of the "individual coercion doctrine":

> "Although the individual coercion doctrine has nowhere been explicated in detail, it appears to require proof by the plaintiff of such events and circumstances surrounding the relationship between the franchisor and *each* franchisee as will demonstrate that the franchisee was *coerced* into agreeing to an anticompetitive tie, usually of equipment or supplies." 68 F.R.D. at 78.

Ungar, 531 F.2d at 1219.

> particular, and upon the economy of the country in general, and the admitted significance of a ruling under [Section I of the Sherman Act], I am persuaded that a decision after trial will be the more desirable procedure in the matter. It will serve to bring into sharper focus certain issues of importance which have been obscured by the voluminous affidavits with their statements, counterstatements and alternative positions, and the conflicting **[**45]** conclusions which the parties contend are to be drawn from the multitude of facts and statistics presented.

The case will proceed to trial as heretofore scheduled.

Indium Corp. of America v. Semi-Alloys, Inc.

United States District Court for the Northern District of New York

August 2, 1984

No. 82-CV-482

Reporter

591 F. Supp. 608 *; 1984 U.S. Dist. LEXIS 24610 **; 224 U.S.P.Q. (BNA) 404 ***; 1984-2 Trade Cas. (CCH) P66,182

INDIUM CORPORATION OF AMERICA, Plaintiff, v. SEMI-ALLOYS, INC., Defendant

Core Terms

patents, allegations, infringement, frame, tack-welded, lids, original complaint, relevant market, competitor, Gold, anti trust law, antitrust, supplier, damages, reasonable apprehension, declaratory judgment, case or controversy, fraudulently, manufacture, grounds, invalid

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

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

Patent Law > Infringement Actions > Defenses > General Overview

HN1[] **Conveyances, Licenses**

For a court to have jurisdiction over plaintiff's declaratory judgment claim, the complaint must allege conduct on the part of defendant that has given plaintiff a "well grounded fear" or "reasonable apprehension" of an impending infringement suit.

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

HN2[] **Jurisdiction & Review, Subject Matter Jurisdiction**

An examination of the totality of the circumstances must be made to determine whether there is a controversy arising under the patent laws.

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

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

HN3[] **Justiciability, Case & Controversy Requirements**

In determining whether a case or controversy exists, it is improper to ignore the realities of business life.

Antitrust & Trade Law > Clayton Act > Claims

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Antitrust & Trade Law > Clayton Act > General Overview

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

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

HN4[] **Clayton Act, Claims**

Antitrust standing limits the availability of a private right of action to any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws; *15 U.S.C.S. § 15*.

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

HN5[] **Private Actions, Standing**

Allegations of injury will support standing only if they are not unduly speculative or duplicative of injuries sustained by others.

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

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

HN6[] **Private Actions, Standing**

Plaintiff has undoubted standing to recover for injuries resulting from the antitrust violations of his "direct" competitor. Such standing is so clear that it is seldom challenged.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > Fraud

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

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

HN7[] **Bad Faith, Fraud & Nonuse, Fraud**

In order to state a "Walker-Process type-claim," plaintiff must at least be able to allege facts that indicate that defendant has enforced, or has sought to enforce, or has threatened to enforce its fraudulently obtained patents against plaintiff itself.

Antitrust & Trade Law > ... > Intellectual Property > Bad Faith, Fraud & Nonuse > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

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

Patent Law > Infringement Actions > General Overview

Patent Law > Infringement Actions > Burdens of Proof

Patent Law > Infringement Actions > Defenses > General Overview

Business & Corporate Compliance > ... > Infringement Actions > Defenses > Fraudulent Procurement of Patent

HN8[] **Intellectual Property, Bad Faith, Fraud & Nonuse**

Thus, "enforcement" in the context of claim that plaintiff was injured by the enforcement of a fraudulently procured patent, does not require proof that defendant expressly threatened plaintiff with an infringement suit.

Counsel: [1]** Parkhurst & Oliff, Alexandria, Virginia, Burns & Jenney, Syracuse, New York, Abelove, Siegel, Hester & Stephens, Utica, New York, Roger W. Parkhurst, Esq., Thomas J. Wall, Esq., Michael H. Stephens, Esq., for Plaintiff.

Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York, Gottlieb, Rackman & Reisman, P.C., New York, New York, Mead, Begley & Quinlan, Schenectady, New York, Jay Greenfield, Esq., William P. Farley, Esq., Michael I. Rackman, Esq., William Quinlan, Esq.

Judges: Neal P. McCurn, D.J.

Opinion by: McCURN

Opinion

[*405] [*610]** NEAL P. McCURN, D.J.

MEMORANDUM-DECISION AND ORDER

Plaintiff Indium Corporation of America ("Indium") commenced this action in June of 1982, seeking a declaratory judgment of the invalidity, unenforceability, and non-infringement of three patents held by defendant Semi-Alloys, Inc. ("Semi-Alloys"); treble damages for alleged antitrust violations by Semi-Alloys; and damages based on a pendent state law claim of unfair competition. Upon motion by the defendant pursuant to *Rules 12(b)(1)* and *(6), Fed. R. Civ. P.*, this Court dismissed the original Complaint, but granted plaintiff leave to file an Amended Complaint. *Indium Corporation of America v.* ***[**2]*** *Semi-Alloys, Inc., 566 F. Supp. 1344 (N.D.N.Y. 1983)*, *as amended by Order dated July 21, 1983*. Plaintiff duly filed an Amended Complaint on August 22, 1983. Presently before the Court is defendant's motion to dismiss the Amended Complaint, which is based upon essentially the same grounds as its prior motion to dismiss the original Complaint.

For reasons set forth herein, the Court concludes that the Amended Complaint sufficiently remedies the defects of the original Complaint to withstand the instant motion to dismiss.

[*611] *Declaratory Judgment Jurisdiction*

The patents challenged herein are for an "Hermetic Sealing Cover for Container for a Semiconductor Device" (U.S. Patent 3,874,549), and a method for fabricating such cover (U.S. Patent 3,946,190) and such container (U.S. Patent 3,823,468). Defendant describes the patented device, generally, as a "tack-welded frame lid." *Amended Complaint* para. 9. In support of its claim that such patents are invalid and unenforceable, plaintiff alleges, in substance, (a) that Norman Hascoe (the president of Semi-Alloys and the patent applicant) and Semi-Alloys failed to reveal highly relevant prior art to the Patent **[**3]** Office; (b) that Semi-Alloys had sold thousands of the patented units more than a year prior to the filing dates of the patent applications; (c) that the subject matter claimed was obvious; and (d) that Hascoe was not the true and sole inventor, and had misrepresented himself as such to the Patent Office. *Amended Complaint* para. 86.

HN1[] For the Court to have jurisdiction over plaintiff's declaratory judgment claim, the Complaint must allege conduct on the part of Semi-Alloys that has given Indium a "well grounded fear" or "reasonable apprehension" of an impending infringement suit. *Indium v. Semi-Alloys at 1346*. Plaintiff's original Complaint contained allegations that the defendants had asserted the patents-in-suit against competitors in three previous lawsuits; that the defendant had sent a letter to the plaintiff offering to license Indium under the patents; and that the defendant had previously sued Indium for unfair competition, and had indicated in its pleading in that suit an awareness of Indium's "program to develop, manufacture and market packaging devices similar to plaintiff's COMBO(R)" (Semi-Alloy's tradename for the patented device). The alleged conduct was held "insufficient **[**4]** to create a 'reasonable apprehension' of an infringement action on the part of Indium," and plaintiff's declaratory judgment claims were consequently dismissed for lack of subject matter jurisdiction. *Id. at 1346-48*.

The Amended Complaint, however, places the previously alleged acts in a new light by alleging, in considerable detail, the business context in which such conduct occurred. Plaintiff alleges, for instance, that between 1975 and 1982 the defendant had threatened with infringement suit or had actually sued *every* other supplier of tack-welded frame lids, and had driven all from the market except its co-conspirator, Williams Gold Refining Company, Inc.

More specifically, plaintiff alleges that, in 1975, the relevant market for gold tin frames was supplied by a maximum of seven suppliers: Alpha Metals, Inc., Cominco American, Inc., Consolidated Refining Corp., Plessey, Inc., Williams Gold Refining Company, Inc., **[***406]** Semi-Alloys, Inc. and Indium Corporation of America. Only three of those firms other than Semi-Alloys supplied tack-welded frame lids to the relevant market: CRC, Plessey, and Williams Gold. Semi-Alloys allegedly threatened CRC with a patent infringement suit, **[**5]** and CRC gradually ceased supplying tack-welded frame lids, withdrawing from the market entirely in 1981. Semi-Alloys actually sued Plessey for infringement in 1975, which suit was resolved by a settlement, whereupon Plessey allegedly withdrew entirely from the relevant market. Also in 1975, Semi-Alloys brought an infringement suit against a customer of Williams Gold, which provoked a countersuit by Williams Gold challenging the validity of Semi-Alloys' patents. Those suits were settled in 1981 by an agreement whereby Williams Gold is licensed to supply tack-welded frame lids to the relevant market -- an agreement which plaintiff maintains is an illegal effort to preserve Semi-Alloys' fraudulently procured patents for enforcement.

Plaintiff also alleges that those suppliers that had not entered the submarket in tack-welded frame lids experienced decreased sales, *i.e.*, Cominco, Alpha Metals, Indium, and in one case withdrew from the relevant market entirely, *i.e.*, Alpha Metals.

Hence, when Indium entered the submarket in February of 1982, it became not simply one supplier among a field of competitors **[*612]** operating in that submarket; it became the only supplier of tack-welded **[**6]** frame lids that had not yet been sued, or threatened with suit, by Semi-Alloys for patent infringement.

Plaintiff also specifies in its Amended Complaint that the tack-welding equipment that it purchased in February of 1982 from CRC was the same equipment CRC had been using at the time it was threatened with a patent infringement suit by Semi-Alloys.

It was in this rather omnious business context that Semi-Alloys' conduct in early 1982 occurred. As described more fully in this Court's prior Decision, Semi-Alloys sent Indium a letter in February informing Indium that its patents were available for licensing; and it then sued Indium in March, alleging in its pleading that Indium "has embarked upon an expansion program to develop, manufacture and market high technology packaging devices similar to plaintiff's COMBO(R)."

The distinction between those declaratory judgment actions which present a case or controversy and those which are hypothetical is "necessarily one of degree." *Maryland Casualty Co. v. Pacific Coal Oil & Co., 312 U.S. 270, 273, 85 L. Ed. 826, 61 S. Ct. 510 (1941)*. In holding that no case or controversy was presented by plaintiff's original Complaint, this Court **[**7]** focused upon the allegations therein of particular acts by the plaintiff that were directed toward the defendant, and found that none of those acts constituted a threat of infringement. However, in its Amended Complaint, plaintiff develops the business context in which such acts occurred, and has thereby added weight to its contention that Semi-Alloys' conduct gave it a "reasonable apprehension" of an infringement suit. As a recently decided Federal Circuit case instructs, "an ***HN2***[] examination of the totality of the circumstances must be made to determine whether there is a controversy arising under the patent laws." *C.R. Bard, Inc. v. Schwartz, 716 F.2d 874 (Fed. Cir. 1983)*. Moreover, as this Court noted in its prior Decision, ***HN3***[] in determining whether a case or controversy exists, it is improper to "ignore the realities of business life." *Indium v. Semi-Alloys at 1347*, *quoting* *Muller v. Olin Mathieson Chemical Corp., 404 F.2d 501, 505 (2d Cir. 1968)*. After viewing the allegations in the Amended Complaint in light of these principles, the Court now concludes that the plaintiff herein has set forth sufficient grounds for contending that it had a "reasonable apprehension" of an **[**8]** infringement suit at the time it commenced this action, and that a case or controversy between these parties therefore exists. Defendant's motion to dismiss the declaratory judgment action for lack of subject matter jurisdiction is therefore denied.

The Antitrust Claims

Plaintiff maintains that in Count I of its Amended Complaint it has alleged at least three distinct violations of federal antitrust laws. First, it asserts a claim of a Sherman *§ 1* conspiracy, *15 U.S.C. § 1*, based on allegations of a conspiratorial settlement by the defendant and Williams Gold of their patent-related litigation, which settlement left intact patents that both knew were invalid. Second, plaintiff claims that the defendant violated Sherman *§ 2*, *15 U.S.C. § 2*, by attempting, and succeeding, in monopolizing the relevant market and submarket by enforcing patents that it had fraudulently procured and which were, consequently, invalid. Third, plaintiff claims that the defendant violated both Sherman *§ 1* and *§ 2* by instituting a series of suits, including its state court suit against Indium, with the intent to monopolize the relevant market.

In dismissing plaintiff's original Complaint, this **[**9]** Court pointed to a number of deficiencies, but emphasized its insufficiency in "alleging plaintiff's harm, and the relationship between the defendant's wrongdoing and the plaintiff's harm." *Indium v. Semi-Alloys at 1352*. Both of those **[***407]** elements were deemed crucial for the plaintiff to satisfy the requirement of "anti-trust ***HN4***[] standing," which limits the availability of a private right of action to **[*613]** "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." Clayton Act § 4, *15 U.S.C. § 15*.

Although the Court expressed in that decision its doubt that plaintiff could overcome the inadequacies in its Complaint, *id*. at 1354, it nevertheless now concludes that plaintiff's Amended Complaint states a claim upon which relief can be granted.

First, with respect to the harm sustained, plaintiff now specifies several types of injury. For instance, plaintiff alleges that "Indium's existing business of making and selling separate frames . . . was radically decreased from a volume of several million units annually in 1978 to a small volume of about one hundred thousand units in 1982. . . ." *Amended Complaint* para. **[**10]** 62A. It estimates losses in that regard of "at least about $100,000." *Id*. P 64A. More prominently, plaintiff alleges that it lost profits of "at least about $12.8 million" that it could have earned through sales of tack-welded frame lids, had it not been restrained by Semi-Alloy's unlawful conduct. paras. 62B, 64B. Finally, plaintiff alleges as damages the legal expenses it incurred in conducting a defense in the state court action brought against it by Semi-Alloys. *Id*. PP 62C, 64C.

HN5[] Allegations of injury will support standing only if they are not unduly speculative or duplicative of injuries sustained by others. *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 103 S. Ct. 897, 911, 912, 74 L. Ed. 2d 723 (1983). Although the losses alleged by plaintiff preclude calculation with exactitude, particularly the loss of profits that the plaintiff allegedly *could have earned* had it not been excluded from the market in tack-welded frame lids, such losses are not more speculative than those typically encountered by the courts. *See* Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 23 L. Ed. 2d 129, 89 S. Ct. **[**11]** 1562 (1969); *see generally* P. Areeda, D. Turner, ***Antitrust Law*** para. 344b-c (1978), and "should be proveable under the liberal principles long recognized in antitrust cases." Crimpers Promotions, Inc. v. Home Box Office, Inc. 724 F.2d 290 (2d Cir. 1983). Nor does there appear to be a significant risk of duplicative recoveries here: Plaintiff seeks to recover the profits that *it* lost as a restrained competitor, based on estimates of its projected share of an unrestrained market. Without regard, at this juncture, to any other challenge to these bases for recovery, it is apparent that plaintiff is seeking damages that are distinct from, and do not duplicate, injuries that other potential antitrust plaintiffs might have sustained.

Turning next to the "conceptually more difficult question" of the relationship between the defendant's wrongdoing and the plaintiff's harm, Blue Shield of Virginia v. McCready, 457 U.S. 465, 476, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982), it should be noted at the outset that, as plaintiff emphasizes, it was a direct competitor in the relevant market; hence "there are no vague links in a lengthy chain of causation. . . ." *Plaintiff's Brief* **[**12]** at 16. *Cf. Associated General* (Union lacked standing to sue for damages it sustained as a result of defendant's coercion of third persons). Indeed, as Areeda and Turner state, "[***HN6***[] a] plaintiff has undoubted standing to recover for injuries resulting from the antitrust violations of his 'direct' competitor. Such standing is so clear that it is seldom challenged. . . ." ***Antitrust Law*** para. 340a at 205.

Despite the above-mentioned general rule, plaintiff's original Complaint was found deficient in setting forth the causal link between the wrongdoing and plaintiff's injury because of the absence of two crucial elements. First, plaintiff failed to allege in its original Complaint that it "was ready, willing or able to produce and market the patented device." *Indium v. Semi Alloys* at 1352. Where, as here, the claim asserted is that the defendant unlawfully prevented the plaintiff from engaging in a business, particularized allegations of preparedness are essential. *See* Grip Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466, 475 (7th Cir. 1982). *See generally*, P. **[*614]** Areeda, D. Turner, ***Antitrust Law*** para. 335, 173-175. In its Amended Complaint, plaintiff **[**13]** amply corrects the previous deficiency by alleging, *inter alia*, that at least since 1976 it had the ability and incentive to expand from its existing business of manufacturing separate gold-tin frames into the related business of manufacturing tack-welded frame-lid combinations. *Amended Complaint* paras. 32-35. On this motion to dismiss, such allegations must be construed liberally and their truth must be assumed.

Second, plaintiff failed, in its original Complaint, to adequately allege that the defendant had "enforced" its allegedly fraudulently-obtained patents. In that regard, the Court expressed the view that ***HN7***[] in order to state a "*Walker-Process* type-claim," *see* Walker Process Equipment Inc. v. Food Machinery and Chemical Corp., 382 U.S. 172, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965), **[***408]**

> the plaintiff must at least be able to allege facts that indicate that the defendant has enforced, or has sought to enforce, or has threatened to enforce its fraudulently obtained patents against the plaintiff itself. . . .

Indium v. Semi-Alloys at 1352-53.

Before considering the allegations in the Amended Complaint, the Court is constrained to acknowledge, after **[**14]** consideration of the argument of counsel and further review of the relevant cases and authorities, that it would be a mistake to interpret "enforcement" too narrowly, and thereby limit the remedy of a *Walker Process* type antitrust action to competitors that have actually been sued or threatened with suit by the defendant. The concept must be broad enough to afford a remedy not only to those who actually produced an infringing article and were forced to stop by infringement suit or the threat thereof, but also to those who were ready, willing, and able to produce the article and would have done so but for the exercise of exclusionary power by the defendant. *See* SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1206 (2d Cir. 1981) ("Where . . . the acquisition [of the patent] itself is unlawful, the subsequent exercise of the ordinarily lawful exclusionary power inherent in the patent would be a continuing wrong, *a continuing exclusion of potential competitors*.") (Emphasis added); *See also*, P. Areeda, D. Turner, ***Antitrust Law*** para. 335c at 174 ("It is as unlawful to prevent a person from engaging in a business as it is to drive him from it . . .

."). ***HN8***[] Thus, "enforcement" **[**15]** in the context of claim that the plaintiff was injured by the enforcement of a fraudulently procured patent, does not require proof that the defendant expressly threatened plaintiff with an infringement suit. *See* *Zenith Radio Corp. v. Hazeltine Research, Inc., supra, 395 U.S. 100*. (Despite absence in record of any specific instance of infringement suit against manufacturer's existing or potential distributors or dealers, evidence of the defendant's more general acts of patent enforcement enabled trial court to infer "that the necessary causal relationship between the pool's conduct and the claimed damages existed." *Id. at 125*).

In this instance, plaintiff alleges, inter alia, that it was a direct competitor among a relatively small field of suppliers to the relevant market; that the defendant fraudulently procured the patents in question, and then commenced a course of vigorously enforcing such patents; that between 1975 and 1982 the defendant had threatened with infringement suit or had actually sued every other supplier of tack-welded frame lids, driving all from the market except its co-conspirator; that since 1976, plaintiff was ready, willing, and able to produce tack-welded **[**16]** frame lids but was restrained by the defendant's vigorous course of enforcement; that after learning of grounds upon which the defendant's patents might be held invalid, plaintiff actually commenced producing tack-welded frame lids, whereupon defendant immediately contacted it regarding licensing, and filed suit against it in state court. The Court has already held, *supra*, that such allegations supply the grounds for a "reasonable apprehension" of an impending infringement suit, and therefore create a case or controversy within the Court's declaratory **[*615]** judgment jurisdiction. The Court now holds that such allegations are also sufficient to state that the plaintiff is a person "injured in his property by reason of anything forbidden in the antitrust laws. . . ." Clayton Act § 4, *15 U.S.C. § 15*.

Without belaboring the point, it is also clear that the Amended Complaint also supplies allegations that correct the other deficiencies identified in the original Complaint, *e.g.*, the relevant market, the scope of defendant's monopoly power.

Accordingly, defendant's motion to dismiss the Complaint pursuant to *Rule 12(b)(1)*, *(6)* is hereby denied. [1] In view of the length **[**17]** and complexity of the Amended Complaint (and also in view of the season) defendant is afforded 30 days from the date of entry to answer.

IT IS SO ORDERED.

End of Document

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[1] On July 19, the Clerk's Office received from the plaintiff a motion for leave to file a Supplemental Amended Complaint and a request for expedited procedure. The Supplemental Amended Complaint would add allegations *that*, in May of this year, Semi-Alloys, through its Japanese agent, expressly threatened legal action under Semi-Alloy's corresponding patent against a Japanese would/be purchaser of Indium's tack-welded frame-lids.

Plaintiff's motion, which did not recite a return date, will be placed on the calendar for the Court's next regularly scheduled motion day, September 11, 1984, unless withdrawn of adjourned by mutual consent of the parties. It is assumed that any need for an "expedited procedure" is obviated by this Memorandum-Decision.

United States v. LTV Corp.

United States District Court for the District of Columbia

August 2, 1984, Decided and Filed

Civil Action No. 84-884

Reporter
1984 U.S. Dist. LEXIS 24598 *; 1984-2 Trade Cas. (CCH) P66,133

UNITED STATES OF AMERICA, Plaintiff, v. THE LTV CORPORATION; JONES & LAUGHLIN STEEL INCORPORATED; J & L SPECIALTY STEELS, INC.; and REPUBLIC STEEL CORPORATION, Defendants

Core Terms

divestiture, hot, final judgment, merger, cold rolled, sheet, steel, strip, purchaser, Buyer, stainless, plant, imports, concentration, producer, alloy, bands, carbon, markets, cold, divested, parties, rolled, public interest, stainless steel, finished, sheet steel, accomplished, competitor, largest

LexisNexis® Headnotes

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

Civil Procedure > Judgments > Entry of Judgments > General Overview

HN1[] **Settlements, Antitrust Procedures & Penalties Act**

The standard of review of anti-trust consent decrees is established by § 2 of the Tunney Act, which provides: (e) Before entering any consent judgment proposed by the United States under § 2, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider--(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment; (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial. 15 U.S.C.S. § 16(e).

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Antitrust Procedures & Penalties Act

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Antitrust & Trade Law > ... > US Department of Justice Actions > Settlements > Consent Judgments

Antitrust & Trade Law > ... > Settlements > Consent Judgments > General Overview

HN2[] **Settlements, Antitrust Procedures & Penalties Act**

The public interest in a consent decree under the Tunney Act is to be determined in the context of the anti-trust laws whose fundamental premise is the protection and safeguarding of free competition. The effect on competition of the proposed settlement is of paramount importance in the determination which a federal district court is required to make. Other factors, however, enter into the calculus. Any remedy should be framed with a view to causing the least possible injury to interests of the general public and relevant private interests. The federal district court should consider the impact of the remedy in relation to other important public policies and avoid any unnecessary conflict or friction. It is not free, in making its public interest determination, to decide whether the settlement is the best that could have been reached or, if not, to substitute its own separate notions as to the proper remedy.

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

HN3[] **Settlements, Consent Judgments**

A federal district court's function in reviewing anti-trust consent decrees is not to determine whether it is the best possible settlement that could have been obtained if the government had bargained a little harder. The federal district court is not settling the case. It is determining whether the settlement is within the reaches of the public interest. Basically, a federal district court must look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass. Although under statutory authority, a federal district court is required to scrutinize closely all consent decrees, it is not unmindful that the power to negotiate the terms of any particular consent decree is lodged in the executive branch.

Opinion by: **[*1]** PRATT

Opinion

MEMORANDUM OPINION

JOHN H. PRATT, UNITED STATES DISTRICT JUDGE

This matter is now before the court upon the parties' request that the proposed Final Judgment stipulated to by plaintiff and defendants [1] on March 21, 1984 be entered pursuant to the provisions of the Anti-Trust Procedures and Penalties Act (APPA), the so-called Tunney Act. *15 U.S.C. § 16(b)-(h) (1976).*

A. FACTUAL BACKGROUND

1. The Complaint

Together with the stipulation, plaintiff on March 21, 1984 filed a complaint against defendants asking for injunctive relief to prevent the carrying out of a purchase agreement executed by LTV and Republic on September 28, 1983. As a result of that agreement, Republic would be merged into LTV through an exchange of common and preferred stock valued at $ 770 million at the time of the announcement. **[*2]** *The complaint charges that this proposed acquisition may substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act. According to the complaint, it may do so in the following ways, among others:*

a. Competition in carbon and alloy hot rolled sheet and strip, carbon and alloy cold rolled sheet and strip and stainless cold rolled sheet and strip may be substantially lessened; and

b. Concentration in the manufacture and sale of carbon and alloy hot rolled sheet and strip, carbon and alloy cold rolled sheet and strip and stainless cold rolled sheet and strip will be substantially increased.

Complaint, p. 16.

The complaint seeks both a permanent injunction and a judgment that the proposed acquisition represents a violation of Section 7 of the Clayton Act. The complaint reflects the position of the Department of Justice (DOJ) on February 15, 1984 when it announced its opposition to the defendants' 4 1/2 month-old merger agreement. In its press statement of that day, the DOJ stated, in pertinent part:

After an exhaustive investigation of the proposed deal, we concluded that the merger would sharply increase concentration **[*3]** *in critical parts of the steel industry where only a few domestic companies compete. We concluded that the increased competition would be unacceptably high under the standards contained in the Departments' merger guidelines* [2] and under the applicable law. On that basis we have decided to oppose the merger.

At the same time, the DOJ indicated that it was willing to consider alternatives to the proposed merger.

2. The Events Occurring Between February 15, 1984 and March 21, 1984

Immediately following the February 15, 1984 announcement, the DOJ and its Anti-Trust Division came under sharp criticism from Commerce Secretary Malcolm Baldridge and United States Trade Representative William Brock. There followed a period of intense negotiation between the parties about alternative solutions to the problem. As reflected in the certifications filed pursuant to 15 U.S.C. § 16(g) of the APPA by LTV and Republic on April 2, 1984 and April 3, 1984, respectively, defendants met several times with the DOJ between March 5 and March 21, 1984 concerning the pending transaction and kept Mr. Baldridge **[*4]** *regularly informed as to the status of the discussions with the DOJ. They also discussed with Mr. Brock the matter of an alleged voluntary restraint agreement with the Japanese and the impact on domestic prices of Japanese imports and the European Economic Community Arrangement (EEC). All these conversations took place in face-to-face meetings or by telephone. Communications made solely by counsel of record with the Attorney General or with employees of the DOJ alone were not required to be reported. No written communications were reported. In response to demands from Cyclops*

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[1] *The defendants are LTV Corporation, Jones & Laughlin Steel, Incorporated J & L Specialty Steels, Inc, and Republic Steel Corporation. Hereinafter "LTV" will refer to the first three defendants collectively. Jones & Laughlin Steel Incorporated (hereinafter J & L) and J & L Specialty Steels, Inc. (hereinafter J & L Stainless) are the wholly owned subsidiaries of LTV.*

[2] *The 1982 Merger Guidelines were superseded by Revised Merger Guidelines on June 14, 1984.*

Corporation and Wheeling-Pittsburgh Steel Corporation, participants in this proceeding, for "documents which the United States considered determinative in formulating" the proposed Final Judgment, the DOJ responded that it did not possess such determinative documents and hence could not produce them.

However characterized, the DOJ's treatment of this problem plainly was, and continues to be, a matter of extreme interest to other parts of the Executive Branch, and we can only speculate as to the nature and extent of any inter-departmental communications. [3] This deep concern underscores that the public interest **[*5]** *determination to be made by this court implicates not only the competitive impact of such a judgment upon those immediately concerned, but also broad considerations of public policy having to do with the impact of the entry of such a judgment upon the overall economy and the public generally.*

3. The Terms of the Proposed Final Judgment filed March 21, 1984

The terms of the proposed Final Judgment are phrased in the conventional language of such settlements and it is not necessary at this juncture to go into great detail describing the numerous protective provisions which **[*6]** *are customarily to be found. In summary, the DOJ agrees to consent to the acquisition by LTV of Republic on condition that two Republic plants, one at Gadsden, Alabama, and the other at Massillon, Ohio, be divested. "Prompt and certain divestiture is the essence of the agreement . . ." according to the preamble (p. 1). The purchasers are required to demonstrate to the DOJ or, if the DOJ objects, to the court, that (1) the purchase is for the purpose of competing effectively and (2) that the purchaser or purchasers have the managerial, operational and financial capability to compete effectively. The divestiture of each facility is required to take place within six months of the date of the judgment but no later than December 1, 1984. They are to be accomplished free and clear of all mortgages and encumbrances including pension and termination rights which shall continue to be the obligation of the defendants. In addition, the purchaser of Massillon is to receive from defendants a long-term contract to supply the purchaser with stainless steel hot bands on such terms as to enable the purchaser to compete effectively in the manufacture of cold rolled stainless steel and strip. In the* **[*7]** *case of Gadsden, the defendants, at purchasers' request, agree for 6 months to sell for use at Gadsden certain necessary raw materials. In each case, the purchaser agrees to operate the facility acquired as a viable and ongoing business. If the divestitures do not take place within the specified period, the court, on the application of the DOJ shall appoint a trustee to effect the divestitures.*

The adequacy of such divestitures in meeting DOJ's original February 15, 1984 objections to the merger, forms the basis of the participants' criticisms, and is central to our determination of whether the entry of this judgment is in the public interest.

4. The Competitive Impact Statement

On March 22, 1984, the DOJ submitted to the court a Competitive Impact Statement as required by § 2(b) of the APPA, 15 U.S.C. § 16(b). [4] After describing the history of the proceeding, the three product markets specified in the complaint, and the nature of ultimate use of each product, it sets forth the 1983 market shares of each defendant in each of the three product markets as follows:

(a) Cold and alloy hot rolled sheet and strip:

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[3] *On May 8, 1984, counsel for Cyclops attempted to obtain from the Department of Commerce, under the Freedom of Information Act, all of its documents relating to the proposed merger. In its response, Commerce listed 18 documents concerning its activities on the merger which it declined to produce under the deliberative process exemption of FOIA. 5 U.S.C. § 552(b)(5). Comments by Cyclops Corporation, Ex. A. On May 1, 1984, this court, after hearing, denied the requests of Wheeling-Pittsburgh of April 6, 1984 and of Cyclops of April 23, 1984, for the production of documents concerning the proposed merger.*

[4] *As required by 15 U.S.C. § 16(b), the entire text of the proposed Final Judgment, the Competitive Impact Statement, the stipulation between the parties and an introductory explanation of the nature of the proceedings and the provisions for public comments were published in the Federal Register on April 5, 1984. 49 Fed. Reg. at 13603-09.*

J & L - 12.6% (2nd largest)

Republic - 8.2% (6th largest)

(b) **[*8]** *Cold and alloy cold rolled sheet and strip:*

J & L - 13.5% (2nd largest)

Republic - 8.4% (7th largest)

As the result of the merger, LTV would be the largest producer of carbon and alloy hot and cold rolled sheet and strip.

(c) Stainless cold rolled sheet and strip:

J & L - 37.5% (largest)

Republic - 9.9% (4th largest)

It would also be the largest producer of stainless cold rolled sheet and strip.

In calculating the effect of the merger on market concentrations, the Statement recognized that imports can have an important competitive effect on these markets, but pointed out certain trade restrictions applicable to imports from the EEC (percentage quota agreement on steel products) and from Japan (voluntary limitation on steel products). All domestic shipments and capacity and all imports of relevant products--except **[*9]** *those from EEC and Japan--were included in its measurements of the degree of concentration. Thus defined, the original merger would increase the Herfindahl-Hirschman Index (HHI)* [5] in hot rolled carbon and alloy strip from 871 to 1047; in cold rolled carbon and alloy strip from 953 to 1146; and in stainless cold rolled sheet and strip from 2190 to 2898.

The proposed Final Judgment, according to the Impact Statement, would scale down the original merger proposal by requiring the complete divestiture of Republic's Gadsden and Massillon steel mills within six months **[*10]** *of the date of the proposed Final Judgment. The purchaser is required to be one who can and will operate the same as a viable and ongoing business which can compete in its area of steel production. It is provided that a trustee will be appointed if the sale cannot be achieved within five months but no later than November 1, 1984. In its description of the divestitures, the Statement generally tracks the provisions of the proposed Final Judgment.*

In perhaps the most significant portion not covered by the proposed Final Judgment, the Statement discusses the alternatives that were considered and rejected. In the case of Gadsden, which is not one of the largest carbon and alloy sheet facilities operated by defendants, divestiture of this mill will reduce the increase in market concentration as measured by the HHI by almost one-third. That fact, combined with the financial condition of defendants and possible efficiencies resulting from the merger, led to the conclusion that the merger as restructured would not be anti-competitive. In the case of Massillon, it is claimed that the divestiture would entirely eliminate any increase in concentration in cold rolled stainless sheet and strip, **[*11]** *since all of Republic's production of such product is located in Massillon. To assure the economic viability of the divested plant, the Statement indicates that the proposed Final Judgment provides that defendants, under a long-term contract, will supply to the purchaser stainless hot rolled sheet and strip. Much of that supply will come from LTV's Midland, Pennsylvania plant, a high quality and low cost producer. After considering the divestiture of Midland, an integrated stainless steel mill, in lieu of Massillon, it was concluded that the divestiture of Massillon in combination with the long-term supply commitment from LTV would be sufficient to prevent undue concentration in the stainless cold rolled sheet and strip market.*

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[5] *The Herfindahl-Hirschman Index, which was recently employed in developing the Department's revised merger guidelines, is a measure of seller concentration in a market. 1982 Merger Guidelines, 2Trade Reg. Rep. (CCH) para. 4,500 at 6,881-2. It is calculated by squaring the percentage market share of each firm in the market and then adding those squares. It is arguably a more accurate measure of market concentration than two-firm or four-firm concentration ratios, which merely are sums of the market shares of those firms, because it takes into account both the number and size distribution of all sellers in a market.*

Finally, in order to prevent the exchange of pricing and production information among competitors in the domestic steel industry, defendants are prohibited from participating in the exchange of such information through the American Iron and Steel Institute (AISI) for a period of ten years. According to the Statement, the Final Judgment would also not require the divestitures to take place prior to the consummation of the merger. This departure from the government's **[*12]** *previous policy of "fix it first" was based on the delays which had occurred after the original agreement to merge, the alleged deleterious effects of further delay, and the assurances of prompt divestiture made by defendants.*

B. PUBLIC COMMENTS OF THE LTV-REPUBLIC MERGER AND THE DEPARTMENT'S RESPONSES

Following the publication in the Federal Register on April 5, 1984 of the proposed Final Judgment and the Competitive Impact Statement, written comments were filed within the statutory 60-day period and also published in the Federal Register. [6] We have reviewed the four comments submitted, as well as the DOJ's and defendants' responses thereto. *15 U.S.C. § 16(f)(4). We turn now to these comments.*

1. Cyclops Corporation **[*13]** *(Cyclops)*

Cyclops opposes entry of the proposed Final Judgment only as it relates to stainless steel. It focuses its attention on the divestiture of Massillon, Republic's sole producer of stainless cold rolled sheet and strip.

Cyclops holds a 3% share of this market, one of the three product markets cited in the complaint. As shown previously, LTV (J & L Specialty Steels, Inc.) is the largest producer of stainless (37.5%) and Republic is fourth in size (9.9%). Cyclops presents two arguments why the proposed merger is contrary to the public interest. First, it contends that the proposal violations Section 7 of the Clayton Act by lessening competition, a condition which the Massillon divestiture would not remedy. Second, it maintains that the proposed merger is contrary to public policy limiting foreign imports. Thus, Cyclops, as a buyer of hot bands, asserts it is threatened by the lessening of competition among sellers of hot bands and that Massillon, for a variety of reasons, will not prove a viable competitor in stainless cold rolled sheet and strip.

The government, by way of response, asserts that Cyclops will not lack sources of supply for hot bands after the Massillon divestiture. **[*14]** It points out that Cyclops does not purchase hot bands from Republic--which sells virtually no hot bands to anyone--and that LTV's Midland plant, even after supplying Massillon, has excess capacity to meet Cyclops' needs. So too do Armco, Allegheny Ludlum, and Washington, have such excess capacity.

Despite the provision that LTV enter into a ten-year contract with the purchaser of Massillon to supply hot bands on favorable terms--a timeframe which Cyclops regards as inadequate--Cyclops raises multiple objections to that arrangement. First, Massillon's present productive capacity and market will be taken over by LTV, which has access to Massillon's customer lists. Second, Massillon will be subject to an LTV price freeze due to LTV's increasing the price of hot bands from Midland, the purchaser's disadvantage of having to pay LTV's 10% mark-up under the supply contract, and Massillon's general non-competitiveness (its plant is antiquated and requires expensive capital improvements). In sum, according to Cyclops, divestiture of Massillon's productive capacity will not result in a corresponding divestiture of Massillon's present market share. As a result, the anti-competitive effects **[*15]** of the original merger proposal will not be eliminated. As an alternative, Cyclops proposes that LTV's Midland plant be divested, and evinces an interest in acquiring that facility.

The government challenges all of these claims, stating its understanding that Massillon, despite its need for modernization, is profitable, whereas Republic is not. According to the government, Massillon can also be quickly sold and operate at a profit. As to LTV's taking over Massillon's customers with the help of its excess capacity, the government points out that LTV has not yet succeeded in doing so. It discounts Cyclops' criticism concerning the

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[6] *As required by 15 U.S.C. § 16(b), all comments received and the DOJ's responses thereto were published in the Federal Register on July 19 and July 20. In compliance with 15 U.S.C. § 16(c), a summary of the proposed consent decree and the Competitive Impact Statement, and information concerning the filing of comments and the availability of documents for public inspection was published in The Washington Post on April 5 through April 11, 1984 inclusive.*

alleged inadequacies of the long-term supply contract. It emphasizes that Republic's entire interest in the relevant product market of cold rolled stainless sheet and strip will be divested, and that LTV's present level of concentration will consequently remain the same. The government also dismisses as unlikely a purchase by a foreign steel company having its own supply of hot bands, due to the number of interested inquiries from domestic companies concerning the purchase of Massillon. Admitting the applicability of anti-dumping laws, the DOJ denies that **[*16]** there is any public policy limiting either foreign imports or the ownership of United States manufacturing plants by foreign suppliers. The government considered the divestiture of Midland but rejected such an alternative as unnecessary in view of Massillon's divestiture and the injunctive provisions designed to ensure its competitive viability.

2. *Wheeling-Pittsburgh Steel Corporation (W-P)*

W-P's opposition is directed against the proposed Final Judgment as it relates to the other two product areas listed in the complaint: hot and cold rolled carbon and alloy sheet and strip. W-P is the eighth largest steel producer in the United States. It is one of the smallest integrated producers, with about 3% of domestic capacity. On the other hand, LTV and Republic, when merged, would occupy over 20% of both product markets. Objections to the proposed merger are straight-forward. First, as a horizontal merger of the 2nd and 6th largest steel producers in an industry which is already highly concentrated, the merger violates Section 7 of the Clayton Act and will lead to possible predatory pricing and restriction of credit. Second, the proposed divestiture of Gadsden does not remedy **[*17]** the violation.

With respect to the matter of market concentration, W-P points out that the original merger proposal, which is the subject of the complaint, would cause increases in the HHI as follows:

carbon and alloy *hot* rolled sheet and strip from 1013 to 1219

carbon and alloy *cold* rolled sheet and strip from 1104 to 1330.

The proposed Final Judgment with the divestiture of the Gadsden plant would, according to the DOJ estimates, reduce the increase in concentration by approximately one-third. In the case of hot and cold rolled carbon and alloy strip, the HHI would be approximately 1000 and 1100, respectively, with increases in each market of less than 150. [7] W-P correctly points out that both the original merger and the scaled-down proposal conflict with the DOJ's 1982 Merger Guidelines. The latter consider a transaction as presumptively illegal if the HHI is in the post-merger range of 1000-1800 and the merger will increase the HHI by over 100 points.

On another matter, W-P asserts **[*18]** that the divestiture of Gadsden will not mitigate the adverse effect of the merger on market competition for several reasons. First, assuming Gadsden can be successfully sold and operated at or near capacity, there is still, as pointed out above, an HHI level of concentration in excess of the guidelines. Second, there is substantial doubt that Gadsden can be sold and operated as an effective competitor in the market for hot and cold rolled carbon and alloy sheet and strip. W-P supports this assessment of Gadsden's future viability by reliance on quoted comments from a number of influential sources, including spokesmen for the merging parties, the trade and public press, and industry analysts. The shutting down in 1982 of certain portions of the Gadsden facility, current problems with air pollution, rejection of a proposal for investment in new equipment, and the geographic remoteness from customer located in the Great Lakes Region are cited as examples of the problems facing Gadsden.

If a buyer cannot be found within a year, the parties to the merger are not obligated to continue to operate the mill pending a sale. W-P argues that, in the case of Gadsden, divestiture prior to the **[*19]** merger should have been made a condition precedent, and that the DOJ's departure from its normal "fix it first" policy is not only not justified under the circumstances of this case but is inadequately explained. W-P suggests that the divestiture of some plant other than Gadsden is necessary, and that, at the very least, the DOJ should be ordered to comply with its "fix it

[7] The original merger HHI's calculated by the DOJ were increased by 176 to 1047 in hot rolled carbon and alloy steel and by 193 to 1146 in cold rolled carbon and alloy.

first" policy. The merger also cannot be justified in W-P's view, for reasons of cost efficiencies, which Mr. McGrath discounted in his February 15, 1984 statement rejecting the original proposal, or for reasons relating to the "failing firm" defense on which neither of the defendants relies. W-P finally asserts that there is a close political connection between the DOJ's shift in approving the merger and the United States Trade Policy opposing quotas on imports of foreign steel.

In responding to W-P's comments, the DOJ explains the context of the government's decision. As restructured, the merger HHI Indices would not be increased significantly above the minimum levels at which the DOJ would, under the 1982 guidelines, be "more likely than not" to challenge a merger. Conceding that imports could not be completely **[*20]** ignored, the DOJ does not include, in computing the size of the domestic market, imports from the EEC or Japan, the two largest sources of imports. Those imports were subject to voluntary quotas or other limitations. In the event of a trial, the DOJ anticipates that at that time, the defendants would seek to include in their calculations all imports at their present levels. That would have the effect of reducing the HHI Indices for hot and cold rolled sheet and strip below 1000. In addition, the DOJ would expect the defendants to assert as an affirmative defense the fact that both LTV and Republic had suffered substantial losses in 1982 and 1983--losses which are continuing up through the present quarter of 1984. The defendants would also point to significant savings and operating efficiencies resulting from the merger. The government can not predict the outcome of such a prosecution. The proposal is admittedly a compromise reflecting these uncertainties. It was asserted also that the recent abandonment of a pending merger between United States Steel and National Steel, which would have brought together two companies controlling 50% of the domestic sheet market, made it easier for **[*21]** the government to reach this compromise.

As for the divestiture of Gadsden, which currently produces 15% to 20% of Republic's total sheet production, the DOJ asserts that this action will reduce the HHI in hot and cold rolled sheet and strip to 1006 and 1091, respectively. The government further understands that considerable interest has been manifested on the part of potential buyers, particularly since the buyers would not have to assume the burden of an unfavorable iron ore contract. Among such potential buyers would likely be foreign producers threatened by substantial restrictions of imports. The government would not object to their entry.

In conclusion the government regards Gadsden as a saleable property, which can be sold to a qualified buyer and profitably operated as a viable competitor in the domestic market. It defends its failure to insist on the "fix it first" policy as justified by the deteriorating financial condition of the companies which would be aggravated by further delay. The maintenance of high levels of production with resulting lower prices during the deep depression of the past few years was not as W-P contends an example of predatory pricing on the part **[*22]** of the larger companies, but an effort to survive by attempting to cover fixed costs. Finally, while opposed to quotas on imports, the DOJ reached its decision on the merits of the proposed settlement without regard to the Administration's policy regarding imports.

3. *Bliss Laughlin Steel Co. (BLS)*

BLS objects to the proposed Final Judgment as drafted and asks that it be modified to require divestiture of Massillon's bar facilities as well as those producing stainless steel. BLS is a producer of cold finished bars and ranks third in bar market share behind LTV and Republic. It, unlike LTV and Republic, is a non-integrated producer, which must purchase hot rolled bars as its raw material. It claims the merger will have substantial anti-competitive effects in the cold finished and hot rolled bar markets due to the enhanced market position of LTV. Injury to BLS and other smaller competitors will result. Noting that the complaint has not challenged the effect of the merger on the bar market, BLS asserts that the increased concentration in the bar market is comparable to the increase in the HHI found unacceptable by the DOJ in the case of hot and cold rolled sheet and strip, and **[*23]** stainless. In the case of cold finished bars and hot rolled bars, the HHI shows an increase from 954 and 1232 to 1562 and 1832, respectively. BLS also urges that the entire Massillon facility be divested, including that portion devoted to the production of cold finished bars. That would eliminate in the bar market, as in stainless, any anti-competitive increase in concentration. According to BLS, there is a nationwide cold finished bar market in which there are 48 U.S. producers. BLS produces a type and quality of steel bar suitable for a variety of special uses. Excluding imports, BLS is estimated to have 7.85% of this cold finished market in 1984, as compared with 34.97% for LTV if the proposed Final Judgment is approved. This represents an HRS of 1562--an increase of 608. Aside from this increase in the HHI, which under the 1982 Guidelines would "more likely than not" cause the DOJ to challenge the merger, the so-called "other factors" to be considered all increase the likelihood of a challenge. These are (1) the close location of certain portions of the merging firms and the similarity of their products; (2) the fact that orders for the relevant product are frequent, regular and **[*24]** small relative to the total output of the typical firm (BLS being a typical producer of cold finished bars); and (3) the ready availability to competitors of detailed information about specific transactions, prices and output levels.

In addition, BLS objects to the proposed acquisition because of its effect on the hot rolled bar market, of which BLS is a customer. The merger would give LTV a total market share of 37.03% and would result in an HHI for hot rolled bars of 1832--an increase in concentration of over 600 points. This would produce the same anti-competitive consequences as in the cold finished bar market discussed above, since LTV, due to its dominance, would be able to set the price for hot bars while simultaneously competing in the cold bar market. This, in turn, will have an adverse effect on BLS which, as a non-integrated producer, is a customer in the hot bar market. The entry of a number of "mini-mills" in the hot bar market is not a satisfactory answer, because of differences in methods of production. Those differences cause the quality of steel to vary from that produced by larger hot bar mills. The cold finished bar industry is only about 1.7% of the entire United **[*25]** States steel market and it would not prove economical for a non-integrated producer to build a mini-mill to supply raw materials for cold bar production. In BLS's view, the only satisfactory solution to the increased concentration in the cold finished and hot bar markets is the complete divestiture of Massillon's bar facilities which produced 75-80% of the total Republic bar product.

The DOJ's response to BLS's comments is based on both procedural and substantive grounds. Procedurally, the DOJ asserts that the BLS objections are not relevant to this proceeding since no violation stated in the complaint relates to the bar market, nor is that subject touched on in the proposed settlement agreement. The Tunney Act states that in making its determination concerning whether the entry of the judgment is in the public interest the court must consider, among other things, (1) the competitive impact of the settlement, including termination of alleged *violations;* and (2) the impact on the public generally and an individuals alleging specific injury *from violations set forth in the complaint.* 15 U.S.C. § 16(e) (emphasis supplied). [8] The DOJ in its discretion did not address the issue **[*26]** of bar markets and, under such circumstances, the appropriate remedy is a private suit under Section 4.

On the substantive side, the DOJ disputes the BLS claim of undue concentration in the bar markets as measured by the HHI, asserting that its computation of market shares is substantially lower than that of BLS. It points out that the bar and sheet markets are considerably different, that there are many more bar producers than sheet producers, and that the nature of bar markets is changing under the growing influence of mini-mills (producing cold finished bars) which are pushing integrated competitors out of this business. A number of these mini-mills do not report shipments to the AISI, but, based on its calculations, the DOJ estimates that after the merger, the HHI in hot rolled and cold finished bar markets would be at or near 1000. The ability of large, integrated producers such as LTV and Republic **[*27]** to influence price competition in the market for cold finished bars and hot rolled bars after the merger is offset by diminished barriers of entry spearheaded by these new producers. There are now, according to BLS, 48 mini-mills in the cold bar market. As for the hot bar market, there were at least 31 producers of hot bars in 1982. If LTV decided to raise the price of hot bars, BLS could receive its supply of hot bars from one or more other hot bar producers. Accordingly, the DOJ concludes that the merger, as it affected the hot and cold bar markets, would not violate Section 7 of the Clayton Act.

4. *The United Steelworkers of America (USA)*

The USA states that it is not opposed to the merger but is concerned that the required divestitures of Massillon and Gadsden are "thinly veiled excuses for closing plants and laying off workers." It therefore opposes the divestitures,

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[8] "APPA under the circumstances of this case [does not] permit or require the Attorney General to assert additional claims not alleged at the outset of the case." United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) para. 61,508 at 71,973, 71,979 (W.D.Mo. 1977).

because in its view, the plants will be ultimately closed and jobs lost. For a number of reasons, the USA does not believe that either plant can survive as a divested entity. In the case of Massillon, USA states that the former is an antiquated facility in need of extensive capital improvements, and dependent **[*28]** on LTV for its supply of hot bands under the long term supply agreements. It is likely that Republic's hot rolling plant at Canton, Ohio will be phased out due to LTV's provision of Massillon's hot band requirements out of the Midland facility. As for the carbon steel mill at Gadsden, the steelmaking segment requires substantial investments which would prevent it, if divested, from functioning as a viable competitor. If Gadsden is not sold, but closed, 2,200 jobs will be lost.

The DOJ responds that the merger could not be approved without the divestitures and that the purpose of the proposed Final Judgment is to preserve these two plants as viable competitors in their respective markets. It does not anticipate that either plant will be closed and it would not approve the sale to any purchaser likely to close the mill after reaping short term profits. It recognizes that no one can guarantee that any mill will remain in operation indefinitely and that recent closings of steel mills and loss of jobs has occurred through the action of the steel companies themselves and not as the result of divestitures. It regards the proposed settlement as consistent with the goals of USA to preserve **[*29]** jobs.

5. *Response of LTV and Republic to Comments on Proposed Final Judgment*

The goal of these respondents, parties to the proposed Final Judgment, is "to place the transaction in its proper perspective and demonstrate that it is pro-competitive, does not violate the antitrust laws and that the proposed judgment is in the public interest." Response of LTV and Republic to Comments on Proposed Judgment, at 1.

With respect to the carbon and alloy steel markets, defendants contend that the merger will produce operating efficiencies which will enable the surviving company to be a more effective competitor in the world steel market. They point to the declining state of the United States steel industry due to shrinking consumption and growing imports. That decline has caused huge recurring losses, lack of funds for capital improvements, inefficient facilities and unutilized capacity. Defendants asserts that LTV, during 1982 and 1983, lost approximately a half billion dollars before taxes in its carbon and alloy business. These were covered by cash advances which are expected to increase substantially in the next several years. Republic also finds itself in a similar weakened position, **[*30]** *with pre-tax losses of $ 474 million in 1982 and $ 394 million in 1983. Defendants describe numerous changes which will enable the merged company to operate as a "more efficient, lower cost, competitive entity, and which are estimated to produce cost savings of $ 343 million or $ 27 per ton of steel. While the precise amount of these efficiencies is subject to dispute, it is claimed that they will be substantial, thus providing the entire rationale for the merger. There is no dispute that the merging companies have sustained heavy losses and are in a weakened financial condition. While neither the DOJ nor the companies have asserted the "failing company" defense, the basic fact of their current financial predicament is relevant to their ability to survive alone.*

The present plight of the United States steel industry is attributed in no small part of the threat of foreign competition and to foreign imports which in 1982 accounted for 22% of the domestic market and now account for some 25% of that market. This has made the domestic industry less competitive at home and has produced plant closings with large losses of jobs. By failing to acknowledge that the relevant market is world-wide **[*31]** *and that actual imports from Japan and the EEC should be included in calculating the HHI under the Merger Guidelines, the DOJ made a mistake when it determined that the merger as originally proposed was anit-competitive and monopolistic and violated the anti-trust laws. According to defendants, the HHI for hot rolled sheet and strip was actually 833 while for cold rolled sheet and strip it was 939. This contrasts with the DOJ HHI of 1047 and 1146. With the divestiture of Gadsden, the degree of concentration as measured by the HHI should be even less.*

With respect to the stainless stell market, defendants argue that the requirement that Republic divest itself of Massillon leaves the market unchanged and will not result in increased concentration. Defendants also direct certain comments to the several objections of Cyclops concerning the viability of Massillon as a future competitor and Cyclops' ability to purchase hot bands for its cold rolled stainless product. These objections have been previously addressed in the DOJ's response to Cyclops' comments and will not be repeated.

To summarize the defendants' argument, the steel industry is in a state of severe depression. Separately, **[*32]** *the defendants cannot generate funds for capital improvements in plant and equipment without which they cannot meet foreign competition. The merger will produce savings in the cost of operation and in the amounts otherwise necessary for capital improvement. The consolidation combines two weakened companies and will permit the merged company to function as an effective competitor in the world market. Defendants urge that the proposed Final Judgment is in the public interest and should be approved.*

C. STANDARD OF REVIEW

HN1[] *The standard of review of anti-trust consent decrees is established by Section 2 of the Tunney Act, which provides:*

(e) Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider--

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(2) the **[*33]** *impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.*

15 U.S.C. § 16(e).

According to the legislative history of the Tunney Act, the avowed purpose of the public interest determination requirement was to remedy the "'judicial rubber stamping' by district courts of proposals submitted by the Justice Department." To achieve this purpose, it required public disclosure of the reasons for, and terms of, proposed settlements with an opportunity for public comment as well as an express judicial determination that the proposal is in the public interest. H. R. Rep. No. 1463, 93d Cong., 2d Sess. 4, reprinted in 1974 U. S. Code Cong. & Ad. News 6535, 6538. *See generally* Note, "The ITT Dividend: Reform of Department of Justice Consent Decree Procedures," 73 Col. L. Rev. 594 (1973)(discussing the public interest requirements of the Tunney Act and the impetus for changes in procedures for review of anti-trust consent decrees). [9]

[*34] ***HN2***[] The public interest is to be determined in the context of the anti-trust laws whose fundamental premise is the protection and safeguarding of free competition. The effect on competition of the proposed settlement is of paramount importance in the determination which we are required to make. Other factors, however, enter into the calculus. Any remedy should be framed with a view to causing the least possible injury to interests of the general public and relevant private interests. The court should consider the impact of the remedy in relation to other important public policies and avoid any unnecessary conflict or friction. It is not free, in making its public interest determination, to decide whether the settlement is the best that could have been reached or, if not, to substitute its own separate notions as to the proper remedy.

Finally, despite the fact that the 1974 Tunney Act appears to require a higher level of judicial scrutiny of consent decrees than was previously the case, it is clear that the Act was not intended to discourage settlement of government anti-trust suits. [10] H. R. Rep. No. 1463, 93d Cong., 2d Sess. 5, *reprinted in* 1974 U. S. Code Cong. &

[9] For a more complete history of the Tunney Act, attention is directed to the opinion of Judge Harold Greene of this court in the AT&T case. *United States v. American Tel & Tel Co., et al., 552 F. Supp. 131, 148-49 (1982)*.

[10] It has been estimated that almost 80 percent of the anti-trust suits filed by the DOJ terminate in consent decrees. "The ITT Dividend" at 595 (1973).

Ad. News at 6539 **[*35]** *(quoting* S. Rep. 298, 93d Cong., 1st Sess.). As with any form of settlement, the consent decree process saves the parties the considerable time and expense of litigation. In the particular context of anti-trust litigation, the consent decree mechanism permits the DOJ to spread its limited resources over more suits and, thus; achieve broader enforcement. In the current fiscal climate, the consent decree mechanism plays a significant role in the DOJ's enforcement scheme.

Therefore, ***HN3***[] our function in reviewing anti-trust consent decrees is, as Senior Circuit Judge Bailey Aldrich has stated in an oft-quoted opinion, not . . . *to determine whether this is the best possible settlement that could have been obtained,* if, say, the government had bargained a little harder. The Court is not settling the case. It is determining whether the settlement is within the reaches of the public interest. Basically . . . [we] must look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass. **[*36]** (emphasis supplied).

United States v. Gillette Co., 406 F. Supp.713, 716 (D. Mass. 1975). *Accord* *United States v. Agri-Mark, Inc., 512 F. Supp. 737, 739 (D. Vt. 1981)*; *United States v. National Broadcasting Co., Inc., 449 F. Supp. 1127, 1143 (C.D.Cal. 1978)*; 2 P. Areeda & D. Turner, ***Antitrust Law*** § 330g, at 147-48 (1978). Although under our statutory authority, we are required to scrutinize closely all consent decrees, we are not unmindful that the power to negotiate the terms of any particular consent decree is lodged in the Executive Branch. *United States v. Associated Milk Producers, Inc. 394 F. Supp. 29, 42 (W. D. Mo. 1975)*, *aff'd*, *534 F. 2d 113 (8th Cir.)* *cert. denied, 429 U.S. 940 (1976)*. It is in light of this background that this court has considered the foregoing submissions and makes the following determination as to whether the proposed settlement is "within the reaches of the public interest." *Gillette, at 716*.

D. *CONCLUSION*

On February 15, 1984, the DOJ rejected the original merger proposed by LTV and Republic as violative of Section 7 of the Clayton Act. This action provoked widespread criticism from other parts of the Executive **[*37]** *Branch, including the Secretary of Commerce and President Reagan. On March 21, 1984, the DOJ filed the present proposed Final Judgment which approved the merger on the condition that there be a divestiture of Republic's Gadsden, Alabama facility and that portion of the Massillon, Ohio plant which manufactures cold rolled stainless sheet and strip. According to the DOJ, the divestiture of Gadsden will reduce to acceptable levels the HHI market concentration in the two specified areas of carbon and alloy sheet. The DOJ asserts that the post-merger HHI in hot rolled carbon and alloy sheet will be reduced to approximately 1006 and in cold rolled sheet to 1091.* [11] These reductions do not deviate significantly from the 1982 Merger Guidelines. In the case of Massillon, there will be no increase in the level of market concentration. The two plants are to be promptly divested by selling them to purchasers who will continue to manage and operate them as competitive and ongoing businesses. Cyclops and Wheeling-Pittsburgh, aside from complaining about the DOJ's abrupt "change of position," vigorously challenge the effectiveness of the divestitures in effecting reductions in market concentration. **[*38]** *They claim that because of the age of the facilities involved and the need for extensive capital improvements, there will be an absence of interested buyers able to compete effectively. In the case of Bliss & Laughlin, the divestiture of Massillon is opposed, not for the reasons asserted by Cyclops, but because the divestiture should be broader and include Massillon's bar facility.*

The DOJ supports its position that the merger does not produce an undue concentration of power in the relevant markets by reliance on the HHI. While it is concerned about the weakened economic condition of the merging companies, it explicitly does not rely on the "failing firm" doctrine. It admits that the merger will yield operating efficiencies through lower costs and the utilization of unused capacity, but is unable to quantify the extent of such savings. It concedes the importance of foreign imports, but in determining the size of the domestic market, it has excluded both imports from Japan covered by a voluntary agreement, and imports within the EEC Arrangement stated to expire on December 31, 1985.

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[11] *Both of these computations exclude imports from Japan and the EEC.*

In making our determination **[*39]** *as to the reach of the public interest, we are required to consider the positions of the interested parties as specifically expressed by them. We must however, also consider these positions in the broader factual context about which there is no substantial dispute.*

This context subsumes several vital issues. First, we live in a world of increasing international competition. In general terms, the high value of the American dollar and the lower costs of foreign manufacture have, sometime in combination with foreign subsidies, helped contribute to an unfavorable balance of trade.

Second, potential and actual foreign imports have a significant impact on domestic prices in determining the size of the relevant product market in steel. The extent of this impact is influenced by a number of factors which are beyond anyone's control, and which are difficult to measure and to predict. As previously noted, the present rates of exchange have affected entry of foreign imports into domestic markets, including steel. This trend can be somewhat counterbalanced by quotas, whether imposed by the United States or by the voluntary action of the importing country as in the case of Japan. At the same **[*40]** *time, we are aware of the Administration's opposition to quotas on steel (including domestic-content legislation). This policy appears to be consistent with our long tradition as a trading nation of relying on domestic exports to pay for foreign imports. We cannot predict whether this policy will continue to prevail.* [12] It should be sufficient to say that foreign imports of steel, both present and future, have had and will have some unquantifiable influence on domestic prices. Foreign competition therefore must be included in determining the size of market shares and the degree of market concentration. Thus, the rigid application of the HHI, in measuring concentration in the domestic market may very well have a tendency to exaggerate the extent of such concentration.

Third, a basic United States industry--steel--continues to find itself in a weakened and deteriorating condition. The present plight and future prospects of LTV and Republic are **[*41]** *no exception to this pattern. The purpose of the present merger is to achieve savings in cost through increased efficiences which will enable the surviving company to compete more effectively both here and in the export market. We cannot predict that these efforts will succeed, but we can say with some certainty, that without an opportunity to improve their acute financial predicament, their future will indeed be bleak.*

Finally, the proposed Final Judgment represents a compromise. The DOJ has no assurance that it will prevail at trial. Even if it were confident of prevailing, it could not predict whether the relief it would obtain would differ substantially from that encompassed by the present settlement. The savings to the parties in time as well as money would be substantial. We repeat that we are not at liberty to impose our notions about a proper remedy as would be true in the case of a trial with a finding of liability.

For all of the foregoing reasons, and after full consideration of the record, all the public comments received, the DOJ's and defendants' responses thereto, it is our determination that the proposed Final Judgment is in the public interest.

FINAL JUDGMENT **[*42]** **-** August 2, 1984, Filed

WHEREAS, plaintiff, United States of America, having filed its Complaint herein on March , 1984, and plaintiff and defendants, by their respective attorneys, having consented to the entry of this final Judgment without trial or adjudication of any issue of fact or law herein and without this Final Judgment constituting any evidence against or an admission by any party with respect to any such issue;

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[12] *This policy, if course, is eclectic and subject to numerous exceptions. Only recently the International Trade Commission made a preliminary finding that would place important restrictions on imports of all hot and cold rolled sheet.*

AND WHEREAS, the defendants have agreed to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, prompt and certain divestiture is the essence of this agreement and the defendants have represented to the plaintiff that the divestiture required below can and will be made and that defendants will later raise no claims of hardship or difficulty as grounds for asking the Court to modify any of the divestiture provisions contained below;

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue or fact or law herein, and upon consent of the parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction of the subject matter of this action and **[*43]** of each of the parties hereto. The Complaint states a claim upon which relief may be granted against defendants under Section 7 of the Clayton Act, as amended (*15 U.S.C. § 18*).

II

As used in this Final judgment:

A. "LTV" means the defendant The LTV Corporation, including each division, subsidiary or affiliate thereof, and each officer, director, employee, attorney, agent or other person acting for or on behalf of any of them.

B. "J&L" means the defendant Jones & Laughlin Steel Incorporated, including each division, subsidiary or affiliate thereof, and each officer, director, employee, attorney, agent or other person acting for or on behalf of any of them.

C. "J&L Stainless" means the defendant J&L Specialty Steels, Inc., including each division, subsidiary or affiliate thereof, and each officer, director, employee, attorney, agents or other person acting for or on behalf of them.

D. "Republic" means the defendant Republic Steel Corporation, including each division, subsidiary or affiliate thereof, and each officer, director, employee, attorney, agent or other person acting for or on behalf of them.

E. "Defendants" means LTV, J&L, J&L Stainless and Republic.

F. "Person" means **[*44]** any natural person, corporation, association, firm, partnership or other business or legal entity.

G. "Steel mill" means the manufacturing plant, real property, capital equipment, and any other interest, tangible assets or improvements associated with a facility for making steel products, but shall not include cash, cash equivalents, pre-paid expenses or accounts receivable.

H. "Gadsden" means the steel mill and coke batteries owned by Republic (as of March 21, 1984) located in Gadsden, Alabama; provided, however, that any purchaser of Gadsden may elect not to purchase that portion of the mill related to coke and steel production.

I. "Massillon" means the stainless sheet cold rolling and finishing facilities owned by Republic (as of March 21, 1984) located in Massillon, Ohio.

III

A. The provisions of this Final Judgment shall apply to the defendants, their successors and assigns and to all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

B. Defendants shall require, as a condition of the sale or other disposition of all or substantially all of their assets involved **[*45]** in the production of carbon and alloy hot and cold rolled sheet steel and stainless hot and cold rolled sheet steel, that the acquiring party agrees to be bound by the provisions of this Final Judgment.

IV

A. Within six (6) months of the date of entry of this Final Judgment, but in no event later than December 1, 1984, defendants are hereby ordered and directed to divest to a purchaser or purchasers all of their direct and indirect ownership in and control over Gadsden and Massillon.

B. Divestiture of Gadsden shall be accomplished in such a way as to ensure that, as of the time of divestiture, it can reasonably be anticipated that Gadsden can and will be operated by the purchaser or purchasers as a viable, ongoing business engaged in the manufacture and sale of carbon and alloy hot and cold rolled sheet steel made from slabs produced at Gadsden or elsewhere. Divestiture shall be made to a purchaser or purchasers who shall demonstrate to the plaintiff or, if plaintiff objects, to the Court that (i) the purchase is for the purpose of competing effectively in the manufacture and sale of carbon and alloy hot and cold rolled sheet steel, and (ii) the purchaser or purchasers have the **[*46]** managerial, operational and financial capability to compete effectively in the manufacture and sale of carbon and alloy hot and cold rolled sheet steel.

C. Divestiture of Massillon shall be accomplished in such a way as to ensure that, as of the time of divestiture, it can reasonably be anticipated that Massillon can and will be operated by the purchaser or purchasers as a viable, ongoing business engaged in the manufacture and sale of stainless cold rolled sheet steel. Divestiture shall be made to a purchaser or purchasers who shall demonstrate to the plaintiff or, if plaintiff objects, to the Court that (i) the purchase is for the purpose of competing effectively in the manufacture and sale of stainless cold rolled sheet steel, and (ii) the purchaser or purchasers have the managerial, operational and financial capability to compete effectively in the manufacture and sale of stainless cold rolled sheet steel.

D. In connection with the divestiture of Massillon, defendants shall offer to the purchaser of Massillon (herein and in the Appendix annexed hereto referred to as "Buyer") a long-term contract to supply Buyer with stainless steel hot bands on such terms and conditions as are **[*47]** reasonably designed to enable Buyer effectively to compete with defendants in the manufacture and sale of cold rolled stainless steel sheet and strip. Unless plaintiff agrees otherwise, the contract to be offered to Buyer by defendants shall include in substance the terms set out in the Appendix annexed hereto. Unless the context otherwise requires, all references in this Final Judgment to the divestiture of Massillon shall mean and include the long-term contract referred to herein, and the procedures of Sections VI and VII of this Final Judgment, including but not limited to approval by the plaintiff, shall be equally applicable to the long-term contract.

E. In accomplishing the divestiture ordered by this Final Judgment, the defendants shall make known in the United States and in other major noncommunist steel producing countries, by usual and customary means, the availability of Gadsden and Massillon for sale as ongoing businesses. The defendants shall notify any person making an inquiry regarding the possible purchase of Gadsden or Massillon that the sale is being made pursuant to this Final Judgment and provide such person with a copy of this Final Judgment. The defendants shall **[*48]** also furnish to all bona fide prospective purchasers who so request all pertinent information regarding Gadsden and Massillon and shall permit them to make such inspection of physical facilities and any and all financial, operational, or other documents and information as may be relevant to the sale of either or both facilities.

F. Defendants agree to take all reasonable steps to accomplish said divestiture, including the sale of assets only. Except to the extent otherwise approved by the plaintiff, Gadsden and Massillon shall be divested free and clear of (i) all mortgages, encumbrances and liens, (ii) any contractual commitments or obligations (such as "take or pay" fuel and ore supply contracts) existing as of the date of divestiture, unless the purchaser or purchasers of the divested plant voluntarily assume the future performance of any such existing contracts, (iii) any pension rights of present or former employees accrued as of the date of divestiture, and (iv) any termination payment rights of former employees accrued as of the date of divestiture, all of which shall continue to be the obligation of defendants. In the event that as a matter of law the plants cannot be sold **[*49]** free and clear of any such mortgages, encumbrances, liens, commitments or obligations, defendants shall hold the purchaser or purchasers harmless with respect to the same. In order to enable the purchaser of Gadsden to continue to operate the steel mill without undue interruption following divestiture, defendants agree that, at the request of the purchaser, they will continue, for a period not exceeding six months (unless extended by the Court) from and after the date of divestiture, to sell for use at Gadsden necessary raw materials, including iron ore, coal, limestone and coke, to the extent that such items are currently being supplied by defendants to Gadsden, and on substantially the same financial and other terms and conditions.

V

A. If the defendants have not divested all of their ownership interest in Gadsden and Massillon within the time period specified in Section IV(A) of this Final Judgment, the Court shall, on application of the plaintiff, appoint a trustee to effect the divestiture. Such appointment shall become effective not more than 45 days following the filing of the petition. The trustee shall dispose of Gadsden and Massillon at such price and on such terms as are **[*50]** then obtainable upon a reasonable effort by the trustee, subject to the provisions of Section VI of this Final Judgment, and shall have such other powers as this Court shall deem appropriate. The trustee shall have the power to rehire the defendants to divest assets only, retaining and assuming all liabilities of Gadsden and Massillon upon their divestiture. Defendants shall not object to a sale by the trustee on any grounds other than malfeasance, provided, however, that if the buyer chooses to purchase any inventory of semi-finished or finished steel mill products, coke or raw materials, defendants shall have a right to object unless the aggregate sale price shall include a price (payable on reasonable terms), in the case of steel or coke inventory, at least equal to the current production cost of that inventory and, in the case of raw materials, at least equal to the cost thereof, as reflected in either case on the books and records of defendants.

B. As to Gadsden, the trustee shall have the power to require defendants to sell necessary raw materials for use at Gadsden in accordance with the provisions of Section IV(F). As to Massillon, the trustee shall have the power to cause **[*51]** defendants to execute a long-term supply contract in accordance with the provisions of Section IV(D) and the Appendix.

C. If defendants have not divested all of their ownership interest in both Gadsden and Massillon within five (5) months of the date of entry of this Final Judgment, but in no event later than November 1, 1984, the plaintiff and the defendants (acting jointly) shall immediately notify each other in writing of the names and qualifications of not more than two (2) nominees for the position of trustee for the required divestiture. The parties shall attempt to agree upon one of the nominees to serve as the trustee. If the parties are able to agree on a trustee within thirty (30) days of the exchange of names, plaintiff shall notify this Court of the person upon whom the parties agreed and this Court shall appoint such person as the trustee. If the parties are unable to agree within that time period, plaintiff shall furnish this Court the names of each party's nominees. This Court may hear the parties as to the qualifications of the nominees and shall appoint one of the nominees as the trustee.

D. The trustee shall serve at the cost and expense of the defendants, on such **[*52]** terms and conditions as the Court may prescribe, and shall account for all monies derived from a sale of Gadsden and Massillon and all costs and expenses so incurred. After approval by the Court of the trustee's accounting, including fees for its services, all remaining monies shall be paid to the defendants and the trust shall then be terminated. The compensation of such trustee shall be based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestiture and the speed with which it is accomplished.

E. Defendants shall use their best efforts to assist the trustee in accomplishing the required divestiture. The trustee shall have full and complete access to the personnel, books, records and facilities of the businesses to be divested, and defendants shall develop such financial or other information relevant to the assets to be divested as the trustee may request. Defendants shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

F. After its appointment, the trustee shall file monthly reports with the parties and the Court setting forth the trustee's efforts to accomplish divestiture as contemplated **[*53]** under this Final Judgment. If the trustee has not accomplished such divestiture within six (6) months after its appointment, the trustee shall thereupon promptly file with the Court a report setting forth (i) the trustee's efforts to accomplish the required divestiture, (ii) the reasons, in the trustee's judgment, why the required divestiture has not been accomplished, and (iii) the trustee's recommendations. The trustee shall at the same time furnish such report to the parties, who shall each have the right to be heard and to make additional recommendations consistent with the purpose of the trust. The Court shall thereafter enter such orders as it shall deem appropriate in order to carry out the purpose of the trust, which shall, if necessary, include extending the trust and the term of the trustee's appointment.

VI

At least thirty (30) days prior to the scheduled closing date of any proposed divestiture pursuant to Section IV or V of this Final Judgment, defendants or the trustee, whichever is then responsible for effecting the divestiture required herein, shall notify the plaintiff of the proposed divestiture. If a trustee is responsible, it shall similarly notify the defendants. **[*54]** The notice shall set forth the details of the proposed transaction and list the name, address and telephone number of each person not previously identified who offered or expressed an interest or desire to acquire any ownership interest in Gadsden or Massillon together with full details of same. Within fifteen (15) days of receipt by plaintiff of such notice, the plaintiff may request additional information concerning the proposed divestiture and the proposed purchaser. The defendants shall furnish the additional information within twenty (20) days of the receipt of the request, unless the parties shall otherwise agree. Within thirty (30) days after receipt of the notice or within fifteen (15) days after receipt of the additional information, whichever is later, the plaintiff shall notify in writing the defendants and the trustee, if there is one, if it objects to the proposed divestiture. If the plaintiff fails to object within the periods specified, or if the plaintiff notifies in writing the defendants and the trustee, if there is one, that it does not object, then the divestiture may be consummated, subject only to defendants' limited right to object to the sale under the proviso **[*55]** in Section V(A). Upon objection by the plaintiff or by the defendants under the proviso in Section V(A), the proposed divestiture shall not be accomplished unless approved by the Court. The defendants shall have no right to object to any divestiture of Gadsden or Massillon proposed by the trustee except under the proviso to Section V(A).

VII

Thirty (30) days from the date of entry of this Final Judgment and every thirty (30) days thereafter until the divestiture has been completed, the defendants shall deliver to plaintiff an affidavit as to the fact and manner of compliance with Section IV of this Final Judgment. Each such affidavit shall include the name, address and telephone number of each person who, during the preceding thirty (30) days, made an offer, expressed an interest or desire to acquire, or entered into negotiations to acquire, or made an inquiry about acquiring any ownership interest, in either Gadsden or Massillon, and shall describe in detail each contact with any such person during that period. The defendants shall maintain full records of all efforts made to divest Gadsden and Massillon.

VIII

Until the divestiture required by this Final Judgment has been accomplished, **[*56]** the defendants shall:

A. maintain normal repair and maintenance schedules at Gadsden and Massillon and preserve those facilities as they currently exist, except for the deterioration of the blast furnace and coke ovens normally associated with continuing usage;

B. refrain from altering or selling any assets of Gadsden or Massillon, other than in the ordinary course of business, or from taking any action that will have the effect of reducing the scope of Gadsden's or Massillon's manufacturing or sales operations or its product line from that existing at the time of the filing of the Complaint in this action, without the prior approval of the plaintiff;

C. refrain from taking any action that would jeopardize the sale of Gadsden as a viable competitor in the manufacture and sale of carbon and alloy hot and cold rolled sheet steel and of Massillon as a viable competitor in the manufacture and sale of stainless cold rolled sheet steel; and

D. until divestiture of Massillon is accomplished, establish a marketing organization for the sale of cold rolled stainless sheet steel from Massillon which shall be maintained separate and apart from J&L Stainless' marketing organization **[*57]** in the same manner and to the same extent as if J&L Stainless and Republic remained competitors, and there shall be no understanding, agreement, consultation or other communication between the two organizations or its members with regard to prices or terms of sale to customers of stainless sheet steel or as to the allocation or division of trade or customers. LTV and Republic shall forthwith advise in writing all managerial employees of J&L Stainless or Republic having any responsibilities with regard to the marketing of stainless sheet steel of the provisions of this paragraph.

IX

For the sole purpose of enforcing the limited right to Court review of contract disputes provided in paragraph 12 of the Appendix to this Final Judgment, the purchaser of Massillon, and its successors and assigns, may make application to the Court for such relief as may be appropriate to carry out the intent of Section IV(D) of this Final Judgment.

X

For the purposes of determining or securing compliance with the Final Judgment and subject to any legally recognized privilege, from time to time:

A. Duly authorized representatives of the Department of Justice shall, upon written request of the Attorney **[*58]** General or of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted:

1. access during office hours of such defendant to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, who may have counsel present, relating to any matters contained in this Final Judgment; and

2. subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers, employees and agents of such defendant, who may have counsel present, regarding any such matters.

B. Upon the written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division made to any defendant's principal office, such defendant shall submit such written reports, under oath if requested, with respect to any of the matters contained in this Final Judgment as may be requested.

No information or documents obtained by the means provided in this Section X shall be divulged by a representative of the Department of Justice to any person other **[*59]** than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United State is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

C. If at the time information or documents are furnished by any defendant to plaintiff, such defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under *Rule 26(c)(7) of the Federal Rules of Civil Procedure*, and such defendant marks each pertinent page of such material, "Subject to claim of protection under *Rule 26(c)(7) of the Federal Rules of Civil Procedure*", then ten days' notice shall be given by plaintiff to defendants prior to divulging such material in any legal proceeding (other than a grand jury proceeding).

XI

Defendants are hereby enjoined and restrained for a period of ten (10) years from providing to the American Iron and Steel Institute for transmittal to any other steel company, or recieving from the American Iron and Steel Institute, without the consent of plaintiff, operating, output **[*60]** and/or efficiency data for individual operating units including, but not limited to, coke ovens, sinter plants, blast furnaces, electric furnaces, basic oxygen furnaces, primary mills, continuous casters, bar mills, plate mills, structural mills, hot strip mills and sheet finishing mills.

XII

Defendants are hereby enjoined and restrained for a period of ten (10) years from acquiring one percent (1%) or more of the voting securities of any person engaged in the manufacture or sale of carbon and alloy hot and cold rolled sheet steel or stainless hot and cold rolled sheet steel, the assets of which are recorded on the books of such company (net of related valuation reserves recorded on such books) in an amount in excess of $ 15 million, or from acquiring from any such person, except pursuant to supply arrangements or otherwise in the ordinary course of business, assets relating to such products (except raw materials) in an amount in excess of $ 15 million without first obtaining the consent of plaintiff or, if plaintiff objects, the approval of this Court upon defendants' establishing, by a preponderance of the evidence, that the acquisition will not lessen competition or tend to create **[*61]** a monopoly in any line of commerce in any section of the country.

XIII

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violations hereof.

XIV

This Final Judgment will expire on the tenth anniversary of the date of its entry, except that as to the supply contract referred to in Section IV(D), on the termination thereof.

XV

Entry of this Final Judgment is in the public interest.

Dated: August 2, 1984

Appendix

Terms of the Long-Term Supply Contract

(1) The term of the contract shall be not less than ten years, with a right of renewal in Buyer for not less than two additional years in the event Buyer cannot by a reasonable effort secure an adeguate alternative source of stainless steel hot bands upon expiration of the original term of the contract and that defendants then have substantially as much stainless steel hot **[*62]** *band capacity as they have today.*

(2) Stainless steel hot bands supplied to Buyer shall be as specified by the Buyer and at least equal in quality to hot bands used by defendants to manufacture cold rolled stainless steel sheet and strip for sale by defendants to their own customers.

(3) Defendants agree to supply up to 100 percent of the Massillon requirements of stainless steel hot bands for further finishing into cold rolled sheet and strip at Massillon and sale of such sheet and strip by Buyer, up to a maximum of 30,000 tons per quarter, and not to exceed 10,000 tons in any given month, with a right in Buyer to increase the maximum to 36,000 tons per quarter (and not to exceed 12,000 tons in any given month) in the event that the capacity of Massillon is increased to accommodate such larger supply.

(4) Lead times for Buyer's placing orders with defendants, submitting change orders, and cancelling orders shall be on terms and conditions not less favorable to Buyer on a proportionate basis than the practice normally followed by defendants in connection with orders submitted by defendants' own marketing organization. All orders placed by Buyer shall be filled in accordance **[*63]** *with its specifications, unless modified with Buyer's consent.*

(5) Stainless steel hot bands furnished to Buyer shall be melted at J&L's Midland plant and rolled at J&L's Cleveland plant, except that ingots for 60" wide hot bands and other specialty products for Massillon now produced at Republic's Canton plant and which Midland is not now capable of producing shall continue to be furnished from Canton. In the event that any of these plants should for any reason become inoperative or unavailable, defendants shall supply Buyer from such other plant or plants as it may then operate, on like terms as herein provided for with respect to the Canton, Midland and J&L Cleveland plants.

(6) In case of shortage, interruption of supply or other force majeure events, Buyer shall be accorded relatively equal status in all respects with defendants' own manufacturing and marketing organizations and customers, and defendants shall not give preferential treatment to their own organizations and customers.

(7) Buyer shall be permitted at its option to place orders for stainless steel hot bands with other suppliers either in addition to or in lieu of placing orders with defendants.

(8) **[*64]** *The purchase price for the stainless steel hot bands shall be based upon (i) defendants' actual average monthly manufacturing costs by grade, plus (ii) overhead expenses accumulated on a monthly basis and allocated based on the ratio of defendants' hot band shipments to Buyer to defendants' total hot band production, together with (iii) a markup equal to ten percent of manufacturing and overhead expenses.*

(9) Payment shall be made by Buyer for stainless steel hot bands purchased from defendants at the end of each month following the month of delivery.

(10) Defendants will submit to Buyer monthly proof of all cost data used to calculate price, subject to right of audit by Buyer. Defendant shall grant Buyer reasonable access for inspection to its manufacturing facilities used to supply product to Buyer, and to all financial and other records pertinent to the contract or the parties' obligations thereunder.

(11) Subject to plaintiff's prior approval, Buyer shall have the right to assign the contract to any successor of Buyer's interest in Massillon.

(12) An appropriate method shall be provided for the speedy resolution of disputes under the contract. In the event of **[*65]** *a dispute, and following reasonable efforts to resolve the dispute through the mechanism provided in the contract (unless the Court agrees to a waiver of this requirement by reason of emergency), Buyer shall have the right to petition this Court, in accordance with Section IX of this Final Judgment, for such relief under the contract as may be appropriate, based on a clear and convincing showing by Buyer that without such relief Buyer will be unable effectively to compete with defendants in the sale of cold rolled stainless steel sheet or strip in accordance with the intent of Section IV(D) of this Final Judgment.*

Int'l Wood Processors v. Power Dry, Inc.

United States District Court for the District of South Carolina, Greenville Division

August 14, 1984

Civil No. 82-2115-14

Reporter

593 F. Supp. 710 *; 1984 U.S. Dist. LEXIS 24374 **; 224 U.S.P.Q. (BNA) 52 ***; 1984-2 Trade Cas. (CCH) P66,193

International Wood Processors, a corporation, Plaintiff v. Power Dry, Inc., a corporation, Power Dry Patent, Inc., a corporation, Drywood Corp., a corporation, Compton & Cloer Lumber Co., a corporation, General Wood Processors, Inc., a corporation, European Banking Co. Limited, a United Kingdom Company, K. N. Hronopoulos, an individual, Delano Compton, an individual, Arthur J. Crowley, an individual, Defendants

Core Terms

sublicense, kilns, defendants', damages, financing, antitrust, patent, termination, conspiracy, technical information, drying, rights, injunctive relief, license, new trial, conspired, projections, documents, inducing breach of contract, punitive damages, affiliated, sales, anti trust law, circumstances, competitor, know-how, notified, amount of damages, jury award, assumptions

LexisNexis® Headnotes

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review

HN1[] **Trials, Judgment as Matter of Law**

On a motion for judgment notwithstanding the verdict the court must refrain from weighing the credibility of the witnesses, view all the evidence in the light most favorable to the non-moving party, and give that party the benefit of all reasonable inferences which may be drawn from the evidence. With these requirements firmly in mind, if the evidence is of such quality and weight that reasonable men might reach different conclusions in the exercise of impartial judgment, a motion for a directed verdict or judgment notwithstanding the verdict should be denied.

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

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

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

Patent Law > Ownership > Conveyances > General Overview

HN2[] **Ownership & Transfer of Rights, Licenses**

A patentee's termination of a licensee, in concert with competing licenses, is not entitled to an antitrust exemption. Where patent policy allegedly conflicts with the goals of the antitrust laws, the courts have not prescribed immutable rules. Rather, an interest analysis and balancing test are appropriate in resolving the tension.

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

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

HN3[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Conspiracy need not be proved, and rarely is proved, by direct evidence of unlawful agreement. Conspiracy can be established, however, by circumstances and inferences, which at a minimum suggest a commitment to a common end.

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

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

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

HN4[] **Monopolies & Monopolization, Conspiracy to Monopolize**

A member of a conspiracy, the conspirator need not declare his assent to the conspiracy or its purpose. It is enough that, with knowledge of the unlawful plan, the defendant encouraged, advised or assisted in furthering the plan. Furthermore, acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet if they are part of the sum of acts which are relied upon to effectuate the conspiracy which the antitrust statute forbids, they come within its prohibition.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Evidence > Weight & Sufficiency

HN5[] **Jury Trials, Province of Court & Jury**

Where the evidence is merely conflicting and where issues of credibility and weight abound, the court cannot simply substitute its own determination for that of the jury's. It is the function of the jury as the traditional finder of facts, and not the court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses.

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

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

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

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

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

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

HN6[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

The courts have long applied a rule of reason to determine whether a particular restraint, which is not illegal per se, unreasonably restrains trade and thus violates the Sherman Act, *15 U.S.C.S. § 1*. This rule has recently been applied in cases, which are not easily classified because they involve aspects of both vertical and horizontal restraints. Under the rule of reason analysis, the anti-competitive and pro-competitive effects of the restraint must be considered.

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**

Intrabrand competition is competition among those who sell the product of a particular manufacturer, while interbrand competition is competition among the manufacturers of the same generic product. The primary concern of ***antitrust law*** is interbrand competition, not intrabrand competition.

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

HN8[] **Regulated Practices, Market Definition**

An effective rule of reason analysis requires an examination of the relevant market. Concerning the determination of the relevant product market, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purpose make up a relevant product market.

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

HN9[] **Private Actions, Remedies**

To sustain an antitrust verdict under the Sherman Act, *15 U.S.C.S. § 1*, the evidence must be sufficient to find both (1) the fact of injury to plaintiff's business or property and (2) the amount of damages sustained by plaintiff.

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

HN10[] **Private Actions, Remedies**

There is a clear distinction between the measure of proof necessary to establish the fact that plaintiff had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. There has been no tendency to lighten plaintiff's burden; the preponderance of evidence rule applies in unqualified form. Proof of an overcharge, an exclusion from a market, a termination or a loss of suppliers or customers are illustrative of the kinds of things that serve to meet the burden. Plaintiff's burden of proof as to the amount of damages has, however, been ameliorated considerably. The court or jury is entitled to make a just and reasonable estimate of the damages from relevant data, which may include the probable and inferential, as well as direct and positive proof.

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

HN11[] **Private Actions, Remedies**

Once fact of injury is proven, the burden on the antitrust plaintiff to establish the precise amount of damages is not as great as in other kinds of lawsuits.

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

HN12[] **Private Actions, Remedies**

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 *15 U.S.C.S. § 4*.

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

HN13[] **Private Actions, Remedies**

In the absence of more precise proof, the factfinder may conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts have caused damage to the plaintiffs.

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

Torts > Business Torts > General Overview

HN14[] **Private Actions, Remedies**

It is as unlawful to prevent a person from engaging in business as it is to drive a person out of business. An antitrust plaintiff in a market exclusion case is not precluded from proving damages as lost profits simply because its nascent business has shown no past profits.

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

HN15[] **Private Actions, Remedies**

It is well established that an antitrust plaintiff may recover lost future profits.

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

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

HN16[] **Private Actions, Remedies**

The use of expert testimony, sales projections and financial forecasts are accepted methods of proving antitrust damages, particularly when defendant's wrongful conduct and its own dismal business performance make proof by other means virtually impossible.

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

Evidence > Admissibility > Expert Witnesses > Ultimate Issue

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

HN17[] **Private Actions, Remedies**

In assessing the expert's testimony, juries are allowed to act upon probable and inferential, as well as direct and positive proof. The expert on damages is allowed some economic imagination so long as it does not become fantasy. The essential requirement is that the expert's testimony be based on the available data, which provides a rational foundation for a qualified expert's logical assumptions and inferences. It is sufficient if the expert presents one set of logical relations rationally premised on evidence which the jury, as ultimate fact-finder, might credit even though disputed.

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

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

HN18[] **Private Actions, Remedies**

Where the defendant adduces no evidence of alternative methodologies or statistics, but merely criticizes those employed by the plaintiff's expert, acceptance of the projections of plaintiff's expert is appropriate, since they do have a rational basis.

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

HN19[] **Defenses, Demurrers & Objections, Affirmative Defenses**

Defendants are estopped from denying the validity of a sublicense where plaintiff reasonably relied, to its detriments and with defendants' knowledge, on the promises made it the sublicense.

Business & Corporate Compliance > ... > Contracts Law > Breach > Nonperformance

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

HN20[] **Breach, Nonperformance**

Where a party's performance is prevented by the other party to the contract, the first party's nonperformance is excused and does not constitute a breach.

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

HN21[] **Private Actions, Remedies**

California law permits both established and non-established businesses to recover where the damages can be calculated with a reasonable certainty.

Contracts Law > Breach > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN22[] **Contracts Law, Breach**

Under California law, inducing breach of contract is a tort with five basic elements: (1) that a valid contract existed between the plaintiff and another party; (2) that the defendant had knowledge of the contract and intended to induce a breach thereof; (3) that the contract was breached; (4) as a proximate result of the defendant's wrongful or unjustified [unprivileged] conduct; (5) resulting in damage to the plaintiff.

Business & Corporate Law > ... > Duties & Liabilities > Causes of Action & Remedies > Breach of Contract

Contracts Law > Breach > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN23[] **Causes of Action & Remedies, Breach of Contract**

The conduct by which a defendant induces the breach, or intentionally interferes with another's contract rights, may be either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification for such interference. Moreover, when interference with performance is intended, the manner of interference is not of great importance. Furthermore, an agent of the promisor may be liable for inducing a breach of contract where he misdirects or omits performance.

Contracts Law > Breach > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN24[] **Contracts Law, Breach**

A defendant may be liable if he provides a party with an incentive to breach the contract. Furthermore, a defendant is not justified in inducing a breach of contract simply because he is in competition with one of the parties to the contract and seeks to further his own economic advantage at the expense of the other.

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Criminal Law & Procedure > Criminal Offenses > Acts & Mental States > Actus Reus

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

HN25[] **Jury Trials, Province of Court & Jury**

Intent, referencing a state of mind, is generally proved through circumstantial evidence, and the jury may draw the inference that a defendant intends the consequence of his knowing acts or conscious omissions.

Civil Procedure > Remedies > Damages > Punitive Damages

Contracts Law > ... > Damages > Types of Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN26[] **Damages, Punitive Damages**

See *Cal. Civ. Code § 3294* (1970 & Supp. 1984).

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Torts > ... > Types of Damages > Punitive Damages > Aggravating Circumstances

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

Torts > ... > Types of Damages > Punitive Damages > General Overview

HN27[] **Jury Trials, Province of Court & Jury**

An award of punitive damages requires an examination of motive and intent, and the requisite malice in fact may be inferred from a defendant's conscious disregard of the plaintiff's rights. Defendant's state of mind may be proved by direct or indirect evidence from which the jury may draw inferences.

Civil Procedure > Appeals > Standards of Review

HN28[] **Appeals, Standards of Review**

If there is a view of the case, which makes the jury's answers consistent, the court must adopt that view. It does not matter whether defendant can suggest equally plausible reasons for the verdict that would require reversal. The test to be applied in reconciling apparent conflicts between the jury's answers is whether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted.

Civil Procedure > Appeals > Standards of Review

HN29[] Appeals, Standards of Review

Inconsistent jury verdicts upon different counts or claims are not an anomaly in the law which at times recognizes a jury's right to an idiosyncratic position provided the challenged verdict is based upon the evidence and the law.

Evidence > Relevance > Exclusion of Relevant Evidence > Confusion, Prejudice & Waste of Time

Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

HN30[] Exclusion of Relevant Evidence, Confusion, Prejudice & Waste of Time

Under *Fed. R. Evid. 403*, the court may exclude certain evidence after finding the danger of unfair prejudice and waste of time on collateral issues substantially outweigh the attenuated probative value of the proffered evidence.

Evidence > ... > Exemptions > Statements by Coconspirators > General Overview

Evidence > ... > Exceptions > Business Records > General Overview

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

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

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

HN31[] Exemptions, Statements by Coconspirators

Hearsay documents may be admissible as business records, under *Fed. R. Evid. 803(6)*, and as statements by a co-conspirator or his agent pursuant to *Fed. R. Evid. 801(d)(2)(E)*.

Evidence > ... > Exceptions > State of Mind > General Overview

HN32[] Exceptions, State of Mind

A letter expressing state of mind is reasonable to show conforming action of second party is admissible under *Fed. R. Evid. 803(3)*.

Evidence > ... > Exceptions > Business Records > General Overview

Evidence > Rule Application & Interpretation

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN33[] Exceptions, Business Records

The general policy of Fed. R Evid., and Fed. R. Evid. 803(6) in particular, favors the admission of evidence rather than its exclusion if it has any probative value at all, and the court has broad discretion in determining issues of admissibility.

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

Evidence > Rule Application & Interpretation

HN34[] **Monopolies & Monopolization, Conspiracy to Monopolize**

In an antitrust conspiracy suit, where there is rarely direct evidence of agreement and plaintiff must rely on reasonable inferences from indirect proof, the rules of evidence should be liberally construed to the end that the truth may be ascertained and proceedings justly determined.

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

HN35[] **Jury Trials, Jury Instructions**

There is no duty to charge the jury on issues inferentially suggested by incidental evidence in the record.

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

HN36[] **Directors & Officers, Management Duties & Liabilities**

See Del Code Ann. tit. 8 § 144(a) (1983).

Contracts Law > ... > Consideration > Enforcement of Promises > General Overview

HN37[] **Consideration, Enforcement of Promises**

A bargained-for exchange is the essence of contract consideration.

Contracts Law > Contract Interpretation > General Overview

HN38[] **Contracts Law, Contract Interpretation**

Courts do not apply a rule of contract interpretation mechanically.

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

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

HN39[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Affiliated corporations can be held liable for conspiring with unaffiliated companies or persons.

Civil Procedure > Trials > Judgment as Matter of Law > Alternative Motions for New Trials

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

Civil Procedure > Judgments > Relief From Judgments > Motions for New Trials

HN40[] Judgment as Matter of Law, Alternative Motions for New Trials

The grant of a new trial is addressed to the court's sound discretion and that the standard for granting a new trial is somewhat less stringent than that for granting a judgment notwithstanding the verdict. The verdict must be contrary to the great, and not merely the greater weight of the evidence.

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN41[] Right to Jury Trial, Actions in Equity

When ruling on equitable claims, the court is bound by the jury's relevant findings on the legal claims.

Civil Procedure > ... > Declaratory Judgments > State Declaratory Judgments > Discretionary Jurisdiction

Civil Procedure > Judgments > Declaratory Judgments > General Overview

HN42[] State Declaratory Judgments, Discretionary Jurisdiction

It is well established that the grant of declaratory relief rests within the discretion of the trial court.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Declaratory Judgments > General Overview

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Remedies > Damages > Monetary Damages

HN43[] Estoppel, Collateral Estoppel

When a plaintiff in an antitrust action seeks both monetary damages and injunctive relief, the plaintiff is first entitled to a jury trial on his legal claims. The court is then bound by the jury verdict on its subsequent ruling on the equitable claims under the doctrine of collateral estoppel. As a result, the court's treatment of the equitable claims must not be inconsistent with the jury's disposition of the issues presented to it.

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

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Civil Procedure > Judgments > Declaratory Judgments > General Overview

HN44[] **Private Actions, Remedies**

The court is not required to grant equitable relief simply because the jury awarded damages to plaintiff. Under *15 U.S.C.S. § 26*, the court may grant equitable relief to remedy violations of the ***antitrust law*** 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. Accordingly, the court must apply basic principles of equity in determining whether to grant the injunctive relief sought by plaintiff.

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

Civil Procedure > Judgments > Declaratory Judgments > General Overview

HN45[] **Private Actions, Remedies**

If plaintiff's remedy at law is adequate and injunctive relief would afford a double recovery because plaintiff would receive an opportunity to earn profits it has already been awarded by the jury, then injunctive relief is inappropriate.

Counsel: [1]** Sedgwick, Detert, Moran & Arnold, (by Dale E. Fredericks and Rebecca A. Hull), San Francisco, California, and Dority & Flint, (by Julian W. Dority), Greenville, South Carolina, for Plaintiff.

Sutherland, Asbill & Brennan, (by John H. Fleming and John A. Chandler), Atlanta, Georgia, and Leatherwood, Walker, Todd & Mann, (by Mark R. Holmes), Greenville, South Carolina, for Power Dry, Inc., Power Dry Patent, Inc., Compton & Cloer Lumber Co., General Wood Processors, Inc., European Banking Co. Limited and Delano Compton, Arthur J. Crowley Professional Corp., (by Arthur J. Crowley), Los Angeles, California, and Love, Thornton, Arnold & Thomason, (by Jennings L. Graves, Jr. and John R. Devlin, Jr.), Greenville, South Carolina, for Arthur J. Crowley, for Defendants.

Judges: MacMahon, D.J. *

Opinion by: MacMAHON

Opinion

[*53] [*715]** MacMAHON, D.J.

All defendants in this action, excluding K. N. Hronopoulos ("Hronopoulos") and Drywood Corporation ("Drywood"), move for judgment n.o.v. or for a new trial, pursuant to *Fed.R.Civ.P. 50* and *59*, respectively. In addition, plaintiff requests **[**2]** declaratory and injunctive relief in accordance with the verdict.

* Of the United States District Court for the Southern District of New York, sitting by designation.

I. The Case

This case arose from the actions of the parties and other individuals in their attempts to develop and market a new technology for drying wood. A brief outline will provide a helpful context for our discussion of the issues raised by defendants. There was evidence from which the jury could find the following facts.

Before wood can be used in commercial products, such as furniture and flooring, its moisture content must be reduced. This is usually accomplished in conventional wood drying kilns. In conventional kiln drying, wood is stacked in a large, insulated chamber, **[*716]** the temperature and humidity within the chamber are controlled, and, by circulating dry, heated air over the wood, "the lumber gets to a certain point and its dry." XX at 6-8. [1]

In 1973, Edward Koppelman applied for a patent on a **[**3]** new method and machine for drying wood through the use of a vacuum chamber and radio frequency waves. A patent was granted in 1976. The patented method of drying wood in radio frequency vacuum kilns ("RFV kilns"), sometimes referred to as the "RFV process," differs from conventional kiln drying in several respects. An RFV kiln is a vacuum chamber in which wood is packed tightly together. Radio frequency waves heat the water in the wood, and, as the temperature rises, it evaporates into the chamber's atmosphere. The kiln's atmosphere, however, maintains a "zero relative humidity level" because of the vacuum. Consequently, the wood dries much faster than in conventional kilns, and this advantage also results in lower energy costs. PX 214; 200. There was evidence, however, that these advantages were offset to some extent by the fact that the RFV process was not successful with many types of wood and wood products.

In 1974, Koppelman issued an exclusive license to use and develop the RFV process to Drywood, a Delaware corporation. Defendant Hronopoulos was an officer, director and sole shareholder of Drywood at the time. Neither Hronopoulos nor Drywood appeared in this action.

In 1978, **[**4]** Koppelman assigned all of his interest in the patent to Hronopoulos. Hronopoulos then gave 50% of his interest in the patent and 10% of his Drywood shares to defendant Arthur J. Crowley ("Crowley"). PX 34; 36.

In February 1979, Hronopoulos also gave Crowley's law firm, Arthur J. Crowley Professional Corporation ("AJCPC"), a security interest in Hronopoulos' 50% patent interest as collateral for legal fees earned by AJCPC, and for future services, totalling $536,000. PX 36. **[***54]**

The Sublicense

In its efforts to raise capital, Drywood issued several non-exclusive sublicenses. *See* Exhibit C to PX 13; PX 12; PX 14. On February 4, 1979, Drywood issued the non-exclusive sublicense involved here to John C. Olsen, "or a company or corporation designated by him." PX 53.

On February 26, 1979, Olsen assigned the non-exclusive sublicense to plaintiff International Wood Processors ("IWP"), a California corporation of which he was president and majority shareholder. [2] PX 41; 42. Drywood was notified of the assignment. PX 43. At this time, Olsen was an officer and employee of Drywood.

[5]** Sometime in the spring of 1979, Olsen left Drywood's employ, and in August 1979 Drywood executed a "*First Amendment* to Non-Exclusive Sublicensing Agreement," which "ratified and confirmed in its entirety" the February 4 sublicense given to Olsen and subsequently assigned to IWP. PX 54 para. 8.

The parties do not dispute that the IWP sublicense was the most extensive sublicense issued. It permitted the manufacture, lease and sale of an unlimited number of RFV kilns without any territorial restrictions. It also provided

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[1] This citation form refers to the volume (XX) and pages (6-8) of the trial transcript. "PX --" denotes plaintiff's exhibit.

[2] Throughout the relevant period, Olsen was president and majority shareholder of IWP. He was involved in the events as an agent for IWP. Accordingly, for the sake of convenience, we refer hereinafter to IWP with the understanding that it was Olsen who received communications and acted on IWP's behalf.

for an exchange of technical information and know-how concerning RFV kilns and the RFV process. PX 53 para. 7. [3] In addition to various undertakings, **[*717]** the sublicensee agreed to pay substantial royalties to Drywood.

[6]** *Corporate Restructuring*

By late 1979, Drywood and Hronopoulos were the subjects of federal and state investigations concerning illegal securities transactions. Apparently to continue to raise capital, Drywood turned to a joint venture with defendant Compton & Cloer Lumber Company ("C & C"). Defendant Delano Compton ("Compton") was the president, chief operating officer and major shareholder in C & C. Drywood transferred its exclusive license to the joint venture which was called General Wood Processors, Joint Venture ("GWP-J/V"). PX 13.

During this period, defendant European Banking Company, Ltd. ("EBC"), a British corporation, became interested in the commercial potential of the RFV process and began negotiations with Compton, Crowley, Howard Blumenthal (an employee of AJCPC), Drywood, Hronopoulos and others. PX 129. EBC proposed to finance a new corporate structure which would have exclusive rights to the RFV process. *See, e.g.*, PX 170.

The evidence shows that EBC was very concerned about the competitive threat posed by the existence of sublicenses previously issued by Drywood. IWP's sublicense was of particular concern because of its "world wide rights." *See, e.g* **[**7]** ., PX 65; 73. The evidence also shows that each of the defendants knew, through meetings, telexes and letters, that EBC would not finance the proposed restructuring unless the outstanding sublicenses were either reacquired or cancelled. *See, e.g*., PX 65; 73; 240 at No. 22; 31; 32; 243; 277; 278; XIX at 30.

The evidence also shows that each of the defendants, in varying degrees, knowingly participated in a common plan to effect EBC's scheme.

For example, in January 1981, a two-day meeting concerning the terms of EBC's proposed financing was held in New York City. Crowley, Blumenthal, Hronopoulos, Compton and Neil Balfour (EBC's representative) participated in meetings held on the first day. There was evidence that discussions at these meetings included the existence, scope, competitive threat and methods of cancelling the IWP license. *E.g.*, XIX at 30.

On March 12, 1981, AJCPC, on behalf of Drywood, notified IWP that Drywood, through GWP-J/V, "[stood] ready to deliver the chambers," a precondition to IWP's performance. AJCPC further notified IWP that it should contact Compton concerning the sublicense and that "all the time periods referred to in . . . the sublicense and **[**8]** its amendments are hereby activated. . . ." PX 88. Compton testified, however, that GWP-J/V was not ready at that time to deliver any chambers to IWP. XVI at 23. **[***55]**

On April 6, 1981, IWP notified Compton and Drywood that it had essentially secured financing and requested the technical information necessary to obtain financing and construct RFV kilns. PX 30; 93; 99; 102. Neither Drywood nor Compton replied. XVI at 23-24; XIX at 40. IWP also wrote to EBC expressing its willingness to discuss selling its sublicense. PX 100.

In May 1981, EBC financed a new corporate structure which controlled both the patent and exclusive licensing rights to the RFV process. GWP-J/V transferred its exclusive license to defendant Power Dry, Inc. ("PDI"). PDI then granted a purported exclusive license, [4] limited to the United **[*718]** States, to defendant General Wood

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[3] *See also* PX 170. This is an internal memorandum of defendant European Banking Company, Ltd. The memorandum was written by Neil Balfour, an executive director and member of the board of directors of the bank at the time. He notes in the memorandum that there are "only two [sublicenses] which have commercialization potential." One of these was controlled by defendants Drywood and Compton & Cloer Lumber Company. The other sublicense which was "of interest" to EBC was plaintiff's. The memorandum further notes: "It is possible that these two sublicenses could be brought within the control of a single, new corporate entity (to avoid competition between the two sublicenses)." *Id*. Pd.

Processors, Inc. ("GWP, Inc."). Hronopoulos transferred his remaining 50% interest in the patent, which was subject to AJCPC's security interest, to defendant Power Dry Patent, Inc. ("PDP") and was retained by PDI as a consultant. *See* PX 101; *see also* PX 158.

[9]** In return for $500,000 paid by EBC to his professional corporation, Crowley released the pledge -- AJCPC's security interest in Hronopoulos' 50% patent interest. In addition, Crowley transferred 1% of his personal 50% interest in the patent to PDP. He retained his remaining personal 49% interest and the royalty rights pertaining to that interest. PX 34; 35; 91; 97. Compton received considerable stock in PDI and was made chairman of the board. *See* XVI at 24.

In November 1981, after learning that Drywood's rights and obligations under the exclusive license had been assigned to PDI, IWP notified PDI that it had financing available, requested technical information and stated that it was negotiating with contractors to build RFV kilns. *See* PX 104; 105.

Finally, on January 23, 1982, PDI, PDP and GWP, Inc., responding for the first time to IWP's request for technical information etc., informed IWP that its sublicense was terminated. PX 5. IWP then began this litigation in the Central District of California, but the case was transferred to this district.

II. The Claims

The jury was charged on the following claims: (1) that defendants conspired to restrain trade in **[**10]** the United States market for the RFV process and kilns by excluding plaintiff as a competitor, in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*; (2) that Drywood and PDI breached the sublicense by failing to provide technical information and know-how, in violation of California contract law; and (3) that each of the other defendants intentionally induced the breach, also in violation of California law.

In its fourth claim, plaintiff seeks a declaratory judgment that the sublicense is a valid contract and that plaintiff is entitled to current and future technical information and know-how received by Drywood or PDI. *28 U.S.C. § 2201*.

In its fifth claim, plaintiff seeks an order directing Drywood and PDI to provide such information and know-how. *15 U.S.C. § 26*.

Defendants counterclaim for a declaratory judgment that plaintiff has no right under its sublicense. [5]

[11]** After hearing live or deposition testimony from over 20 witnesses and considering over 240 exhibits during a three and one-half week trial, the jury returned a general verdict, accompanied by answers to special interrogatories, for plaintiff and against all defendants on all three claims submitted to it. The jury awarded plaintiff $900,000 on the antitrust claim; $200,000 on the breach of contract claim; $200,000 on the inducement of breach claim; and assessed $70,000 in punitive damages against EBC, Compton and Crowley. The Clerk entered judgment for $2,700,000 against all defendants, and judgment for $70,000 was entered against the three defendants found liable for punitive damages.

Defendants base their motions on a host of contentions. We address those arguably meritorious.

III. The Antitrust Verdict

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[4] Strictly speaking, this license could have been "exclusive" only if plaintiff IWP's sublicense did not exist, because IWP's sublicense was not subject to any territorial restrictions and, therefore, could compete directly with GWP, Inc. in the United States.

[5] PDI also counterclaimed that plaintiff had tortiously interfered with its business relationship and violated the Lanham Act, *15 U.S.C. § 1125*. Plaintiff moved to dismiss these claims and defendants did not object. *See* Power Dry, Inc. et al. Brief in Response to Plaintiff's Motion to Dismiss Counterclaims at 2-3. Accordingly, PDI et al.'s first and second counterclaims are dismissed. We discuss PDI et al.'s remaining counterclaim for declaratory relief, essentially the reverse of plaintiff's claim for such relief, in Part X, *infra*.

HN1[] On a motion for judgment n.o.v., we must refrain from weighing the credibility of the witnesses, view all the evidence in the light most favorable to the non-moving **[*719]** party, and **[***56]** give that party the benefit of all reasonable inferences which may be drawn from the evidence. *Continental Ore Co. v. Union Carbon & Carbide Corp., 370 U.S. 690, 696 n.6, 8 L. Ed. 2d 777, **[**12]** 82 S. Ct. 1404 (1962)* (same standard in antitrust treble damage suits); *Simblest v. Maynard, 427 F.2d 1, 4 (2d Cir. 1970)*. With these requirements firmly in mind, "if the evidence is of such quality and weight that reasonable men might reach different conclusions in the exercise of impartial judgment, a motion for a directed verdict [or judgment n.o.v.] should be denied." *Harrington v. United States, 504 F.2d 1306, 1312 (1st Cir. 1974)*; *Simblest v. Maynard, supra, id*. (evidence must be such that there could be only one conclusion).

In their motions for judgment n.o.v., defendants principally contend that (1) their activities are exempt from the antitrust laws because of their patent rights; (2) there is insufficient evidence of conspiracy or membership in the conspiracy; (3) there is insufficient evidence of an unreasonable restraint of trade; and (4) there is insufficient evidence of the fact of injury or the amount of damages.

A. Patent Rights

Defendants argue that the termination of plaintiff's sublicense is exempt from antitrust scrutiny under the patent laws. Defendants cite several cases for the proposition that a patentee's *refusal to license* is exempt, **[**13]** under some circumstances, from the antitrust laws, *e.g., United States v. Westinghouse Electric Corp., 648 F.2d 642, 647 (9th Cir. 1981)*. However, this argument, and their cases, are inapposite because the issue here is not the failure to license; rather, it is the breach and termination of a license, already issued by the patentee, in the context of a larger conspiracy to exclude a competitor in restraint of trade.

Defendants have cited no cases which support the proposition that a patentee's breach or termination of a license in such a context is not subject to the strictures of the antitrust laws. Indeed, the cases are to the contrary. For example, in *Mannington Mills, Inc. v. Congoleum Industries, Inc., 610 F.2d 1059 (3d Cir. 1979)*, the court squarely held "that HN2[] a patentee's termination of a licensee, in concert with competing licenses, is not entitled to an antitrust exemption." *Id. at 1073*. Where patent policy allegedly conflicts with the goals of the antitrust laws, the courts have not prescribed immutable rules. Rather, an interest analysis and balancing test are appropriate in resolving the tension. L. Sullivan, Antitrust §§ 177 at 505-06; 184 at **[**14]** 532-34 (1977) (patent and antitrust interests must be balanced based on specific facts of each case).

In light of the evidence in this case, we find that the clear detriment to competition outweighs the attenuated patent arguments asserted by defendants, some of whom had no patent rights at any time.

B. Evidence of Conspiracy

Defendants contend that there was insufficient evidence from which a jury could conclude that defendants conspired to exclude plaintiff as a competitor. We note again that on this motion plaintiff is entitled to "the benefit of all inferences which the evidence fairly supports even though contrary inferences might reasonably be drawn." *Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1042 (2d Cir. 1976)*.

It is axiomatic that HN3[] conspiracy need not be proved, and rarely is proved, by direct evidence of unlawful agreement. Conspiracy can be established, however, by circumstances and inferences which "at a minimum . . . suggest a commitment to a common end." *Michelman v. Clark-Schwebel Fiber Glass Corp., supra, 534 F.2d at 1043*; *American Tobacco Co. v. United States, 328 U.S. 781, 809-10, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)* ("unity of **[**15]** purpose or a common design or understanding").

Moreover, it is hornbook law that to be HN4[] a member of a conspiracy, the conspirator **[*720]** need not declare his assent to the conspiracy or its purpose. It is enough that, with knowledge of the unlawful plan, the defendant encouraged, advised or assisted in furthering the plan. Furthermore, "acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet if they are part of the sum of acts which are relied upon to effectuate the conspiracy which the [antitrust] statute forbids, they come within its prohibition." *American Tobacco Co. v. United States, supra, 328 U.S. at 809*.

In their joint brief in support of their motions, PDI, PDP, GWP, Inc., EBC and Compton, despite over three weeks of trial and the admission of over 240 documents, offer one sentence supporting their statement that the evidence is insufficient to establish conspiracy. They state: "As discussed above, the evidence establishes that no party other than Power Dry acted to give Olsen [IWP] notice of the invalidity of his license." Defendants' reference to the discussion "above" is quite unilluminating, and they do not elaborate in their **[**16]** reply brief.

Nevertheless, interpolating defendants' laconic arguments, we understand their contention to be that PDI acted unilaterally in **[***57]** terminating plaintiff's license and, therefore, there can be no illegal conspiracy. This argument misses the mark. Plaintiff alleged, and presented evidence from which a jury could reasonably conclude, that defendants were involved in an ongoing conspiracy to restrain trade unreasonably by excluding plaintiff from the market. The termination letter was simply the culmination of the conspiracy which was also effectuated by (1) withholding technical information and know-how, and (2) facilitating and financing a corporate restructuring with knowledge that its essential purpose was to secure a monopoly, by excluding plaintiff in the market for the RFV process.

There was more than sufficient evidence from which a jury could conclude that defendants had a "unity of purpose" or "common understanding" that plaintiff be excluded as a competitor. Plaintiff had the only outstanding sublicense which was essentially unlimited in scope and not subject to any territorial restrictions. Other potentially competing sublicenses, of more limited scope, had either **[**17]** been acquired, terminated or lapsed. There was also substantial evidence that EBC had made it clear to defendants that it would not finance RFV development and marketing unless the restructured corporation held a majority of the patent rights and all license rights. *E.g.*, VII at 43-44; PX 65. Evidence also showed that defendants knew of EBC's conditions and assisted in furthering a common plan to remove outstanding sublicenses as a competitive threat. Moreover, the evidence showed that all defendants sought, and benefited or stood to benefit from, an EBC financing and from a monopoly position in the RFV process. *See* PX 158; 240.

As a result of the financing, for example, Crowley's professional corporation, AJCPC, received $500,000. Compton became chairman of the board of PDI, as well as an officer. He also received stock in the new corporation. The reorganization financed by EBC significantly improved the likelihood that Crowley's royalties would increase and that Compton's substantial investment of time and money in the RFV process would finally become profitable.

Letters, telexes and memoranda, generally cross-copied, which referred directly or obliquely to the existence, **[**18]** necessity and methods of terminating plaintiff's sublicense were exchanged among defendants and their agents. Meetings were held in October 1980 and January 1981. The evidence supported a conclusion that the sublicenses were discussed and that methods of terminating plaintiff's sublicenses were discussed in order to assure PDI, PDP and GWP, Inc. a monopoly position in the RFV process.

Following the January meeting, Drywood, through AJCPC, notified plaintiff that all time periods in its sublicense were "activated," and plaintiff was further informed that no exceptions would be made. **[*721]** Based on a provision in its sublicense, PX 53 para. 7, plaintiff requested essential technical information concerning RFV kilns. It also informed defendants that, upon receipt of the information, it could assure financing and perform under the contract. *E.g.*, PX 93. Defendants ignored plaintiff's requests. After learning that plaintiff was actively marketing RFV kilns, PDI, PDP and GWP, Inc. terminated plaintiff's sublicense. PX 5.

A jury could reasonably conclude from the evidence that each of the defendants had not only a motive but also a "unity of purpose" to exclude plaintiff **[**19]** as a competitor of PDI, PDP and GWP, Inc. Moreover, the jury was entitled to find that defendants knowingly assented and acted to further the conspiracy.

Defendants' arguments to the contrary simply point to conflicting evidence and inferences. However, ***HN5***[] where the evidence is merely conflicting and where, as here, issues of credibility and weight abound, the court cannot simply substitute its own determination for that of the jury's. "It is the function of the jury as the traditional finder of facts, and not the court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." *Boeing Co. v. Shipman, 411 F.2d 365, 375 (5th Cir. 1969)* (*en banc*).

Thus, having carefully reviewed all the evidence, including but not limited to that which is outlined above and in Part I, *supra*, we cannot say that

> (1) there is such a complete absence of evidence supporting the verdict that the jury's finding could only have been the result of sheer surmise and conjecture, or (2) there is such an overwhelming amount of evidence in favor of the movant[s] that reasonable and fair minded men could not arrive at a verdict against [them].

*Mallis **[**20]** v. Bankers Trust Co., 717 F.2d 683, 688 (2d Cir. 1983)*.

C. Unreasonable Restraint of Trade

Defendants contend that their conduct did not unreasonably restrain trade because "there was clear evidence of pro-competitive effects in eliminating Olsen [IWP]. . . ." Power Dry, Inc. et al. Supplemental Brief in Support of Post-Trial Motions at 18. As examples of the "pro-competitive" effects of "eliminating" IWP, defendants reason that (1) successful marketing of the RFV process required "one substantial and credible voice" **[***58]** and "unity of effort;" (2) "Olsen's [IWP's] presence in the market . . . [exacerbated] the unsavory reputation for the process which Power Dry was seeking to overcome;" and (3) "IWP's allegedly inept technical and marketing skills would damage the image of the RFV drying process." Power Dry, Inc. et al. Supplemental Brief, *supra*, at 17-18.

HN6[] The courts have long applied a "rule of reason" to determine whether a particular restraint, which is not illegal *per se*, unreasonably restrains trade and thus violates the Sherman Act. *Standard Oil Co. v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*; *see also* *Continental T.V., Inc. v. GTE **[**21]** Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)* (hereinafter "*Sylvania*"). This rule has recently been applied in cases, such as this one, which are not easily classified because they involve aspects of both vertical and horizontal restraints. *E.g., Copy-Data Systems, Inc. v. Toshiba America, Inc., 663 F.2d 405 (2d Cir. 1981)*; *Abadir & Co. v. First Mississippi Corp., 651 F.2d 422 (5th Cir. 1981)*; *Donald B. Rice Tire Co. v. Michelin Tire Corp., 638 F.2d 15* (4th Cir.), *cert. denied*, *454 U.S. 864, 70 L. Ed. 2d 164, 102 S. Ct. 324 (1981)*. Under the "rule of reason" analysis, the anti-competitive and pro-competitive effects of the restraint must be considered. *Sylvania, supra.*

A further distinction has been drawn between the effects of restrictive conduct on intrabrand competition and interbrand competition. ***HN7***[] Intrabrand competition is competition among those who sell the product of a particular manufacturer, *Sylvania, supra, 433 U.S. at 52 n.19*, while interbrand competition is "competition among the manufacturers **[*722]** of the same generic product." *Id*. The primary concern of ***antitrust law*** is "interbrand competition, not intrabrand **[**22]** competition." *Copy-Data Systems, Inc. v. Toshiba America, Inc., supra, 663 F.2d at 411*.

We now turn to defendants' asserted pro-competitive effects. The thrust of their argument is that the elimination of plaintiff as a seller of RFV kilns better enables defendants to compete head-on with sellers of conventional kilns, thereby enhancing interbrand competition in the market for all wood drying kilns. Defendants are fighting the wrong battle, however, because the jury reasonably found that the relevant product market is the market for RFV kilns and not all wood drying kilns. [6] In this market, RFV kilns are the "generic product," and there were only two "brands" or

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[6] ***HN8***[] An effective rule of reason analysis requires an examination of the relevant market. *E.g., Donald B. Rice Tire Co. v. Michelin Tire Corp., 483 F. Supp. 750, 755* (D. Md.), *aff'd*, *638 F.2d 15* (4th Cir.), *cert. denied*, ***454 U.S. 864, 70 L. Ed. 2d 164, 102 S. Ct. 324 (1981)***. The relevant geographic market -- the United States -- is not disputed. Concerning the determination of the relevant product market, "no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purpose make up" a relevant product market. *United States v. E.I. duPont de Nemours, 351 U.S. 377, 394-95, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*; *see also* R. A. Posner, Antitrust § 437 (1974) (regarding "cross-elasticity of demand" as parallel concept in economics).

There was ample evidence to support the jury's conclusion, *see* Verdict Form, Interrogatory No. 10, that wood drying through the RFV process constituted a relevant market. The jury heard expert testimony concerning the relevant product market from those knowledgeable in the business, as well as from an expert in economics, Ronald Wilder. *See* XIV at 17-21. The evidence showed that RFV kiln drying differed from conventional kiln drying in several significant respects affecting interchangeability: speed, cost, the types of wood susceptible to RFV drying, and the types of wood products amenable to the process. Moreover, defendants' manufacturers of RFV kilns -- defendants and plaintiff. By eliminating plaintiff, therefore, defendants eliminated all interbrand competition in the market for RFV kilns.

[23]** In this context, the jury was entitled to find, indeed, it could hardly find otherwise, that defendants' elimination of their only competitor in the relevant market was an unreasonable restraint of trade. *See* *Sylvania, supra, 433 U.S. at 52 n.19* ("extreme example of deficiency in interbrand competition is . . . where there is only one manufacturer").

D. Fact of Injury and Amount of Damages

HN9[] To sustain an antitrust verdict under *§ 1* of the Sherman Act, the evidence must be sufficient to find both (1) the fact of injury to plaintiff's business or property and (2) the amount of damages sustained by plaintiff. *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562, 75 L. Ed. 544, 51 S. Ct. 248 (1931)*; *Wilder Enterprises, Inc. v. Allied Artists Pictures Corp., 632 F.2d 1135, 1139 n.1 (4th Cir. 1980)*; *Paschall v. Kansas City Star Co., 605 F.2d 403, 407-08 (8th Cir. 1979)*; *see also* L. Sullivan, Antitrust, *supra*, § 251 at 785; Note, Private Treble Damage Antitrust Suits: **[***59]** Measure of Damages for Destruction of All or a Part of a Business, 80 Harv. L. Rev. 1566, 1572-1574 (1967).

However, "there ***HN10***[] is a clear distinction between the measure of proof necessary **[**24]** to establish the fact that [plaintiff] had sustained some damage and the measure of proof necessary to enable the jury to fix the amount." *Story Parchment Co. v. Paterson Parchment Paper Co., supra, id*. One authoritative commentator has summarized this distinction as follows:

> **[*723]** Proof that injury occurred -- proof of the fact of damage, as the process is sometimes called -- is usually straightforward. There has been no tendency to lighten plaintiff's burden; the preponderance of evidence rule applies in unqualified form. Proof of an overcharge, *an exclusion from a market, a termination* or a loss of suppliers or customers are illustrative of the kinds of things that serve to meet the burden. Plaintiff's burden of proof as to the amount of damages has, however, been ameliorated considerably. The court or jury is entitled to make a "just and reasonable estimate" of the damages from "relevant data" which may include the "probable and inferential, as well as direct and positive proof."

L. Sullivan, Antitrust, *supra, id*. (emphasis added, footnotes omitted). *See also,* *Bonjorno v. Kaiser Aluminum & Chemical Corp., 518 F. Supp. 102, 114 (E.D. Pa. **[**25]** 1981)* (once ***HN11***[] fact of injury has been proven, the burden on the antitrust plaintiff to establish the precise amount of damages is not as great as in other kinds of lawsuits).

Thus, where, as here, the evidence is sufficient to find that the aim and effect of the conspiracy were to exclude plaintiff as a competitor in the market, the jury was entitled to find that plaintiff was injured in fact. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)* (even partial exclusion sufficient to find injury in fact). Moreover, there was ample evidence of injury in fact. For example, plaintiff's economics expert testified:

> Once [plaintiff] received the letter [PX 5] and once customers and potential financiers knew that the sublicense was in doubt or terminated or whatever, [plaintiff's] ability to compete in the market was effectively ended.

XIV at 41-42.

Defendants' argument is premised on the assertion that even if plaintiff's sublicense had not been terminated or technical information withheld, plaintiff would not have marketed RFV kilns because of its alleged lack of financing, technical and managerial experience. **[**26]** This argument is unpersuasive.

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own evidence showed that they did not consider the price charged for conventional kilns when setting their price for RFV kilns. IX at 99-102. This evidence corroborates Wilder's opinion that the cross-elasticity of demand between RFV kilns and conventional kilns was "very low." XIV at 20. Thus, we find the evidence of an absence of reasonable interchangeability between RFV and conventional kilns sufficient to support the jury's finding that the RFV process constituted a relevant product market.

Plaintiff presented evidence that it had financing, and that it had launched a serious marketing campaign with some success. Furthermore, in addition to plaintiff's president's (Olsen's) own experience in the RFV process while employed by Drywood, plaintiff had engaged an experienced businessman and manager, familiar with the RFV process, as an advisor and sales representative.

Thus, at most, the record presents conflicting evidence which it was the jury's province as fact-finder to weigh and accept or reject. We certainly cannot say that the *only* reasonable conclusion to be drawn from the evidence is that plaintiff could not have competed even if there had been no conspiracy. "It ***HN12***[] 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*." *Zenith Radio Corp. v. Hazeltine Research, Inc., supra, 395 U.S. at 114 n.9*; *Bonjorno v. Kaiser Aluminum & Chemical Corp., supra, 518 F. Supp. at 110*.

Turning to the question of the amount of damages, we find the Supreme Court's instructions **[**27]** in *Zenith Radio Corp*., also a market exclusion case, to be particularly apt:

> Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that ***HN13***[] in the absence of more precise proof, the factfinder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline **[*724]** in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs." *Bigelow v. RKO Pictures, Inc., supra*, at 264. See also *Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 377-79, [71 L. Ed. 684, 47 S. Ct. 400]* (1927); *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 561-566, [75 L. Ed. 544, 51 S. Ct. 248]* (1931).

[28]** *Zenith Radio Corp., supra, 395 U.S. at 123-24*.

Defendants contend that plaintiff's proof of the amount of damages is speculative. They do not argue that the damages are excessive; rather, their position is that there was simply no basis for awarding any damages. The gist of their argument is that awarding lost future profits to a business with no actual sales **[***60]** record necessarily requires a leap into the speculative. In support of their argument, defendants attack the assumptions and conclusions of plaintiff's expert on damages.

We start with the premise that "it ***HN14***[] is as unlawful to prevent a person from engaging in business as it is to drive a person out of business." *Thomsen v. Union Castle Mail S.S. Co., 166 F. 251, 253 (2d Cir. 1908)*. An antitrust plaintiff in a market exclusion case is not precluded from proving damages as lost profits simply because its nascent business has shown no past profits. *See H & B Equipment Co. v. International Harvester Co., 577 F.2d 239 (5th Cir. 1978)*; see also, *Hayes v. Solomon, 597 F.2d 958 (5th 1979)* (plaintiff can sue for harm to unestablished business if he intended to start business and was prepared to do so), *cert. denied* **[**29]** , *444 U.S. 1078, 62 L. Ed. 2d 761, 100 S. Ct. 1028 (1980)*; *Martin v. Phillips Petroleum Co., 365 F.2d 629, 633* (5th Cir.), *cert. denied*, *385 U.S. 991, 17 L. Ed. 2d 451, 87 S. Ct. 600 (1966)*; *Triangle Conduit & Cable Co. v. National Elec. Prods. Corp., 152 F.2d 398, 399 (3d Cir. 1945)*; *Fleer Corp. v. Topps Chewing Gum, Inc., 415 F. Supp. 176, 181 (E.D. Pa. 1976)* (allegation of intent and preparedness to engage in business is sufficient to give plaintiff standing under *§ 4* to sue for harm to the nascent venture); *see generally*, 2 P. Areeda & D. Turner, ***Antitrust Law*** para. 335 at 174-75 (1978); Proof of Damages for Terminated or Precluded Plaintiffs, 49 Antitrust L.J. 153 (1980).

There was more than sufficient evidence that plaintiff intended, was prepared to, and, in fact, attempted to compete. For example, there was evidence that plaintiff had financing arrangements, had negotiated for the construction of RFV kilns, had a knowledgeable manager and businessman as an advisor and sales representative, had printed advertising brochures, had attempted to put together sales seminars, and had contacted potential customers with some success. In addition, of course, the **[**30]** jury was entitled to consider the evidence that defendants themselves perceived plaintiff to be a competitor. Thus, the fact that plaintiff could not point to past profits does not render speculative the damages award based on a projection of future lost profits.

Evidence of Damages

HN15[] It is well established that an antitrust plaintiff may recover lost future profits. *E.g., Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 22-25 (5th Cir. 1974)*; *see also*, Annot., Measure and Elements of Damages under 15 U.S.C. § 15, 16 A.L.R. Fed. 14, § 17 (1973).

Plaintiff sought to prove lost future profits through the testimony of an expert in accounting and financial forecasting. **HN16**[] The use of expert testimony, sales projections and financial forecasts are accepted methods of proving antitrust damages, particularly when defendant's wrongful conduct and its own dismal business performance make proof by other means virtually impossible. *See Delaware Valley Marine Supply Co. v. American Tobacco Co., 184 F. Supp. 440, 443 (E.D. Pa. 1960)*; *Wm. Goldman Theatres, Inc. v. Loew's, Inc., 69 F. Supp. 103* (E.D. Pa.), *aff'd*, *164 [*725] F.2d 1021* (3d Cir.), **[**31]** *cert. denied*, *334 U.S. 811, 68 S. Ct. 1016, 92 L. Ed 1742 (1948)*; *see also* Annot., *supra*, 16 A.L.R. Fed. at 51-55; 16N von Kalinowski, Antitrust Laws and Trade Regulation § 115-03[3] at 115-79 (1974); Models for Assessing Lost Profits to Antitrust Plaintiffs, 60 Minn. L. Rev. 1233 (1975).

HN17[] In assessing the expert's testimony, "'juries are allowed to act upon probable and inferential, as well as direct and positive proof.'" *Story Parchment Co. v. Paterson Parchment Paper Co., supra, 282 U.S. at 564*; *Zenith Radio Corp. v. Hazeltine Research, Inc., supra, 395 U.S. at 124*. Moreover, as the Fifth Circuit has noted, "the expert on damages need not be armed on the right hand with a slide rule, on the left hand with a computer. He is allowed some economic imagination so long as it does not become fantasy." *Terrell v. Household Goods Carriers' Bureau, supra, 494 F.2d at 25*. The essential requirement is that the expert's testimony be based on the available data which provides a rational foundation for a qualified expert's logical assumptions and inferences. *See id. at 24*; L. Sullivan, Antitrust, *supra*, at 787.

Obviously, an expert's assumptions, if within **[**32]** the realm of reason, need not be the only possible set of assumptions based on the data. It is sufficient if the expert presents one set of logical relations rationally premised on evidence which the jury, as ultimate fact-finder, might credit even though disputed. *See, e.g., Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 903* (5th Cir.), *cert. denied*, *412 U.S. 923, 37 L. Ed. 2d 150, 93 S. Ct. 2736 (1973)*; *see also, Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 71 L. Ed. 684, 47 S. Ct. 400 (1927)* (defendant cannot complain that antitrust damages "cannot be measured with the same exactness and precision" as in absence of violation).

Plaintiff's proof of the amount of damages largely consists of the testimony and financial projections of John Markel, a certified public accountant trained in marketing and financial forecasting. Markel developed two comprehensive financial forecasts which are summarized in PX 296 and 297. These forecasts, or **[***61]** projections, clearly show his assumptions and method of computing lost future profits. Markel testified that he had consulted individuals experienced in the field of RFV wood drying and had examined the **[**33]** relevant literature.

The crucial assumptions in his projections were the price of each RFV kiln and the average number of machines sold each year. In the course of painstaking direct examination and thorough cross-examination, Markel testified to the facts and sources underlying his assumptions. He explained clearly the logic employed in arriving at his estimate of the present value of lost profits.

In establishing a sales price, Markel considered prices charged by defendants, costs, and estimates of other knowledgeable persons, as well as plaintiff's proposed price. VI at 14. Markel then applied a payback and capital budgeting analysis, which he explained to the jury, and determined that from both the buyer's and seller's standpoint the price per unit was reasonable. VI at 13.

The reasonableness of Markel's projection of the average number of sales per year presents a closer question. But we cannot say that a reasonable jury could not accept plaintiff's expert's projection of the average number of annual sales, giving plaintiff's evidence "the advantage of every fair and reasonable intendment that the evidence can justify." *Continental Ore Co. v. Union Carbon & Carbide Corp.,* **[**34]** *supra, 370 U.S. at 696 n.6*.

Markel testified that he based this projection on a review of the sublicense and conversations with at least five different, knowledgeable sources. VI at 19-20. Markel himself was trained in marketing and calculating financial forecasts for businesses. While Markel's sales projections **[*726]** may appear somewhat optimistic, we cannot say as a matter of law that their foundation is inadequate or that they fall beyond the pale of reason. Moreover, it is obvious that the jury was not unduly mesmerized by Markel's testimony. The jury returned verdicts for substantially less than Markel's projections, thus indicating that it fully performed its role as independent fact-finder. [7]

[35]** The evidence shows that defendants sold at least ten machines in approximately two or three years, despite their own admission that their companies were poorly managed. XVI at 25. There was also evidence that a former sublicensee had thirty RFV kilns. XVI at 27. Defendants contend that they did not profit from these sales. This contention was never documented as to individual sales, and, in any event, is not dispositive. The jury might well have concluded, based on the evidence, that defendants' net losses were due to their admittedly poor management.

It would also be contrary to logic and justice if a defendant found liable for exclusionary conduct could point to its own lackluster market performance to bar plaintiff's recovery as a matter of law. At most, defendants' inconclusive evidence of net loss was simply one factor among many for the jury to consider.

It should also be noted that the thrust of defendants' damages defense at trial was that there was simply no injury in fact. *E.g*., VI at 21. They offered no alternative methodology or calculations. Rather, they were content to rely on discrediting plaintiff's expert through cross-examination. As one court **[**36]** noted, however

> ***HN18***[] Where the defendant adduces no evidence of alternative methodologies or statistics, but merely criticizes those employed by the plaintiff's expert, acceptance of the projections of plaintiff's expert is appropriate, since they do have a rational basis. *See* *Taxi Weekly, Inc. v. Metropolitan Taxicab Board of Trade, Inc., 539 F.2d 907, 914-15 (2d Cir. 1976)*.

Eiberger v. Sony Corp. of America, 459 F. Supp. 1276, 1286 (S.D.N.Y. 1978).

In sum, recalling that antitrust damages "are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts," *Zenith Radio Corp., supra, 395 U.S. at 123*, we find that damages awarded were supported by the evidence and within the bounds of **[***62]** reason. *See* *Litton Systems Inc. v. American Telephone & Telegraph Co., 700 F.2d 785* (2d Cir.), *cert. denied*, *464 U.S. 1073, 104 S. Ct. 984, 79 L. Ed. 2d 220 (1983)*.

IV. Breach of Contract

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[7] We note here that the jury was specifically instructed to give careful scrutiny to expert testimony:

> Now, the Rules of Evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call expert witnesses. Witnesses who by education and experience have become expert in some art, science, profession or calling, may state an opinion as to the relevant and material matter in which they profess to be an expert. And they may also state their reasons for the opinion.
>
> You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is not supported by the evidence in the case, or is outweighed by other evidence, you may disregard the opinion entirely.
>
> In short, as I told you as the experts were testifying, you're not bound by their opinions.

XIII at 9.

The jury found Drywood and PDI (as assignee) liable for breach of contract by failing to give plaintiff updated technical information and know-how concerning RFV kiln drying, as required by para. 7A of the sublicense. [8] Defendants contend, **[**37]** however, **[*727]** that their performance was excused because plaintiff failed to comply with an alleged condition precedent, i.e., that it provide defendants with "suitable documentation to Drywood's satisfaction irrevocably guaranteeing financing for the construction of one unit" (hereinafter "financial documents"). PX 53 para. 5A. [9]

[38]** The contract provides that plaintiff is to present financial documents "within sixty (60) days from the date of the issuance of this sublicense. * * *" PX 53 para. 5A. The sublicense was issued on February 4, 1979. It is undisputed that plaintiff did not furnish financial documents within sixty days. Nevertheless, defendants gave plaintiff no notice to cure, as required by the contract. See PX 53 para. 12A. [10] **[**39]** Nor did defendants notify plaintiff that the contract was terminated. In fact, over six months later, in August 1979, Drywood executed an amendment to the sublicense. PX 54. The amendment acknowledged "substantially changed circumstances," "ratified and confirmed [the sublicense] in its entirety," made no reference to the sixty-day period, and specifically made plaintiff's performance contingent on defendants' performance. [11] See PX 54 para. 1.

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[8] Paragraph 7, in its entirety, provides:

7. *Trade Secrets & Know-How*

A. Drywood shall make available, for the use of Sublicensee, all trade secrets and know-how that Drywood has relating to the construction and operation of the Facility and the apparatus and process encompassed within said patent insofar as they relate solely to the drying, seasoning and treating of lumber.

B. Sublicensee shall forthwith give full information of, and convey to Drywood, any and all trade secrets and know-how acquired by Sublicensee relating to the construction and operation of the Facility and the apparatus and process encompassed within said patent.

PX 53

[9] Paragraph 5A provides:

A. Sublicensee shall, within sixty (60) days from the date of the issuance of this Sublicense, submit to Drywood suitable documentation to Drywood's satisfaction irrevocably guaranteeing financing for the construction of one unit (as defined hereinabove) and shall cause commencement and completion of construction of the unit within twelve (12) months from the date hereof. Sublicensee shall diligently pursue the expeditious completion of the unit and the installation and operation of the Chamber. Within twenty-four (24) months from date hereof, Sublicensee shall have completed the ten (10) unit Facility referred to in paragraph 1 above.

[10] Paragraph 12A of the sublicense provides:

A. In the event of default by Sublicensee (or its assignee) in any of the terms or conditions of this Sublicense, and the failure to cure same on thirty (30) days written notice and demand by Drywood then, in addition to all other rights and remedies it may have under law and equity, Drywood may terminate its Sublicense; provided that if more than thirty (30) days is required to cure a default (other than payment of monies), then the default shall be deemed cured if Sublicensee commences to cure same within thirty (30) days and diligently pursues same to completion. An election by Drywood of one remedy shall not constitute a waiver of any other remedies which it may thereafter exercise.

[11] Paragraph 1 of the amendment to the sublicense makes IWP's obligation to perform contingent upon Drywood/PDI's prior performance of one of three conditions. Paragraph 1 provides:

1. The 12-month period referred to in paragraph 1(A) and 5(A) of the Sublicense shall commence the date that Drywood either (a) informs Sublicensee that it, Drywood, stands ready (which must be verifiable) to construct, or contract for the construction of said Chambers, (b) inform Sublicensee that it, Drywood, is unable for any reason to construct or to contract for construction of said Chambers, or (c) from the date that Drywood delivers, or notifies Sublicensee that it stands ready to deliver, all necessary documentation and know-how to Sublicensee so as to allow Sublicensee to construct or contract for the construction of said Chambers, whichever date first occurs. * * *"

PX 54

Defendants' execution of the sublicense was a knowing waiver of plaintiff's failure to provide financial documentation, originally required under the sublicense, within sixty days of February 4, 1979. See E.A. Farnsworth, Contracts **[**40]** § 8.5 (1982). Furthermore, for nearly three years, plaintiff reasonably relied, to its detriment and with defendants' knowledge, on the promises made by Drywood in the sublicense and its amendment. ***HN19***[] Defendants are therefore estopped from denying the validity of the sublicense at this late stage. See *Longshore v. County of Ventura*, 25, Cal. 3d 14, *157 Cal. Rptr. 706, 598 P.2d 866, 874 (Cal. 1979)*; *Restatement (Second) of Contracts § 90 comment a* (1979). **[***63]**

Moreover, even assuming plaintiff was required to present financial documents within a reasonable time after defendants complied with one of the conditions **[*728]** in the amended sublicense, [12] there was sufficient evidence for the jury to conclude that defendants' undisputed refusal to provide technical information prevented plaintiff from obtaining appropriate financial documents. ***HN20***[] Where a party's performance is prevented by the other party to the contract, the first party's nonperformance is excused and does not constitute a breach. *See People of Porto Rico v. Title Guarantee & Surety Co., 227 U.S. 382, 33 S. Ct. 362, 57 L. Ed. 561 (1913)*; 6 Corbin Contracts § 1264 (1962). The factual issue of defendant's frustration **[**41]** of plaintiff's performance was squarely put to the jury. The jury was entitled to conclude that irrevocable guarantees of financing for the new technology could not be obtained by plaintiff without adequate assurance of access to defendants' technical information and know-how. Thus, plaintiff's nonperformance was justifiably excused.

The jury might also have found that Drywood's notice to IWP (PX 88), which purported to activate the period for plaintiff's performance, was ineffective. The amendment to the sublicense made plaintiff's performance contingent on Drywood's performance of one of three conditions. *See* fn. 11, *supra*. Drywood apparently chose the first option, *see* PX 54 *§ 1(a)*, and informed plaintiff it stood ready to deliver RFV kilns. PX 88. In light of the uncontradicted evidence, neither Drywood nor any defendant was ready at that time to supply RFV kilns, e.g., XVI at 23. The jury could conclude that Drywood's notice was not "verifiable," as required **[**42]** by the amended sublicense. PX 54 para. 1(a). Thus, the notice was ineffective and did not activate plaintiff's performance period.

Finally, the jury may have found that plaintiff secured adequate finance guarantees. There was evidence that John Dutton, who owned a business financing or "venture capital" company (XV at 6-7), had agreed to finance plaintiff's initial operation (XV at 13-18; PX 283). The evidence further showed that plaintiff informed defendants that it had secured financing (PX 93; 99; 100; 102; 104; 105). Viewing all the evidence, in addition to defendants' failure to provide any notice of default, the evidence supports the jury's finding that plaintiff provided adequate guarantees of financing.

There is no dispute that defendants did not provide plaintiff with updated technical information and know-how. Their second contention, however, is that the sublicense did not require them to furnish such information. We determined, after viewing the contract as a whole, that the contract was ambiguous on the issue of whether Drywood (and its assignee PDI) was obligated to furnish updated technical information on a continuing basis. Accordingly, the issue was presented to **[**43]** the jury which reasonably found that defendants were obligated under the sublicense to provide such information and had breached the contract by failing to do so. Resolving ambiguities in contracts is particularly within the jury's province as fact-finder, and defendants have presented no argument which persuades us that the jury's conclusion is at all unreasonable in light of the contract itself and the circumstances in which it was made.

We note that defendants also claim that there is insufficient evidence of damages on the claim for breach of contract. Defendants' argument on this point, however, does not differ from their attack on the award of antitrust damages, which was substantially larger. ***HN21***[] California law, which the parties do not dispute as controlling this issue, permits both established and unestablished businesses to recover where "the damages can be calculated with a reasonable certainty." *S. Jon Kreedman & Co. v. Meyer Bros. Parking-Western Corp., 130 Cal. Rptr. 41, 49, 58 Cal. App. 3d 173 (1976)*. As we concluded in Part III-D, *supra*, the evidence of damages was not

[12] *See* footnote 11. supra.

speculative and was sufficient for a jury to determine damages, whether for a breach **[*729]** **[**44]** of contract or market exclusion, with reasonable certainty.

In sum, there was sufficient evidence for the jury to conclude that defendants Drywood and PDI breached the sublicense, as amended, and caused ascertainable damages to plaintiff.

V. Inducing Breach of Contract

In its third cause of action, plaintiff claimed that all defendants, excluding Drywood and PDI, induced the latter two defendants to breach plaintiff's sublicense. There is no dispute among the parties that California law applies to this claim.

HN22[] Under California law, inducing breach of contract is a tort with five basic elements:

> '(1) that a valid contract existed between the plaintiff and another party; (2) that the defendant had knowledge of the contract and intended to induce a breach thereof; (3) that the contract was breached; (4) as a proximate result of the defendant's wrongful or unjustified [unprivileged] conduct; (5) resulting in damage to the plaintiff. **[***64]** [Citations]' *Abrams & Fox, Inc. v. Briney (1974), 39 Cal. App. 3d 604, 608, 114 Cal. Rptr. 328, 331* * * *

Mayes v. Sturdy Northern Sales, Inc., 154 Cal. Rptr. 43, 91 Cal. App. 3d 69 (1979). *See also* *Restatement (Second) of Torts, **[**45]** § 766* (1977).

HN23[] The conduct by which a defendant induces the breach, or intentionally interferes with another's contract rights, may be "either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification for such interference." *Abrams & Fox, Inc. v. Briney, supra,* 114 Cal. Rptr. at 606; *Imperial Ice Co. v. Rossier, 18 Cal. 2d 33, 112 P.2d 631, 632, 634 (Cal. 1941)*. Moreover, when interference with performance is intended, the manner of interference is "not of great importance." W. Prosser, Handbook on the Law of Torts, § 129 at 936 (1971); *Restatement (Second) of Torts, supra, § 766 comments c*, k. Furthermore, an agent of the promissor may be liable for inducing a breach of contract where he misdirects or omits performance. W. Prosser, *supra*, at 935-36 n.19.

HN24[] A defendant may also be liable if he provides a party with an incentive to breach the contract. *Id. at 934*; *see also* Annot., Procuring Breach of Contract, 26 A.L.R. 2d 1227, § 813 at 1251 (1952); Note, Inducing Breach of Contract, 36 Harv. L. Rev. 663 (1923). Furthermore, a defendant is not justified in inducing a breach of contract simply because he is in competition **[**46]** with one of the parties to the contract and seeks to further his own economic advantage at the expense of the other. *Imperial Ice Co. v. Rossier, supra, 112 P.2d at 633*.

We now turn to the facts of this case. We have previously held that the evidence was sufficient to find that the contract was breached and plaintiff was damaged. *See* Part IV, *supra*. Furthermore, there is no dispute that defendants knew of plaintiff's sublicense. In fact, the only element peculiar to the inducement to breach claim challenged by defendants is the requirement that defendants intended to induce the breach. [13]

[47]** Intent, referencing a state of mind, is generally proved through circumstantial evidence, and the jury may draw the inference **[*730]** that a defendant intends the consequence of his knowing acts or conscious omissions.

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[13] We note that defendants assert that "no party other than Power Dry (with its wholly-owned subsidiaries, Power Dry Patent and GWP, which were legally incapable of inducing any breach by Power Dry) participated in the decision in January 1982 to notify plaintiff of the invalidity of its purported contract." PDI et al. Brief in Support of Post Trial Motions; *see also* Compton Post-Trial Brief at 3, para 4; Crowley Post-Trial Brief at 20-21, para 3. These arguments, even assuming they were true, are irrelevant to the contract issues because the gist of the contract claim is Drywood's and PDI's failure to provide technical information prior to plaintiff's termination. Thus, it is defendants' conduct in providing encouragement, assistance and incentive to withhold technical information, not the termination letter, that provides the source of their liability on the contract and tort claims.

HN25[] -

See, e.g., United States v. Martinez, 694 F.2d 71, 73-74 (5th Cir. 1982); *United States v. Tidwell, 559 F.2d 262, 264* (5th Cir.), *rehearing denied*, *564 F.2d 98 (5th Cir. 1977)*, *cert. denied, 435 U.S. 942, 98 S. Ct. 1520, 55 L. Ed. 2d 538 (1978)*.

There was more here, however, than mere permissible inference. There was direct evidence that defendants knew plaintiff was entitled to technical information and that plaintiff had requested that information from Drywood and PDI. There was also evidence that EBC and Compton directed PDI to ignore plaintiff's request. Furthermore, the evidence showed that defendants actively facilitated the financing and transfer of the sublicense to PDI knowing that PDI would breach the sublicense. Each of the defendants derived substantial economic advantage from the financing in which the breach and termination of plaintiff's sublicense played a central role.

The assertion that defendants considered the sublicense invalid, **[**48]** *see, e.g.*, Compton's Post Trial Brief at 3, para. 5, is not a defense where defendants knew the terms of an express contract. *Restatement (Second) of Torts, supra, § 766 comment i*.

Nor can Crowley shield himself from liability simply by asserting that he gave no legal opinion on the validity of the sublicense. Throughout the relevant period, Crowley was actively pursuing his financial interest on several fronts: (1) as a party who held essential patent interests and royalty rights; (2) as a shareholder in Drywood; (3) as general counsel, through AJCPC, to Drywood; and (4) as a major shareholder in AJCPC, with a security interest in Hronopoulos' patent interest. In his capacity as counsel to Drywood, Crowley directed Howard Blumenthal, an AJCPC employee, to notify various sublicensees that their licenses were terminated or "activated." PX 19; 41. Nonetheless, Crowely never advised Drywood, nor did he direct Bluementhal, to respond to plaintiff's numerous requests for technical information pursuant to the sublicense.

From the evidence, of which the forgoing is but a small portion, the jury could reasonably infer that defendants intended to induce Drywood's and PDI's breach. **[***65]**

[49]** *Punitive Damages*

The jury awarded plaintiff punitive damages against EBC, Compton and Crowley for maliciously inducing a breach of contract. Intentionally inducing a breach of contract is an actionable tort. W. Prosser, *supra*, § 129 at 929. ***HN26***[] *California Civil Code § 3294* (West 1970 & Supp. 1984) provides for punitive damages in tort claims. The statute provides, in relevant part:

> (a) In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

* * *

> (c) As used in this section, the following definitions shall apply:
> (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others.
> (2) "Oppression" means subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.
>
> (3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant **[**50]** with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

See also Duff v. Engelberg, 47 Cal. Rptr. 114, 116, 237 Cal. App. 2d 505 (1965) (punitive damages may be awarded on claim for inducing breach of contract); Annot., *supra*, 26 A.L.R. 2d at 1274-75.

[*731] Defendants contend that there was insufficient evidence of malice to award punitive damages. However, ***HN27***[] an award of punitive damages requires an examination of motive and intent, and the requisite "malice in fact" may be inferred from a defendant's conscious disregard of the plaintiff's rights. Neal v. Farmers Insurance Exchange, 582 P.2d 980, 986, 21 Cal. 3d 910, 148 Cal. Rptr. 389 (Cal. 1978); *see also* Colonial Life & Acc. Ins. Co. v. Superior Court, 647 P.2d 86, 90, 31 Cal. 3d 785, 183 Cal. Rptr. 810 (Cal. 1982); Taylor v. Superior Court, 598 P.2d 854, 855-56, 24 Cal. 3d 890, 157 Cal. Rptr. 693 (1979). Defendant's state of mind may be proved by direct or indirect evidence from which the jury may draw inferences. Neal v. Farmers Insurance Exchange, supra, 582 P.2d at 987 n.6; Bertero v. National General Corp., **[**51]** 529 P.2d 608, 625, 13 Cal. 3d 43, 118 Cal. Rptr. 184 (1974).

In brief, viewing the evidence in the light most favorable to plaintiff, the evidence showed that all three defendants discussed the terms of plaintiff's sublicense; all knew that plaintiff needed the technical information, and the license, to compete; all realized that plaintiff's license was a significant obstacle to their personal and corporate gain; all helped Drywood and PDI withhold information; and all facilitated the EBC financing knowing full well that, after the assignment from Drywood, PDI would breach plaintiff's license to their benefit.

The evidence is clearly sufficient for a jury reasonably to conclude that EBC, Compton and Crowley induced the breach in conscious disregard of plaintiff's rights.

Accordingly, we find no grounds to disturb the jury's award of punitive damages.

VI. The Verdict

Defendants contend that a new trial is required because the jury awarded $900,000 in lost profits on the antitrust claim and only $200,000 in damages on the breach of contract claim. Defendants argue that "the jury apparently considered only to [sic] [the] number of defendants being punished under each count **[**52]** -- $200,000 to be paid by two defendants, and $900,000 to be paid by nine defendants." PDI et al. Brief in Support of Post-Trial Motions at 22. The argument is frivolous speculation. Moreover, applying defendants' fanciful theory, the jury should also have returned a verdict for $700,000, instead of $200,000, on the claim for inducing breach of contract because seven defendants were found liable on that claim.

The only case cited for the proposition that different damage awards on different claims merits a new trial is Weingart v. Allen & O'Hara, Inc., 654 F.2d 1096 (5th Cir. 1981). In that case, the district court granted defendant's motion for judgment n.o.v., or, in the alternative, for a new trial on several independent grounds. Only one of the grounds "was that the jury's answers to the special interrogatories on damages were hopelessly inconsistent with the evidence and demonstrated that the answers were the result of confusion, sympathy and prejudice." Id. at 1105-06. After affirming on several grounds, the Fifth Circuit turned to the inconsistent verdict issue. In affirming, of course, the court applied an abuse of discretion standard. Without reference to the specific **[**53]** interrogatories, the court stated

> that a new trial is required. The plaintiffs claimed the same damages on the same facts under their fraud theory as under their breach of contract theory, and the jury charges and the interrogatories on **[***66]** compensatory damages on each of those theories were identical and yet the jury awarded compensatory damages of only $28,000 for breach of contract and over $200,000 for fraud.

Id. at 1106. We find *Weingart* inapposite because, in that case, plaintiff apparently claimed identical harm under both claims.

In the instant case, however, plaintiff alleged, and the jury was charged, that the contract claim was based on defendants' failure to provide technical information. The antitrust claim, on the other hand, was **[*732]** based on plaintiff's total exclusion from competition. The jury was entitled to conclude that the extent of the damages stemming from market exclusion was greater than that caused by the failure to provide updated technical information.

In Aquachem Co. v. Olin Corp., 699 F.2d 516, 521 (11th Cir. 1983), the court stated:

> The Seventh Amendment demands that, **HN28**[] if there is a view of the **[**54]** case which makes the jury's answers consistent, this Court must adopt that view. Griffin v. Matherne, 471 F.2d 911, 915 (5th Cir. 1973). It

> does not matter whether Aquachem can suggest equally plausible reasons for the verdict that would require reversal. *Miller v. Royal Netherlands, supra*, 508 F.2d at 1108. The test to be applied in reconciling apparent conflicts between the jury's answers is "whether the answers may fairly be said to represent a logical and probable decision on the relevant issues as submitted. . . ."

And in *Malm v. United States Lines Co., 269 F. Supp. 731* (S.D.N.Y.) (emphasis added), *aff'd*, *378 F.2d 941 (2d Cir. 1967)*, the court stated that "inconsistent ***HN29***[] jury verdicts upon *different counts or claims* are not an anomaly in the law which at times recognizes a jury's right to an idiosyncratic position provided the challenged verdict is based upon the evidence and the law."

Applying this standard, we cannot say that the jury's different damages award on different claims, with correspondingly different injuries, is irreconcilable.

VII. Evidentiary Rulings

A. Olsen's Immunity

Defendants contend that the court erred in granting plaintiff's motion **[**55]** *in limine* to exclude evidence that Olsen was given immunity to testify before a grand jury investigating allegedly illegal activities of Drywood and Hronopoulos. We excluded evidence of Olsen's immunity on the basis of ***HN30***[] *Fed. R.Evd. 403* after finding the attenuated probative value of the proffered evidence was substantially outweighed by the danger of unfair prejudice and waste of time on collateral issues.

Defendants argue that "the grant of immunity to Olsen was . . . a critically important probative link" in their defense that the sublicense was void as against public policy because it was given in return for favorable testimony before the grand jury.

The probative value of the evidence is, at best, slight. Moreover, the grant of immunity runs counter to defendants' claim that Olsen traded his testimony for the sublicense. Immunity was pointless if he had agreed not to testify, and immunity would not have been given, in all likelihood, if Olsen were not going to testify favorably.

In any event, defendants had ample opportunity to support their theory by showing the difference in Olsen's testimony before and after he received the sublicense and amendment. Thus, defendants were **[**56]** not materially prejudiced by the exclusion.

We note that letters from the office of the United States Attorney, stating that the government considered Olsen free of criminal liability, were also excluded. This entire area raised collateral issues of dubious relevance and presented a serious danger of confusing the issues and causing inordinate delay. Moreover, the clear danger of unfair prejudice to plaintiff, by implicating Olsen in criminal activity, substantially outweighed its probative value, if any. Accordingly, the evidence was excluded. *Fed.R.Evd. 403*.

B. Miscellaneous Documents

Defendants also object to the admission of the following plaintiff's exhibits: 73, 127, 232, 233, 277 and 288. We have once again reviewed the contents of these documents and their foundation. We conclude now, as we concluded previously after extensive argument, that these ***HN31***[] documents are admissible as business records, *Fed.R.Evd. 803(6)*, and as statements by a co-conspirator or his agent, *Fed.R.Evd. 801(d)(2)(E)*.

We also find PX 232 and 233 -- the Sapounakis memoranda -- admissible for the **[*733]** additional reason that they are statements of the declarant's state of mind. *Fed.R.Evd. 803(3)*; **[**57]** *Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295-96, 36 L. Ed. 706, 12 S. Ct. 909 (1892)* (letter ***HN32***[] expressing state of mind reasonable to show conforming action of second party); *United States v. Moore, 571 F.2d 76, 82 n.3 (2nd Cir. 1978)*; *United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976)*, *cert. denied sub nom. Inciso v. United States, 429 U.S. 1099, 51 L. Ed. 2d 546, 97 S. Ct. 1118 (1977)*. **[***67]**

We do not find that these documents lack trustworthiness, *see* Fed.R.Evd. 803(6); beyond this, their weight and credibility were matters for the jury. In this context, we note that the jury was specifically instructed to give particularly careful scrutiny to the documents:

> Now, much of the evidence here consisted of business records and other writings. Most of these came in under what we call an exception to the hearsay rule. You heard the lawyers object many, many times in this case on the ground of hearsay. Hearsay is an out of court statement by a witness which is not subjected to cross examination. And in these business records that were admitted into evidence, there are many such out of court statements.
>
> Now, you may consider those statements, but you should **[**58]** use some caution and scrutinize them carefully before you rely on them, simply because they were not subjected to the lie detecting process of cross examination. (XIII at 13-14.)

HN33[] The general policy of the Federal Rules of Evidence, and Rule 803(6) in particular, "favors the admission of evidence rather than its exclusion if it has any probative value at all," *In re Ollag Construction Equipment Corp., 665 F.2d 43, 46 (2d Cir. 1981)* (citation omitted), and the court has broad discretion in determining issues of admissibility, *e.g., United States v. Fendley, 522 F.2d 181, 184 (5th Cir. 1975)*. ***HN34***[] In an antitrust conspiracy suit, where there is rarely direct evidence of agreement and plaintiff must rely on reasonable inferences from indirect proof, the rules of evidence should be liberally construed "to the end that the truth may be ascertained and proceedings justly determined." *Fed.R.Evd. 102*.

For the foregoing reasons, we find that the contested documents were properly admitted.

VIII. Jury Instructions

Defendants contend that various errors in the charge require the grant of a new trial. We have carefully reviewed the charge, in light of the evidence, claims **[**59]** and arguments of counsel. *National Distillers & Chemical Corp. v. Brad's Machine Products, Inc., 666 F.2d 492, 497 (11th Cir. 1982)*. We find that the charge, taken as a whole, "fairly and adequately state[s] the pertinent legal principles" raised by the evidence. *Hogg's Oyster Co. v. United States, 676 F.2d 1015, 1019 (4th Cir. 1982)*. *See also Johnson v. Bryant, 671 F.2d 1276, 1280 (11th Cir. 1982)*; *Glass Containers Corp. v. Miller Brewing Co., 643 F.2d 308, 312 (5th Cir. 1981)* (no ***HN35***[] duty to charge on issues "inferentially suggested by incidental evidence in the record").

Defendants contend that the court should have given PDI's request to charge No. 3 and Crowley's request Nos. 20 and 21 concerning the legality of patent monopolies. In the circumstances of this case, we ruled as a matter of law that the patent defense did not apply, *see* Part III-A, *supra*. Therefore, the requests were not pertinent to any factual issue before the jury, and, moreover, would have been confusing and misleading. *See Harrington v. United States, supra, 504 F.2d at 1317*.

We reach a similar conclusion with respect to PDI's request Nos. 7, 8, 9 and 10. These requests concerned **[**60]** defendants' argument that the sublicense was invalid as an "insider contract" and lacked consideration.

We held the insider contract defense insufficient as a matter of law. The sublicense was "ratified and confirmed" in an agreement which incorporated the sublicense in an amendment to the sublicense. **[*734]** The amended sublicense was executed by Olsen and Drywood (PX 54). It is undisputed that when Olsen executed the contract, he was no longer an officer or employee of Drywood. As a matter of law, therefore, the sublicense is not invalid as a contract between a corporation and an officer. *See* Del. Code Ann. tit. 8 § 144(a) (1983). [14]

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[14] ***HN36***[] Del Code tit. 8 § 144(a) (1983) provides:

> (a) No contract or transaction between a corporation and 1 or more of its directors or officers, or between a corporation and any other corporation, partnership, association, or other organization in which 1 or more of its directors or officers are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the

[*68]** **[**61]** Moreover, the original sublicense was executed by Hronopoulos as president of Drywood. Hronopoulos was also a 90% shareholder at the time. Obviously, he knew the terms of the sublicense and that Olsen was an officer of Drywood. Therefore, even the original sublicense is valid under *Del. Code Ann. tit. 8 §§ 144(a)(1)* and *144(a)(2)*.

Defendants' contention that the sublicense lacked consideration was also insufficient as a matter of law. By its own terms, the contract gives Olsen substantial rights to market the RFV process. In exchange, Olsen undertakes to construct or buy kilns, market them, pay royalties, and exchange technical information concerning the RFV process (PX 53). These provisions constitute the ***HN37***[] bargained-for exchange which is the essence of consideration. *Cal. Civil Code § 1605* (West 1970 & Supp.); *In re Estate of Bray, 230 Cal. App. 2d 136, 40 Cal.Rptr. 750, 753 (1964)*. Therefore, defendants' requests to charge on the issue of consideration (PDI's Nos. 8, 9 and 10) were irrelevant to any issue before the jury.

Defendants also argue that the court erred by failing to give PDI's request Nos. 12A and 29 and Crowley's request No. 22. In essence, these instructions **[**62]** state that "an ambiguity in a contract must be construed most strongly against the party which wrote the contract." PDI request No. 12A.

To the extent that this statement constitutes ***HN38***[] a rule of interpretation, the courts do not apply it mechanically, especially where there is no evidence of adhesion or unequal bargaining advantage. In such circumstances, the rule is inapposite. *See, e.g., Schering Corp. v. Home Insurance Co., 712 F.2d 4, 10 (2d Cir. 1983)*; *Texaco, Inc. v. Rogow, 150 Conn. 401, 190 A.2d 48 (1963)* (lease dispute).

The case upon which defendants rely in their brief, *Distillers Distributing Corp. v. J.C. Millett Co., 310 F.2d 162, 164 (9th Cir. 1962)*, is not to the contrary. In that case, the Ninth Circuit did not hold that ambiguous contracts must invariably be construed against the drafter. Rather, the court simply noted that the rule was "applicable" in that case because the record "did not contain sufficient evidence to resolve the interpretation of the contract as contended for by [defendant]."

In this case, the evidence was sufficient to support both sides' interpretations, and the issue was properly submitted to the jury without resort **[**63]** to purported rules in aid of construction. Moreover, the evidence showed that Olsen "drafted" the sublicense by selecting portions from prior sublicenses drafted by Drywood. Thus, **[*735]** the contract was between an individual with no legal experience and a corporation fully familiar with highly similar, if not identical, contracts.

In these circumstances, PDI's request Nos. 12A and 29 and Crowley's No. 22, concerning the rule of construing contracts against the drafter, were inapplicable, confusing and misleading.

Defendants also argue that the jury should have been instructed that "affiliated companies which are not in competition with one another cannot conspire." PDI et al. Brief in Support of Post-Trial Motions at 30. Defendants cite *Call Carl, Inc. v. BP Oil Corp., 554 F.2d 623* (4th Cir.), *cert. denied*, *434 U.S. 923, 54 L. Ed. 2d 280, 98 S. Ct. 400 (1977)*, in support of their argument. In that case, however, involving a gasoline dealership termination, the

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director or officer is present at or participates in the meeting of the board or committee which authorizes the contract or transaction, or solely because his or their votes are counted for such purpose, if:

(1) The material facts as to his relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors or the committee, and the board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; or

(2) The material facts as to his relationship or interest and as to the contract or transaction are disclosed or are known to the shareholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the shareholders; or

(3) The contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified, by the board of directors, a committee or the shareholders.

court expressly stated that it did not consider the issue of whether affiliated companies can conspire because that aspect of the district court's ruling was not appealed. *Id. at 628 n.4*. Thus, *Call Carl* **[**64]** is wholly inapposite and does not support defendants' contention.

Moreover, unlike this case, the only alleged conspirators in *Call Carl* were a parent and its wholly-owned subsidiary. It should also be noted that in *Call Carl* the court found that, despite the termination, there was "horizontal competition in the market from other sources." *Id*. In this case, however, plaintiff's termination completely eliminated horizontal competition in the market for RFV kilns.

In *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 52 U.S.L.W. 4821, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*, the Supreme Court addressed the issue of "whether a parent and its wholly-owned subsidiary are capable of conspiring in violation of *§ 1* of the Sherman Act." *Id. at 4825*. The Court held that a conspiracy based solely on the conduct of a parent and its wholly-owned subsidiary is not prohibited by *§ 1* of the Sherman Act. *Id*. at 4828. However, the Court did "not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own." *Id. at 4825*.

Of greater relevance in the context of this case, however, is **[**65]** the fact that *Copperweld* unequivocally reaffirms the rule that ***HN39***[] affiliated corporations can be held liable for conspiring with unaffiliated companies or persons. *Id. at 4824-25* & nn. 8 & 9. This rule is directly applicable to this case because plaintiff alleged, and the jury reasonably found, that the scope and membership in the conspiracy went beyond an agreement solely between the affiliated companies. There was evidence that the affiliates conspired with non-affiliates, such as EBC, Drywood, Hronopoulos, C & C, and Crowley. Thus, the issue was not whether the affiliates conspired with themselves, but whether they conspired with other defendants as well. This issue falls squarely within the rule reaffirmed **[***69]** in *Copperweld, supra, at 4824-25*. Therefore, defendants' proposed instruction concerning conspiracy solely among affiliates was inapposite. Moreover, even if defendants' proposed instruction were a correct statement of law and relevant, the jury's finding that the affiliates conspired with non-affiliates would render the omission harmless error. *Fed.R.Civ.P. 61*.

In conclusion, we find that the charge, taken as a whole and in light of the pleadings and evidence, fairly **[**66]** and adequately instructs on the law applicable to the factual issues submitted to the jury. *Hogg's Oyster Co. v. United States, supra, 676 F.2d at 1019*.

IX. Motion for New Trial

Defendants also move for a new trial, in the alternative to their motion for judgment n.o.v., on the grounds that the verdict is against the great weight of the evidence and represents a miscarriage of justice. *See* *Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 892 **[*736]** (4th Cir. 1980)*. On this motion, we bear in mind that ***HN40***[] the grant of a new trial is addressed to the court's sound discretion and that the standard for granting a new trial is somewhat less stringent than that for granting a judgment n.o.v. *See, e.g.,* *Bevevino v. Saydjari, 574 F.2d 676, 684 (2d Cir. 1978)*; *Aetna Cas. & Sur. Co. v. Yeatts, 122 F.2d 350 (4th Cir. 1941)*; 11 Wright & Miller, Federal Practice and Procedure § 2806 (1973 & Supp.). Nevertheless, we do not find that the verdicts are contrary to the clear weight of the evidence. *Cf.* *Williams v. City of Valdosta, 689 F.2d 964, 973 (11th Cir. 1982)* (verdict must be "contrary to the great, and not merely the greater weight of the evidence").

[67]** At the heart of this case were the inferences to be drawn from the direct and circumstantial evidence. We have found the jury's inferences reasonable, *supra*. The possibility that contrary inferences might have been drawn does not warrant the grant of a new trial.

Furthermore, we find no support for the argument that the verdict somehow represents a miscarriage of justice. Nor do we find any evidence in the record, in the conduct of the participants at trial, or in our observation of the jury throughout the trial that suggests to us that the verdict was to any extent the result of passion or prejudice. In fact, plaintiff's presentation was notable for its absence of hyperbole.

Accordingly, we deny defendants' motions for a new trial.

X. Declaratory and Injunctive Relief

Plaintiff's fourth and fifth claims seek declaratory relief, pursuant to *28 U.S.C. § 2201*, and injunctive relief, pursuant to *15 U.S.C. § 26*. The fourth claims seeks a declaration of the parties' rights and duties under plaintiff's sublicense. The fifth claims seeks permanent injunctive relief requiring Drywood and/or PDI, in essence, to provide plaintiff with all existing and future technology related to **[**68]** the RFV process. We decline to grant the relief sought on these claims for the following reasons. [15]

A. Declaratory Relief

HN42[] It is well established that the grant of declaratory relief rests within the discretion of the trial **[**69]** court. *Public Service Comm'n of Utah v. Wycoff Co., 344 U.S. 237, 241, 97 L. Ed. 291, 73 S. Ct. 236 (1952)*. In declining to grant declaratory relief in the case before us, we emphasize that a declaratory judgment would serve no useful purpose in clarifying or settling the legal relations of the parties. *Maryland Cas. Co. v. Rosen, 445 F.2d 1012, 1014 (2d Cir. 1971)*; *Maryland Cas. Co. v. Boyle Construction Co., 123 F.2d 558 (4th Cir. 1941)*. The jury award has compensated plaintiff fully for its losses, and, as a result, there is no need for declaratory relief. Furthermore, to the extent that a declaratory judgment would have the effect of requiring defendants to fulfill their obligations under the Nonexclusive Sublicensing Agreement, we note that our reasons for denying injunctive relief apply in this context as well. *See* Part X-B, *infra*.

B. Injunctive Relief

HN43[] When a plaintiff in an antitrust action seeks both monetary damages and injunctive relief, as here, the plaintiff is first entitled to a jury trial on his legal claims. *Ohio-Sealy Mattress Mfg. Co. v.* ***[*737]*** *Sealy, Inc., 585 F.2d 821, 824 (7th Cir. 1978)*; *Florists' Nationwide Telephone Delivery* **[**70]** *Network v. Florists' Telegraph Delivery* ***[***70]*** *Ass'n, 371 F.2d 263, 271 (7th Cir. 1967)*. The court is then bound by the jury verdict on its subsequent ruling on the equitable claims under the doctrine of collateral estoppel. *Florists' Nationwide Telephone Delivery Network, supra, 371 F.2d at 271*. As a result, our treatment of the equitable claims here must not be inconsistent with the jury's disposition of the issues presented to it. *Id*.

Nevertheless, ***HN44***[] we are not required to grant equitable relief simply because the jury awarded damages to plaintiff. Under *15 U.S.C. § 26*, the court may grant equitable relief to remedy violations of the ***antitrust law*** "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." Accordingly, we must apply basic principles of equity in determining whether to grant the injunctive relief sought by plaintiff here. In this context, plaintiff is not entitled to equitable relief because its remedy at law is adequate. *Weiss v. York, 548 F. Supp. 1048, 1057 (M.D. Pa. 1982)*. As part of its theory of damages at trial, plaintiff asserted that defendants' **[**71]** unlawful conduct deprived it of future profits on sales of RFV kilns. Plaintiff then presented evidence from which the jury could make a reasonable estimate of its future lost profits over approximately the next ten years. Having awarded plaintiff $900,000, the jury clearly based its verdict to a considerable extent on this evidence.

Thus, plaintiff requested and received prospective damages. Under plaintiff's own theory of damages, it can suffer no further future harm once it has been compensated for the profits from the sales it claims it would have made absent defendants' unlawful conduct. ***HN45***[] Its remedy at law is therefore adequate. Injunctive relief would afford a double recovery because plaintiff would receive an opportunity to earn the profits it has already been awarded by the jury. *Affiliated Capital Corp. v. City of Houston, 519 F. Supp. 991, 1011 (S.D. Tex. 1981)*, *rev'd on*

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[15] Defendants' claim for declaratory relief, PDI et al. Answer at 17-18, must also be denied. ***HN41***[] When ruling on equitable claims, the court is bound by the jury's relevant findings on the legal claims. *Florists' Nationwide Telephone Delivery Network v. Florists Telegraph Delivery Ass'n, 371 F.2d 263, 271 (7th Cir. 1967)*. It would be wholly inconsistent with the jury's finding in this case to grant defendants PDI et al. the declaratory relief which they request. Moreover, granting declaratory relief would serve no useful purpose at this stage because the legal obligations of the parties have been clarified by the jury's resolution of the legal claims. *See* *Maryland Casualty Co. v. Rosen, 445 F.2d 1012, 1014 (2d Cir. 1971)*. Accordingly, we deny defendants' claim for declaratory relief.

other grounds, 700 F.2d 226 (5th Cir.), *rehearing granted*, 714 F.2d 25 (5th Cir. 1983). In essence, plaintiff has elected to pursue a full damage remedy, and injunctive relief would result in an unjust windfall. *Id*. Moreover, such injunctive relief, in the context of this case, **[**72]** would be analogous to an award of damages for breach of contract *and* specific performance as well. In order to avoid an inequitable result, we conclude that injunctive relief is inappropriate.

XI. Conclusion

Accordingly:

(1) defendants' motions for judgment n.o.v. or for a new trial are denied in all respects;

(2) defendant PDI et al.'s counterclaim for declaratory relief is denied in all respects; and

(3) plaintiff's claims for declaratory and injunctive relief are denied in all respects.

So ordered.

F. Buddie Contracting, Inc. v. Seawright

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

August 15, 1984

Case No. C80-2344

Reporter

595 F. Supp. 422 *; 1984 U.S. Dist. LEXIS 24348 **; 1985-1 Trade Cas. (CCH) P66,352

F. Buddie Contracting, Inc., Plaintiff, v. William Seawright, et al., Defendants

Core Terms

conspiracy, antitrust, collateral estoppel, bid, anti trust law, fraudulent concealment, argues, Sherman Act, courts, relitigation, bidder, summary judgment motion, antitrust claim, public contract, parties, statute of limitations, injury-in-fact, Plants, wrongful concealment, relevant market, self-concealing, circumstances, exemption, contract award, decisions, cases, summary judgment, transfer station, cause of action, genuine issue

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

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

A four year statute of limitations applies to federal antitrust claims.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

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

See 15 U.S.C.S. § 15b.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > Tolling

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

Three elements must be pleaded in order to establish fraudulent concealment: (1) wrongful concealment of their actions by the defendant; (2) failure of the plaintiff to discover the operative facts or the basis of his cause of action within the limitations; and (3) plaintiff's due diligence until discovery of the facts.

Antitrust & Trade Law > Sherman Act > General Overview

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

Governments > Legislation > Statute of Limitations > Tolling

HN4[] **Antitrust & Trade Law, Sherman Act**

A plaintiff must allege fraudulent concealment with specificity under *Fed. R. Civ. P. 9(b)* and the plaintiff bears the burden of proving fraudulent concealment.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN5[] **Antitrust & Trade Law, Sherman Act**

In the most common situation, the wrongful concealment requirement is met by evidence of affirmative conduct upon the part of the defendant which would lead a reasonable person to believe that he did not have a claim for relief.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

Governments > Legislation > Statute of Limitations > Tolling

Governments > Legislation > Statute of Limitations > General Overview

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

When there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of a fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute of limitations does not begin to run until the fraud is discovered by, or becomes known to, the parties suing, or those in privity with him.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN7[] **Antitrust & Trade Law, Sherman Act**

At least in antitrust cases, where a plaintiff remains ignorant of at least some of the facts required to make out its claim, the plaintiff does not have knowledge of its claim.

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

HN8[] **Private Actions, Standing**

See *15 U.S.C.S. § 15*.

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

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

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

HN9[] **Private Actions, Standing**

Antitrust standing consists of two related inquiries. The court is required to determine whether the plaintiff has sustained injury-in-fact. If plaintiff satisfies this test, then the court must analyze whether plaintiff's injury is of the type the antitrust laws were intended to prevent.

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

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

HN10[] **Private Actions, Standing**

There are five factors which guide the exercise of the court's judgment in deciding whether a plaintiff's claim is the type of matter for which the antitrust laws were intended. Specifically, the court must look to: (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.

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

HN11[] **Private Actions, Standing**

A proper antitrust plaintiff should be a consumer, customer, competitor or participant in the relevant market or otherwise inextricably intertwined with any such entity.

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

HN12[] **Private Actions, Standing**

The existence of more direct victims of an antitrust violation may justify denial of the antitrust standing to a plaintiff because the existence of more direct victims is not likely to leave a significant antitrust violation undetected or unremedied.

Antitrust & Trade Law > Sherman Act > General Overview

HN13[] Antitrust & Trade Law, Sherman Act

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > Claims

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] Sherman Act, Claims

A claim under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, is comprised of three elements: (1) a contract, combination or conspiracy among two or more separate entities (2) that unreasonably restrains trade in a relevant market (3) and is in or affects interstate or foreign commerce.

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

HN15[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Where a firm succeeds in tampering with the competitive bidding process in such a manner that competitive bidding becomes a farce, an unreasonable restraint of trade has occurred.

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

Antitrust & Trade Law > Exemptions & Immunities > General Overview

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

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

HN16[] Regulated Practices, Price Fixing & Restraints of Trade

Under the Noerr-Pennington exemption, concerted activities to influence the political processes are exempt from this coverage of the antitrust laws, even if they restrain competition.

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

HN17[] **Regulated Practices, Price Fixing & Restraints of Trade**

The Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.

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

HN18[] **Regulated Practices, Price Fixing & Restraints of Trade**

Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as a part of a broader scheme itself violative of the Sherman Act.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN19[] **Estoppel, Collateral Estoppel**

When an issue of fact or law is actually litigated and determined by valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN20[] **Estoppel, Collateral Estoppel**

Where parties have previously litigated an issue in a state court proceeding, collateral estoppel always precludes relitigation of the issue in a subsequent federal court proceeding.

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > Full Faith & Credit Statutes

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

HN21[] **Full Faith & Credit, Full Faith & Credit Statutes**

See *28 U.S.C.S. § 1738*.

Civil Procedure > ... > Preclusion of Judgments > Full Faith & Credit > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN22[] **Preclusion of Judgments, Full Faith & Credit**

28 U.S.C.S. § 1738 requires a federal court to give a prior state court judgment the same preclusive effect that it would have had in that state.

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**

With respect to the rule of collateral estoppel in Ohio, a point or a fact which is actually and directly in issue in a former action and was there passed upon and determined by a court of competent jurisdiction may not be drawn in question in any future action between the same parties or their privies, whether the cause of action in the two actions be identical or different.

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**

An exception to collateral estoppel allows relitigation of an issue where there are procedural differences between the two courts. Relitigation is allowed where a new determination of the issue is warranted by differences in the quality or expensiveness of the procedures followed in the two courts.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN25[] **Estoppel, Collateral Estoppel**

An exception to collateral estoppel supports allowing a new determination where the party sought to be precluded did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. That exception provides that there is a clear and convincing need for a new determination of the issue when the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN26[] **Estoppel, Collateral Estoppel**

An exception to the general rule of issue preclusion recognizes differences in the burden of persuasion with respect to an issue as a basis for allowing relitigation of that issue. The exception allows relitigation where a party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the subsequent action.

Counsel: **[**1]** Frank B. Moore, Rocky River, Ohio, Matthew A. Zidar, Cleveland, Ohio, for Plaintiff.

Larry Gordon, Cleveland, Ohio, Wm. Tousley Smith, Cleveland, Ohio, for Defendant.

Judges: Dowd, District Judge.

Opinion by: DOWD

Opinion

[*425] MEMORANDUM OPINION

DOWD, District Judge

Before the Court is the motion for summary judgment of defendant, Peabody Galion, Inc., (Peabody). For the reasons stated below, the motion for summary judgment is denied.

I. FACTUAL BACKGROUND

This case arose out of the award of a contract to build a solid waste transfer station (transfer station) for the City of Cleveland (City) in May 1975. The City retained Seminole Management Consultants, Inc., (Seminole) to prepare the specifications for the transfer station and to assist the City in reviewing bids for the project. Seminole's president, Lawrence Plants (Plants), was principally responsible for this work. F. Buddie Contracting, Inc. (Buddie), the plaintiff in this action, was one of the bidders on the project. Peabody, through one of its local distributors, William Seawright (Seawright), also bid on the project.

A number of companies bid for the transfer station contract. In relevant part, those bids were

Buddie Contracting, Inc.	$1,247,700.00
Stephens Paint & Corp.	1,472,000.00
Peabody-Galion	1,578,766.00

[2]** A review of the bids, however, indicates that the bidders found the specifications ambiguous and bid on slightly different projects. The City then turned to its consultant, Seminole, to review the bids and to make a recommendation for the award of the contract. Seminole recommended that the City award the contract to Peabody as the lowest responsible bidder and that the City disqualify Buddie's bid as defective. Acting on Seminole's recommendation, the City then awarded the contract to Peabody on June 20, 1975.

On July 9, 1975, Buddie filed a taxpayer's action in Cuyahoga County Common Pleas Court (Buddie I) alleging a violation of the state laws regulating the award of public contracts. Buddie sought an injunction barring execution of the contract and readvertisement of the bids. Within two weeks, the trial judge heard the case on plaintiff's application for a preliminary injunction.

On August 6, 1975, the trial judge entered judgment in favor of the defendants in the Buddie I action. In his opinion, the trial judge indicated that he had, apparently on his own motion, consolidated the trial on the merits with the application for preliminary injunction pursuant to Ohio Civil **[**3]** Rule 65(B)(2). In relevant part, the trial judge's opinion stated that he found no evidence of improper conduct or collusion involving any public official or bidder. He further found that Seminole was justified in suggesting rejection of Buddie's bid because of defects in the bid. In conclusion, the trial judge, recognizing the limited role of courts in reviewing awards of public contracts, upheld the selection of Peabody as the successful bidder.

Buddie appealed the decision of the Buddie I court to the Eighth District Court of Appeals. That Court affirmed the trial judge's decision in an opinion filed on December 2, 1976. Construction of the transfer station proceeded throughout this period and the transfer station is now complete.

Subsequent to the close of the Buddie I action, press revelations and a subsequent prosecution disclosed an unlawful relationship between Seminole and Peabody. Seminole's president, Plants was discovered to be a close business associate of defendant, Seawright, the president of a Peabody distributor. On December 21, 1978, the Cuyahoga County Grand Jury indicted Seawright, Seminole, and Plants on criminal charges arising out of their involvement in the **[**4]** award of the contract for the transfer station. Ultimately, Seawright pled guilty **[*426]** to one count of attempt and complicity to have an unlawful interest in a public contract. Seminole pled guilty to one count of having an unlawful interest in a public contract and Plants pled guilty to attempt to have an unlawful interest in a public contract. The remaining counts of the indictment were dismissed as part of the plea bargain.

Frank John Gerdnic, vice president of marketing for Peabody's solid waste division, received a grant of immunity in exchange for his testimony in this case. His sworn statement, attached to the brief in opposition to the motion for summary judgment, indicates that Peabody had knowledge of Seawright's unlawful conduct and took no action to disassociate itself from Seawright.

II. PROCEDURAL HISTORY

After the entry of the guilty pleas, Buddie instituted this federal court action alleging violations of the antitrust laws. In brief, Buddie alleges that the defendants conspired to secure the award of the contract for Peabody, even though Peabody was not the lowest responsible bidder. It claims that this conspiracy violated both *§ 1* of the Sherman Act, *15 **[**5]** U.S.C. § 1*, and Ohio's Valentine Act, *Ohio Rev. Code § 1331.01 et seq*.

Peabody now moves for summary judgment arguing that (1) Buddie's cause of action is barred by the statute of limitations; (2) Buddie lacks standing to sue for damages under the antitrust laws; and (3) Buddie's allegations fail to state a violation of the antitrust laws. Even if Buddie's legal theories and factual submission survive these legal challenges, Peabody further contends that collateral estoppel prevents Buddie from establishing facts required to make out its cause of action.

Before turning to these specific challenges, the Court notes the unique standard which applies to the review of summary judgment motions in an antitrust case. Historically, the courts have been extremely reluctant to dispose of antitrust litigation on summary judgment motions. *See* *Poller v. Columbia Broadcasting System, Inc. 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*. While that standard has been somewhat relaxed, *see* *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 284-90, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)*, summary judgment is still disfavored, particularly where factual issues **[**6]** remain subject to dispute. *See* *Smith v. Northern Michigan Hospitals, Inc., 703 F.2d 942 (6th Cir. 1983)*. While it is debatable whether this attitude toward summary judgment applies to motions presenting principally legal issues, the Court approaches the motion mindful of the particular hazards associated with granting summary judgment in antitrust litigation.

III. STATUTE OF LIMITATIONS.

HN1[] A four year statute of limitations applies to federal antitrust claims. [1] The contract award which gives rise to this lawsuit was made on June 20, 1975 - over five years followed until the filing of the complaint in this case on December 19, 1980. Absent some tolling provision, therefore, Buddie's claim will be barred by the statute of limitations.

Buddie's complaint **[**7]** contains an allegation of fraudulent concealment which Buddie claims will result in a tolling of the statute of limitations. [2] The Sixth Circuit set out **[*427]** the requirements for a party alleging fraudulent concealment in *Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1975)*. In that case, the Court stated:

> ***HN3***[] Three elements must be pleaded in order to establish fraudulent concealment: (1) wrongful concealment of their actions by the defendant; (2) failure of the plaintiff to discover the operative facts or the basis of his cause of action within the limitations; and (3) plaintiff's due diligence until discovery of the facts.

Id. at 394 (citation omitted). Further, ***HN4***[] plaintiff must allege fraudulent concealment with specificity under *Fed. R. Civ. P. 9(b)* and plaintiff bears the burden of proving fraudulent concealment. *523 F.2d at 394*.

[8]** Before analyzing Buddie's claim of fraudulent concealment, it is important to recognize the effect of the procedural posture of this case on the analysis. Although plaintiff bears the burden of proof on the issue of fraudulent concealment, on a motion for summary judgment, this Court must only determine whether a genuine issue of material fact exists which justifies a trial. This Court must evaluate, therefore, whether Peabody's motion establishes the absence of a genuine issue regarding any of these elements required for plaintiff's claim of fraudulent concealment.

Peabody has challenged Buddie's claim of fraudulent concealment on the ground that it fails to contain any of the three elements required by *Dayco*. Upon review, this Court concludes that Peabody's motion has not demonstrated the absence of any genuine issue as to any of the elements of fraudulent concealment. The motion to dismiss on this basis, therefore, is denied.

A. *Wrongful Concealment*.

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[1] In relevant part, the statute of limitations provides that

> ***HN2***[] Any action to enforce any cause of action under . . . this title shall be forever barred unless commenced within four years after the cause of action accrued.

15 U.S.C. § 15b.

[2] In relevant part, the complaint alleges

> Plaintiff had no knowledge of said antitrust violations as they affected the bidding process and the award, or of any facts which might have led to discovery thereof at any time prior to disclosures contained in Cleveland Press articles in 1977, which disclosed the business and personal relationships between the defendants. Defendants deceptively secured the appointment of defendants, SEMINOLE and PLANTS as management consultants to the City of Cleveland through the influence of defendant SEAWRIGHT, a close friend and business associate of defendant, PLANTS. SEAWRIGHT was at the same time a distributor for defendant, PEABODY GALION. Defendants, SEMINOLE and PLANTS, thereafter tailored the specifications which they recommended to the City of Cleveland to fit defendant PEABODY GALION'S equipment and, indeed, defendant, PEABODY GALION did, in fact, draft the specifications. For their roles in the award of this contract, defendants, SEMINOLE, SEAWRIGHT and PLANTS, were indicted by a Cuyahoga County Common Pleas Grand Jury and entered pleas of guilty - SEMINOLE to having an unlawful interest in a public contract; PLANTS to attempt and having an unlawful interest in a public contract; and SEAWRIGHT to attempt and complicity. As a result, plaintiff, by the exercise of due diligence, did not discover, and could not have discovered, the violations alleged herein prior to 1977.

Complaint at para. 17.

Under the test set forth in *Dayco*, the first element of Buddie's claim of fraudulent concealment is "wrongful concealment of their actions by the defendants." **HN5**[] In the most common situation, this requirement is met by **[**9]** evidence of "affirmative conduct upon the part of the defendant which would . . . lead a reasonable person to believe that he did not have a claim for relief." *Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978)*. A defendant engaged in land fraud, for example, might satisfy this requirement by forwarding documentation relating to the purchased land to the victim.

In this case, Buddie does not contend that Peabody engaged in any "affirmative conduct" after the date of the contract award. Rather, Buddie has raised a genuine issue as to the existence of a conspiracy before the award of the contract and Peabody's participation in that conspiracy. From these facts, Buddie argues that it has satisfied the requirement of showing wrongful concealment.

This case, therefore, raises the issue of whether a conspiracy, which by its nature is self-concealing, will serve as a substitute for affirmative conduct by the defendants in satisfying the requirement of wrongful concealment. While this issue has been the subject of significant judicial comment, particularly in the context of antitrust claims, neither counsel nor the Court have located a case where a court has **[**10]** accepted a fraudulent concealment claim based upon the presence of a self-concealing conspiracy. **[*428]** Those courts which have considered the issue as a theoretical matter, however, have arrived at inconsistent results. Compare *Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248 (9th Cir. 1978)*; *In re Fertilizer Antitrust Litigation*, 1979-2 Trade Cases para. 62,894 (E.D. Wash. 1979); and *Hall v. E.I. DuPont DeNemours & Co., 312 F. Supp. 358 (E.D. N.Y. 1970)* (rejecting a self-concealing conspiracy theory) with *Ashland Oil Co. of California v. Union Oil Co. of California, 567 F.2d 984 (TECA 1977)* and *Chambers & Barber, Inc. v. General Adjustment Bureau, 60 F.R.D. 455 (S.D.N.Y. 1973)* (accepting a self-concealing conspiracy theory).

In the absence of controlling authority, resolution of this issue requires a consideration of the policies behind the statute of limitations and the fraudulent concealment exception. The Supreme Court's decision in *Bailey v. Glover, 88 U.S. (21 Wall.) 342, 22 L. Ed. 636 (1874)*, the principal early formulation of the doctrine of fraudulent concealment, provides the starting point for this review. In *Bailey*, the Court **[**11]** rejected a statute of limitations defense to a claim by a trustee-in-bankruptcy that the debtor had transferred his assets to his wife's name to avoid the claims of his creditors. Analyzing the concept of fraudulent concealment in the context of the statute of limitations, the Court stated that statutes of limitations:

> were enacted to prevent frauds; to prevent parties from asserting rights after the lapse of time had destroyed or impaired the evidence which should show that such rights never existed, or had been satisfied, transferred, or extinguished, if they ever did exist. To hold that by concealing a fraud, *or by committing a fraud in a manner that it concealed itself* until such time as the party committing the fraud could plead the statute of limitations to protect it, to make the law which was designed to prevent fraud the means by which it is made successful and secure.

Id. at 349 (emphasis added). Rejecting any distinction between the rule applicable in cases brought in law or in equity the Court went on to hold that

> **HN6**[] when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of a fraud which is the foundation **[**12]** of the suit, and when the fraud has been concealed, *or is of such character as to conceal itself*, the statute does not begin to run until the fraud is discovered by, or becomes known to, the parties suing, or those in privity with him.

Id. at 349-50 (emphasis added). The *Bailey* Court, therefore, clearly indicated that it would accept a claim of self-concealing conspiracy as meeting the requirement of wrongful concealment.

The *Bailey* decision serves as the basis for the modern doctrine of fraudulent concealment in ***antitrust law***. [3] More recently, in *Dayco*, the Sixth Circuit stated that the reason for tolling the statute of limitations was the plaintiff's ignorance of its claim because of the defendant's conduct. The statute of limitations exists for the purposes of barring stale conflicts. *523 F.2d at 394*. While the statute allows the defendant to repose after the passage of time, this policy is subsidiary to the policy that the plaintiff should have some opportunity to litigate his claim.

[13]** It is in this context that the Court must consider Buddie's claim that a self-concealing conspiracy will substitute for affirmative conduct. The preceding analysis indicates that the doctrine of fraudulent concealment should be construed to give plaintiffs at least some opportunity to litigate claims which are not discovered because of the conduct of the defendants before the statute of limitations runs. While a conspiracy is self-concealing, the **[*429]** plaintiff lacks the opportunity to bring the claim. A self-concealing conspiracy, therefore, is the logical equivalent of affirmative acts which conceal a potential plaintiff's claim. Upon this analysis, the Court concludes that a self-concealing conspiracy will suffice to meet the requirement of wrongful concealment.

The propriety of this is demonstrated by consideration of the anomalous results which would result from a contrary ruling. If a contrary result obtained, the law would reward people who entered into successful conspiracies. In an unsuccessfully concealed conspiracy, the participants must engage in continuing conduct to keep their conspiratorial acts secret. This continuing conduct would constitute the wrongful **[**14]** concealment required by *Dayco* under any analysis. In a successfully concealed conspiracy, however, the conduct which takes place prior to the implementation of the conspiratorial plan is sufficient to keep the entire scheme secret; continuing conduct is not required. This Court can see no reason to distinguish between these two situations and finds they are equally prejudicial to plaintiffs' ability to discover and litigate their claims, the principal reason for the existence of a fraudulent concealment exception to the statute of limitations. [4]

[15]** The Court also rejects Peabody's contention that the legislative history of the antitrust statute of limitations requires a different result. Specifically, Congress rejected a formulation of the statute which would have provided that the statute began to run when the "plaintiff discovered" the facts relied upon for proof of its claim. The floor debates, however, indicate that Congress believed that the statute of limitations, as enacted, incorporated the rule enunciated in *Bailey*. The legislative history evidence, therefore, supports a conclusion that a self-concealing conspiracy will serve as a substitute for wrongful concealment. *See generally*, Note, 14 *Conn. L. Rev*. 116, 119-20 nn. 28-32.

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[3] For excellent discussions of the developing law of fraudulent concealment and the relationship of the *Bailey* decision to that development, *see* Note, "The Application of the Doctrine of Fraudulent Concealment to Modern Federal Trade Conspiracy Cases," 14 *Conn. L. Rev*. 115 (1981); Note, "Intent to Conceal: Tolling the Antitrust Statute of Limitations under the Fraudulent Concealment Doctrine," 64 *Geo. L.J*. 791 (1976).

[4] The best argument raised in opposition to acceptance of a self concealing conspiracy exception to the requirement of showing affirmative conduct appears in *Hall*. In that case, the court stated that

> It is in the nature of a conspiracy that there be secrecy; mere non-disclosure or denial of the existence of a conspiracy does not constitute fraud or deceit for tolling purposes. If it did, the tolling exception to the statute of limitation would eclipse the basic statute itself.

312 F. Supp. at 362. This Court does not agree with the *Hall* Court's analysis. A self-concealing conspiracy exception will not significantly affect the availability of a fraudulent concealment exception to the statute of limitations. Plaintiffs who claim fraudulent concealment must still demonstrate that they remained ignorant of the existence of the conspiracy and that they exercised due diligence in attempting to discover the conspiracy. These additional requirements will prevent the exception from overwhelming the rule as the *Hall* court feared.

Further, the federal antitrust statute of limitations relates to a range of potential antitrust claims beyond *§ 1* conspiracies. In those situations, where the existence of a conspiracy is not an issue with regards to merits of the claim, a self-concealing conspiracy theory might not apply. In the situation of a *§ 1* claim, however, a successful self-concealing conspiracy leaves plaintiff ignorant of one element of its cause of action. In contrast, in a monopolization claim, for example, the existence of a successful self-concealing conspiracy does not necessarily mean that plaintiff is ignorant of all the facts giving rise to its cause of action.

Having concluded that the presence of a self-concealing conspiracy will serve as a substitute for wrongful concealment by the defendants, the Court must now turn to a consideration of the factual matters in this case. Buddie has raised a genuine issue of fact regarding the existence of the conspiracy based upon the record of the criminal prosecution of Plants, Seawright and Seminole. Further, Buddie has shown that the conspiracy was of the type that would be expected to conceal **[**16]** itself. The conspiracy remained secret through a prior state court judicial proceeding and for over two years thereafter, only coming to light after a journalistic investigation. Under these circumstances, the Court concludes that there are genuine issues of material fact surrounding Buddie's claim of wrongful concealment.

B. *Buddie's lack of knowledge*.

The Court next turns to consideration of the second element of fraudulent concealment **[*430]** - failure of the plaintiff to discover the operative facts that are the basis of its cause of action. The parties in this case are in substantial agreement regarding the development of Buddie's knowledge of the facts underlying its claim. The issue for this Court to decide, therefore, is whether these facts fulfill the requirement that Buddie lacked knowledge of his claim.

Peabody asserts, and Buddie does not dispute, that at the time of the award of the contract in June, 1975, Buddie knew that (1) Peabody was awarded the contract without having the lowest monetary bid; (2) Seminole had used Peabody's specifications to draft the project specifications; (3) Peabody refused to quote equipment prices to any competitor; and (4) Seminole **[**17]** recommended Peabody over Buddie to the City.

Buddie also had "suspicions" as to the cause of these events. Regardless, Buddie has raised a genuine issue of fact regarding its awareness of the relationship between the defendants until the press revelations disclosed their relationship in 1977. Recognizing that "conspiracy" is an element of plaintiff's cause of action, and that a genuine issue of material fact exists as to Buddie's knowledge of the conspiracy, the issue remains whether Buddie may fulfill the lack of knowledge requirement where it had suspicions, but no proof, that a conspiracy existed in 1975.

The parties differ on the legal standard application of the resolution of this question. Peabody argues that "any fact that should excite his suspicion is the same as knowledge of his entire claim." *Wood v. Carpenter, 101 U.S. (11 Otto) 135, 143, 25 L. Ed. 807 (1879)*. That view has been somewhat eroded, however, particularly in the antitrust context and Buddie cites two relatively recent cases in which circuit courts have held that plaintiffs with suspicions, but no proof, of antitrust conspiracies were not barred from establishing their lack of knowledge.

In *In re Beef **[**18]** Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979)*, the Fifth Circuit confronted the lack of knowledge requirement in the context of an antitrust claim. In that case, plaintiffs filed their action in 1975, relying on an allegation of fraudulent concealment to allow recovery of damages for the period preceding 1971. Defendants moved for summary judgment on the fraudulent concealment allegation arguing that plaintiffs had knowledge of their claim because of the filing of a similar lawsuit in 1968 by another plaintiff. In 1975, the plaintiffs in the other suit were awarded judgment. Nonetheless, the Fifth Circuit reversed the district court's grant of summary judgment to defendants on the availability of plaintiffs' fraudulent concealment claim despite finding that "the plaintiffs knew or should have known in 1968 and 1969 the allegations" of this complaint. The Court stated:

> The plaintiffs' knowledge of the [other] complaint, however, is not *as a matter of law* tantamount to actual or constructive knowledge of their claim. . . . The mere filing of a similar lawsuit, without more, does not necessarily give "good ground" because this suit might well be frivolous or baseless.

[19]** *Id. at 1171*. Under these circumstances, the Court concluded that the lack of knowledge issue should have been left for trial.

The Ninth Circuit reached a similar result in *Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687 (9th Cir. 1977)*. In that case, a jury awarded the plaintiff damages for injuries covering the period from 1953 to 1973. As the suit was filed in 1968, plaintiff relied upon fraudulent concealment to toll the statute of limitations and allow recovery for a large portion of this period. Greyhound argued that Mt. Hood had knowledge of its claim because

> Mt. Hood's president expressed concern over Greyhound's expansion by acquiring other carriers, and that he also stated his belief that the consent decrees were being violated.

Id. at 698. Greyhound argued that these expressions indicated sufficient knowledge of Mt. Hood's claim to require Mt. Hood to initiate its own investigation. The Ninth Circuit rejected this view, stating that

> **[*431]** in the face of Greyhound's assurances and denials of responsibility, we cannot say as a matter of law that Mt. Hood's awareness . . . amounted to notice of potential antitrust claims **[**20]** against Greyhound.

Id. at 698-99. Knowledge of some of the facts giving rise to the claim, therefore, did not constitute knowledge of the claim under this analysis.

These authorities stand for the proposition that, ***HN7***[] at least in antitrust cases, where a plaintiff remains ignorant of at least some of the facts required to make out its claim, the plaintiff does not have knowledge of its claim. In this case, Buddie lacked knowledge of the relationship between the defendants. That relationship is necessary to prove "conspiracy," an element of Buddie's antitrust claim. Without that knowledge, Buddie lacked knowledge of the antitrust claim, and therefore is not barred from establishing lack of knowledge.

C. *Buddie's due diligence in investigating its claim*.

The third element of fraudulent concealment which Buddie must establish is its due diligence in investigating the facts giving rise to its claim. *Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389, 394 (6th Cir. 1975)*. In this case, Buddie filed the Buddie I action in state court challenging the contract award. That suit did not include an antitrust claim and the discovery and trial of that suit did not disclose **[**21]** the defendants' relationship, the basis for the conspiracy claim in this suit. The narrow issue for decision here, therefore, is whether Buddie may make out its allegation of due diligence despite its failure to uncover the conspiracy during Buddie I.

Upon review, this Court concludes that a genuine issue of material fact exists as to Buddie's due diligence in investigating its claims. The fact that Buddie failed to uncover the defendants' relationship does not, standing alone, demonstrate Buddie's failure to diligently pursue its claim. Buddie I was tried on an expedited basis; less than one month elapsed between the filing of the complaint and the Court's ruling on the merit. Further, it should be noted that the existence of such a relationship was not a major issue in Buddie I action. Under these circumstances, this Court finds that it would be improper to impose a requirement that Buddie uncover the conspiracy in that state court action. [5]

[22]** D. *Conclusion*

Pursuant to this analysis, the Court finds that there are genuine issues of material fact regarding each element of the allegation of fraudulent concealment. Accordingly, the motion for summary judgment on this basis is denied.

IV. ANTITRUST STANDING

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[5] The cases cited by Peabody, *Benoit v. Burlington Industries, Inc*., 1975 Trade Cases para. 60,160 (S.D. N.Y. 1975); and *Rutledge v. Boston Woven Hose and Rubber Co., 576 F.2d 248 (9th Cir. 1978)*, do not require the opposite result. While both cases involve the filing of a second antitrust lawsuit by a plaintiff arising out of a single transaction, both of these cases are distinguishable.

In *Benoit*, the Court found that all of the facts giving rise to the second lawsuit should have been discovered by plaintiff within the original period of limitations. There was no credible evidence, unlike this case, that plaintiff could have remained ignorant of its rights while exercising due diligence in pursuing its claims in the first case.

Rutledge involved a second antitrust suit involving almost identical parties. In *Rutledge*, where a conspiracy was in issue in both antitrust claims, the Court rejected plaintiff's claims of due diligence when he failed to discover any conspiracy in the first action. In this case, however, conspiracy was not an element of the claims presented in the first lawsuit.

Peabody's next argument in support of its motion for summary judgment is that plaintiff's claim fails to allege "antitrust injury" or "antitrust standing" under the antitrust laws. [6] **[**23]** The core of Peabody's **[*432]** contention is that while Buddie may have been damaged as a result of the transaction giving rise to this lawsuit, those injuries are not compensable under the antitrust laws. Analysis of Peabody's contention, therefore, requires consideration of the developing case law discussing antitrust standing. [7]

Section 4 of the Clayton Act, the provision authorizing private causes of action for antitrust violations, is also the statutory source for the developing doctrine of antitrust standing. In relevant part, that statute provides:

> ***HN8***[] Any person who shall **[**24]** be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States. . . .

15 U.S.C. § 15. A review of this statute does not suggest any intent to limit the scope of the antitrust laws. Regardless, the Courts have developed the doctrine of antitrust standing as a limitation on the availability of the § 4 remedy. The Court must now determine whether Buddie's claim falls within one of those limitations.

The concept of antitrust standing has undergone a significant evolution within the past decade. The Sixth Circuit and the Supreme Court have each issued three major rulings on the concept of antitrust standing during the past decade. The developing case law is summarized in *Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079 (6th Cir. 1983)*, and need not be repeated in this opinion.

Analysis of a plaintiff's ***HN9***[] antitrust standing consists of two related inquiries. The Court is required to determine whether the plaintiff has sustained injury-in-fact. If plaintiff satisfies this test, then the Court must analyze whether plaintiff's injury is of the type the antitrust laws were intended **[**25]** to prevent. The Court will separately analyze these two components of antitrust standing.

A. *Injury-in-Fact*.

The early Sixth Circuit decisions on antitrust standing, *Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975)* and *Chrysler Corp. v. Fedders Corp., 643 F.2d 1229 (6th Cir. 1981)*, clearly indicated that injury-in-fact was part of the inquiry. The most recent Supreme Court and Sixth Circuit decisions have not contained any analysis of injury-in-fact. *See* *Associated General Contractors of California, Inc. (AGCC) v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, *Blue Shield of Virginia v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*, *Southaven Land Company v. Malone & Hyde, Inc., 715 F.2d 1079 (6th Cir. 1983)*. [8] The indication from these decisions, however, is that the courts still consider injury-in-fact as part of the inquiry. The Supreme Court's distinction of antitrust standing from constitutional standing, *see* *AGCC, 103 S. Ct. at 907 n.31*, clearly indicates that injury-in-fact must be presented to meet the constitutional standing requirement. Further, as a

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[6] The terms antitrust injury and antitrust standing are used almost interchangeably in this area of the law. In essence, antitrust injury is the element which is added to traditional notions of standing to produce antitrust standing. For ease of reference, the Court will phrase its discussion of these terms as "antitrust standing."

[7] The term "antitrust standing" is distinct from traditional concepts of "standing." Recently, the Supreme Court discussed this distinction, stating:

> the label "antitrust standing" has traditionally been applied to some of the elements of this inquiry. As commentators have observed, the focus of the doctrine of "antitrust standing" is somewhat different from that of standing as a constitutional doctrine. Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the Court must make a further determination of whether the plaintiff is a proper party to bring a private antitrust action.

Associated General Contractors of California, Inc. v. California State Counsel of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 907 n.31, 74 L. Ed. 2d 723 (1983) (citation omitted).

[8] The failure of the *McCready, AGCC*, and *Southaven* courts to discuss injury-in-fact does not remove this inquiry from the analysis. Those courts focused their attention upon the conceptually more difficult issues relating to the second part of the test. Under these circumstances, their failure to specifically address injury-in-fact is not significant.

logical matter, **[**26]** the determination of whether there is injury-in-fact must precede **[*433]** the analysis of whether this injury is of the type which the antitrust laws were intended to prevent. The Court, therefore, believes that the analysis of Buddie's antitrust standing begins with inquiry into injury-in-fact.

Buddie's claim to injury-in-fact requires a finding that "but for" the allegedly unlawful conduct of the defendants, Buddie would have received the award of the construction contract for the treatment station. [9] Two obstacles loom in Buddie's path which must be surmounted before a finding of injury-in-fact can be made. First, the City's award of the contract **[**27]** to Peabody must be set aside. The possibility of setting that award aside, and the collateral estoppel effect of the Buddie I judgment upholding the award, are discussed later in this opinion in the context of collateral estoppel.

Even assuming that the award of the contract to Peabody may be vacated, the Court must then consider whether Buddie can prove that the City would have made the award to Buddie. Initially, Peabody argues that the City's retention of the option to reject all of the bids precludes the required finding that Buddie would have received the award. The facts in this case **[**28]** indicate that Buddie's bid was significantly lower than Peabody's and that Buddie envisioned a fairly similar completion date for the transfer station. With respect to this contention, therefore, the Court finds that Buddie has raised a genuine issue of material fact regarding whether the City would have exercised its option to reject the other bids if it could not award the contract to Peabody.

Alternatively, Peabody contends that the collateral estoppel effect of the Buddie I court's finding that Buddie's bid was defective precludes a finding that Buddie would have received the contract award. The Court will analyze this contention in the context of its discussion of collateral estoppel.

Under this analysis, if collateral estoppel does not preclude the fact finder from conducting a *de novo* review of the contract award, [10] the Court believes that Buddie has raised a genuine issue of fact regarding whether it would have received the award over Peabody's bid, and thus, has sustained injury-in-fact.

[29]** B. *Proper Type of Injury*.

The recent decisions in *AGCC* and *Southaven* have begun to focus the inquiry for courts analyzing whether a potential antitrust plaintiff's injuries are of the type the antitrust laws were intended to prevent. Previously, the courts had considered this issue in the context of the directness of the injury or whether the interests the plaintiff was attempting to protect were within the target area of the antitrust laws. The parties in this case briefed the antitrust injury issue in view of those authorities. [11] With the decision in *AGCC*, however, that analysis is no longer relevant. *See* *Crimpers Promotions, Inc. v. Home Box Office, Inc., 724 F.2d 290, 293 (2d Cir. 1983)*.

In *AGCC*, the Supreme Court considered whether a carpenters' union had standing to raise an antitrust claim against a contractors' **[**30]** association which allegedly engaged in a conspiracy to direct construction **[*434]** contracts to nonunion firms. In that case, the Court reinstated the district court dismissal of the complaint as failing to state a claim under the antitrust laws because of a lack of antitrust standing. The Supreme Court relied upon common law concepts of "proximate cause" to define the appropriate types of injuries, *103 S. Ct. at 907-08*, and

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[9] Buddie's claim of injury-in-fact also requires a finding that Buddie would have profited from receiving the contract award. As such, calculation of Buddie's damages will require at least some conjecture. The issue of whether this calculation is too speculative to support an award of damages, however, has not been raised in this context in the summary judgment motion. The Court, therefore, reserves decision on this issue.

[10] Public contracting law generally limits a court's review of a contracting authority's award to an abuse of discretion standard. Those cases, however, arise in a different factual context than this antitrust claim. Neither party has briefed the issue of the appropriate standard of review in the context of this summary judgment motion. The Court, therefore, reserves decision on this issue.

[11] In fairness to the parties, the Court acknowledges that the summary judgment motions were briefed prior to the decisions in the *AGCC* and *Southaven* cases.

proceeded to "identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *Id. at 908*.

As noted by the *Southaven* court, the Supreme Court identified ***HN10***[] five factors in the *AGCC* decision which guide the exercise of the Court's judgment in deciding whether plaintiff's claim is the type of matter for which the antitrust laws were intended. Specifically, the Court ruled that it should look to:

> (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) **[**31]** 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.

715 F.2d at 1085 (citations omitted). As noted by the Sixth Circuit, however, it is unclear whether this list of factors is exhaustive or merely illustrative. *Id. at 1086, n.9*. In any case, this Court will proceed to analyze Buddie's claim under the five factors identified in the *AGCC* and *Southaven* decisions.

1. *Causal Connection*.

The first factor identified by the *Southaven* and *AGCC* courts is the "causal connection between the antitrust violation and harm to the plaintiff and whether that harm was intended to be caused." *Southaven, 715 F.2d at 1085*. Buddie has raised a genuine issue of fact regarding whether the alleged antitrust violation in this case resulted in the award of the contract to Peabody, not Buddie. As such, there is a close causal connection between the alleged violation and the injury claimed by Buddie. Moreover, if the defendants engaged in a conspiracy to divert **[**32]** the award from Buddie to Peabody, it can be inferred that they intended to cause the harm which Buddie sustained when it did not receive the contract award.

2. *Plaintiff's Status*.

The next inquiry focuses upon Buddie's status in the relevant market. As the Supreme Court stated in *AGCC*,

> As the legislative history shows, the Sherman Act was enacted to assure *customers* the benefits of price competition, and our prior cases have emphasized the central interest in protecting the economic freedom of *participants* in the *relevant market*.

103 S. Ct. at 908-09, (emphasis added). Under this authority, ***HN11***[] a proper antitrust plaintiff should be a "consumer, customer, competitor or participant in the relevant market or otherwise inextricably intertwined with any such entity." *Southaven, 715 F.2d at 1087*. In this case, Buddie satisfies this element of the test because of its status as a competitor of Peabody's. [12]

[33]** 3. *Directness of the Injury*.

Although concepts of directness are difficult to apply, the *Southaven* court indicated that the presence of "highly speculative" damages is an indicator of indirectness. *715 F.2d at 1087*. In this case, calculation of Buddie's damages from the loss of the contract award is necessarily speculative. In essence, this calculation requires the factfinder to determine how much profit Buddie would have made on the construction project if it had received the award. **[*435]** As Buddie did not construct the plant, this inquiry necessarily requires estimates of the costs Buddie would have incurred. Under this analysis, the Court believes that Buddie's damages are somewhat indirect and speculative, although the claim is not as speculative as the damage theory rejected by the *Southaven* court. *Id. at 1087-1088*. [13]

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[12] The relevant geographic and product markets are discussed later in this opinion. *See infra* at slip op. pp. 35-36.

[13] For a related discussion, *see* note 9 *supra*.

4. *Potential For Duplicative Recovery*.

The concern with potential duplicative recovery derives from the **[**34]** Supreme Court's decision in *Blue Shield of Virginia v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*. In that case, the Court expressed concern regarding the "risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction that violated the antitrust laws." *Id. at 474-75*. In this case, there are only two realistic potential plaintiffs - Buddie and the City. As Plants and Seminole were acting as agents for the City when they engaged in the alleged antitrust violation, it seems unlikely that the City has a claim under the antitrust laws. Under these circumstances, the Court finds that there is very little risk of duplicative recovery arising from allowing Buddie to proceed on this claim.

5. *Existence of More Direct Victims*.

In *Southaven*, the Sixth Circuit indicated ***HN12***[] the existence of more direct victims of an antitrust violation may justify denial of the antitrust standing to a plaintiff because the existence of more direct victims "is not likely to leave a significant antitrust violation undetected or unremedied." *Southaven, 715 F.2d at 1087*, quoting *AGCC, 103 **[**35]** S. Ct. at 911*. As noted in the preceding section, the City is a more direct victim of the alleged violation. The City, however, is probably incapable of pursuing an antitrust claim, thereby leaving Buddie as the most direct victim capable of pursuing an antitrust claim.

6. *Summary of AGCC/Southaven Factors*.

In sum, analysis of the causal connection and Buddie's status in the relevant market support a conclusion that Buddie's injuries are within the coverage of the antitrust laws. Analysis of the directness of the injury supports a contrary decision while analysis of the potential for duplicative recovery and the existence of more direct victims do not significantly support either conclusion. The Court must now consider whether this balance amongst the factors supports a finding of antitrust standing.

Neither the *AGCC* or *Southaven* decisions provide guidance to the Court on how the ultimate issue of antitrust standing is to be decided when all the factors do not support the same conclusion. In the *Southaven* case, however, the Sixth Circuit ruled that the causal connection alone was not enough to satisfy the antitrust standing requirement. In this case, Buddie has demonstrated **[**36]** the causal connection as well as the proper status within the market. Under these circumstances, the Court concludes that Buddie has sustained the type of injury which the antitrust laws were intended to prevent. [14]

C. *Conclusion on Antitrust Standing*.

Pursuant to this analysis, the Court concludes that **[**37]** Buddie has raised a genuine issue of material fact regarding injury-in-fact and the appropriateness of its claim for relief under the antitrust laws. Accordingly, **[*436]** the Court concludes that summary judgment on this basis is inappropriate.

V. APPLICABILITY OF THE ANTITRUST LAWS TO BUDDIE'S CLAIM.

Peabody next argues that Buddie's claim is not actionable under the antitrust laws. Peabody argues that the allegations of Buddie's claim, even if proven, would not constitute a violation of *§ 1* of the Sherman Act. Alternatively, Peabody argues that the conduct complained of in the complaint falls within the *Noerr-Pennington*

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[14] The *Southaven* and *AGCC* courts also supported their denials of antitrust standing to plaintiffs because the plaintiffs' claims were "remedial under other laws." *Southaven, 715 F.2d at 1088*, *AGCC, 103 S. Ct. at 911*. In this case, Buddie has an arguable tort claim for intentional interference with business relationships. While Buddie could pursue this action in state court, it is not as clearly preferable to a federal antitrust claim as the matters discussed in *Southaven* or *AGCC*. Under this analysis, and considering the limited role given this factor by the *Southaven* and *AGCC* courts, the Court finds the existence of other remedies is not a significant factor in the analysis.

exemption from the antitrust laws. Upon review, the Court finds neither of these arguments well taken and denies the motion for summary judgment on this basis.

A. *Applicability of § 1 of the Sherman Act*.

Peabody argues that Buddie's complaint does not, as a matter of law, allege a violation of *§ 1* of the Sherman Act. Peabody characterizes Buddie's complaint as a claim that "sham bidding" constitutes a refusal to deal in violation of *§ 1* of the Sherman Act. Peabody claims, however, that the antitrust laws do not recognize such a cause of action.

[38]** Analysis of this argument begins with a review of the relevant statutory language. *Section 1* of the Sherman Act states that

> ***HN13***[] Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

15 U.S.C. § 1. In view of this statutory language, ***HN14***[] a claim under *§ 1* of the Sherman Act is comprised of three elements - (1) a contract, combination or conspiracy among two or more separate entities (2) that unreasonably restrains trade in a relevant market (3) and is in or affects interstate or foreign commerce. *See Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190, 1195-96 (6th Cir. 1982)*.

For purposes of this summary judgment motion, Peabody does not dispute the presence of a nexus with interstate commerce. Further, Peabody's sole claim with regard to the conspiracy element is that the prior state court proceeding precludes Buddie from establishing this element. Buddie has otherwise raised a genuine issue of fact regarding the conspiracy issue through its introduction of the various documents from the state criminal proceedings. Unless collateral **[**39]** estoppel precludes relitigation of this issue, therefore, the summary judgment is inappropriate on the presence of a conspiracy.

The remaining hotly-contested issue on this portion of the summary judgment motion is whether Buddie has raised a genuine issue of fact regarding the presence of an unreasonable restraint of trade in a relevant market. Peabody argues that the type of machinations with competitive bidding alleged by Buddie in this case do not constitute an unreasonable restraint of trade. Alternatively, Peabody argues that the determination of reasonableness cannot be made in this case because of Buddie's failure to define a proper relevant market.

The court's analysis of any restraint of trade under the antitrust laws may lead to any of three conclusions - the restraint is illegal under the per se rule, the restraining is illegal under the rule of reason, or the restraint does not violate the antitrust laws. In this case, the parties have cited legal authority in support of each of these three conclusions.

The Court's inquiry begins with a consideration of whether Buddie's claim states a cause of action under the rule of reason analysis. [15] Peabody argues that the manipulation **[**40]** of competitive bidding does not **[*437]** state a claim under *§ 1*. Alternatively, Peabody argues that Buddie cannot show an anti-competitive effect upon a relevant market because the challenged conduct effected the award of only a single contract.

Peabody cites three principal decisions in support of its argument that manipulation of competitive bidding does not constitute an unreasonable restraint of trade under rule of reason analysis. *See* **[**41]** *Sitkin Smelting & Refining Co. v. FMC Corp., 575 F.2d 440 (3rd Cir. 1978)*, *Security Fire Door Co. v. County of Los Angeles, 484 F.2d 1028 (9th Cir. 1973)*, *Parmelee Transportation Co. v. Keeshin, 292 F.2d 794 (7th Cir. 1961)*. A review of these cases

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[15] Ordinarily, analysis of a restraint begins with a consideration of whether the challenged restraint is subject to analysis under the per se rule, a position advanced by Buddie citing *City of Atlanta v. Ashland Warren, Inc*., 1982-1 Trade Cases P 64,527 (N.D.Ga. 1981). Based on the current state of the pleadings, however, the Court believes that it need not consider the applicability of per se analysis at this stage of the litigation. The Court expressly reserves decision on the issue of whether the challenged restraint should be analyzed under the per se rule.

indicates that the *Security Fire Door* and *Sitkin Smelting* cases are distinguishable, while the *Parmelee* decision is neither controlling or persuasive.

In *Sitkin Smelting*, the Third Circuit upheld the district court's entry of judgment n.o.v. in favor of defendants on an antitrust claim arising from an arrangement whereby a private company (FMC) agreed to give another defendant (Krentzman) the opportunity to match the highest bid made by its competitors in the bidding process and to award the contract to Krentzman. The Court found *§ 1* inapplicable because of the principle that a trader is free to choose its customers independently. *575 F.2d at 447*. That case, however, is distinguishable because there is no evidence in the record that Krentzman tampered with the bidding process and because Krentzman agreed to match the highest bid of any other competitor. *Id. at 447*.

Likewise, the *Security Door* case is **[**42]** also distinguishable. In this case, the Ninth Circuit rejected a claim challenging a city's specification of a product made by only one manufacturer during a competitive bidding process. In that case, the court found that the choice of the specified product was made by the purchaser and that there was free and open competition amongst the prospective bidders in attempting to "get specified" by the city - the critical focus of competition. The court found no difficulty with a bidding process made uncompetitive by the specification where there was open competition for "getting specified." *484 F.2d at 1030-31*. As such, the case is distinguishable because there was no free and open competition at the critical decision making phase of the award of the transfer station contract.

The *Parmelee* decision, however, is not distinguishable from the claim presented by Buddie. In that case, the Seventh Circuit analyzed an antitrust claim alleging that the successful bidder for a competitively bid contract received the award because of the wrongful conduct of a public official. The Court concluded that plaintiffs were improperly attempting to stretch the Sherman Act "to wrongs not germaine to **[**43]** that act, even though such wrongs be actionable under state law." *292 F.2d at 804*. The reasoning behind this conclusion, however, is unclear.

A contrary conclusion was reached in the recent decision of *Richard Hoffman Corp. v. Integrated Building Systems, 581 F. Supp. 367*, 1984-1 Trade Cases P 65,936 (N.D. Ill. 1984). In that case, the district court denied a motion to dismiss where the successful bidder succeeded in imposing its choice of product upon the customer. Making allusions to the capacity of other bidders to present their products in a free market, the Court ruled that it was "unprepared to hold" that there was no claim under the antitrust laws. *Id*. at p. 68,048-49.

Upon review of these competing precedents, the Court finds the *Hoffman* decision more persuasive. ***HN15***[] Where a firm succeeds in tampering with the competitive bidding process in such a manner that competitive bidding becomes a farce, the Court believes that an unreasonable restraint of trade has occurred. Absent some economic analysis supporting a contrary conclusion, the Court will not preclude Buddie from proceeding on this theory.

Peabody has also argued that Buddie will be unable to show an effect **[**44]** upon competition in a relevant market because a relevant market cannot consist of only a single contract award. The principal decision supporting this theory is the Seventh **[*438]** Circuit's recent decision in *Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549 (7th Cir. 1980)*. In that case, the Court ruled that the "loss by the plaintiff of a single contract with a single purchaser is simply not equivalent to a deleterious effect on the market." *Id. at 558*. Under a contrary rule, "the mere fact that one party bid successfully against another party for a contract would be equivalent to an anticompetitive effect and would raise the specter of an antitrust action being used as a remedy for any tortious conduct during the course of the competition." *Id*. Under the Seventh Circuit's view, such a ruling would "have more of a tendency to discourage than to protect competition." *Id. at 559*. Accordingly, the Seventh Circuit ruled that the plaintiff's claim failed to state a claim for relief under *§ 1* of the Sherman Act.

Although the *Havoco* decision has not been adopted by any other circuit court, Peabody urges this Court to apply the "single contract" rule to this **[**45]** case. In considering this argument, the Court is mindful of Peabody's repeated challenges to Buddie's claim on the basis that Buddie has failed to produce economic analysis supporting the theory behind its claim. Yet, the economic analysis supporting the *Havoco* Court's decision is unclear. Absent such an analysis, the Court will not preclude Buddie from proceeding on its claim under the "single contract" rule.

Accordingly, the motion for summary judgment on this basis is denied.

B. *Applicability of the Noerr-Pennington exemption*.

Peabody next argues that its conduct falls within the *Noerr-Pennington* exemption from the antitrust laws. ***HN16***[] Under this doctrine, concerted activities to influence the political processes are exempt from this coverage of the antitrust laws, even if they restrain competition. Because this Court concludes that the activities involved in this case are not the type of concerted political actions covered by the *Noerr-Pennington* doctrine, the Court finds the *Noerr-Pennington* doctrine inapplicable to this case.

The *Noerr-Pennington* doctrine derives from the Supreme Court decisions in *Eastern Railroad Presidents' Conference v. Noerr Motor **[**46]** Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1960)* and *United Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*. In *Noerr*, the Supreme Court held that a railroad association's collective efforts to secure state legislation harmful to truckers were exempt from the Sherman Act, even though those efforts were deceptive and intended to reduce competition. The Court stated that it was

> clear that ***HN17***[] the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly.

365 U.S. at 136. The Court distinguished agreements to seek legislation from agreements traditionally covered by *§ 1* stating that the agreements to seek legislation "bear very little if any resemblance to the combinations normally held violative of the Sherman Act." *Id*. Relying on concepts of representative democracy to support its decision, the Court stated:

> The whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. **[**47]** To hold that the government retains the power to act in this representative capacity and yet, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.

Id. at 137. *Noerr*, therefore, is based upon concepts of political representation.

Subsequently, the court has reaffirmed and extended the doctrine of *Noerr*. In *United Mine Workers v. Pennington, 381 U.S. 657, **[*439]** 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)* the defendant Union and large coal mine operators had approached the Secretary of Labor and officials of the Tennessee Valley Authority to obtain support for their agreements setting a minimum wage for coal miners. That agreement allegedly had the effect of forcing small coal mine operators out of business. The Supreme Court reversed a judgment in favor of the small mine operators because of a jury instruction which allowed the jury to consider the defendants' intent in approaching the various government officials. The Court stated that: **[**48]**

> ***HN18***[] Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as a part of a broader scheme itself violative of the Sherman Act.

Id. at 670. That rationale was extended even further in *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972)*, where the Court extended *Noerr-Pennington* to appearances before courts and administrative agencies.

Buddie does not challenge this line of cases. Rather, Buddie argues that *Noerr-Pennington* is inapplicable because the government action involved in this case constitutes an administrative or ministerial award of a contract, not the policymaking matters which are the basis for the exemption in *Noerr* and *Pennington*. This Court, therefore, must consider the various approaches taken by other courts in defining the parameters of the *Noerr-Pennington* exemption.

The First, Fifth, and D.C. Circuits have adopted a commercial activities exemption to the *Noerr-Pennington* exemption. The First Circuit's decision in *George R. Whitten, Jr., Inc. **[**49]** v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970)*, is illustrative of these cases. The *Noerr-Pennington* issue arose in the context of the defendants' attempt to induce governmental bodies to specify the defendants' products for competitively bid contracts. The Supreme Court rejected the *Noerr-Pennington* defense to the claim stating that

> *Noerr* stressed the importance of free access to public officials vested with significant policy-making discretion. We doubt whether the court, without expressing additional rationale, would have extended the *Noerr* umbrella to public officials engaged in purely commercial dealings. . . .

Id. at 33. The Court went on to define the boundaries of the *Noerr-Pennington* exemption by stating that the defendant

> is free to seek legislative change in this basic policy, but until such change is secured, Paddock's dealings with officials who administer the bid statute should be subject to the same limitations as its dealings with private consumers. Indeed, to hold otherwise might impair the effectiveness of competitive bidding.

*Id. See also Israel v. Baxter Laboratories, 151 U.S. App. D.C. **[**50]** 101, 466 F.2d 272 (D.C. Cir. 1972)*; *Woods Exploration & Products Co. v. Aluminum Company of America, 438 F.2d 1286 (5th Cir. 1971) cert. denied*, *404 U.S. 1047, 30 L. Ed. 2d 736, 92 S. Ct. 701 (1972)*. *But see Metro Cable Co. v. CATV of Rockford, Inc., 516 F.2d 220 (7th Cir. 1975)*; *Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969)*.

In the absence of Sixth Circuit authority on the validity of a commercial activities exception to the *Noerr-Pennington* doctrine, this Court concludes that it will follow the approach developed by the First, Fifth and D.C. Circuits and apply commercial activities exception. *Noerr-Pennington* is concerned with the needs of a representative democracy in the field of public policy making. These needs are not at issue in this case, where the parties are concerned with the award of a competitively bid contract which only incidentally involves a governmental body. The basis for the exemption, therefore, does not apply to this case.

Accordingly, the motion to dismiss on this basis is denied.

[*440] VI. COLLATERAL ESTOPPEL

In its motion for summary judgment, Peabody has argued that a large number of **[**51]** factual issues are established for purposes of this litigation as a result of the collateral estoppel effect of the prior litigation. Pursuant to this Court's analysis of the antitrust standing and applicability of *§ 1* arguments, three of those issues are of particular importance. Buddie must be able to prove that (1) its bid was not defective; and (2) Peabody was not the lowest responsible bidder for the contract, and (3) the defendants in this action engaged in an antitrust conspiracy with respect to the contract award. Peabody contends that these factual matters are established by the prior state court litigation, while Buddie argues that collateral estoppel does not foreclosure relitigation of these issues as part of its antitrust claim.

Consideration of Peabody's claim of collateral estoppel begins with a review of the procedural posture in which collateral estoppel is being asserted. Both Peabody and Buddie were parties to the Buddie I action. As such, this case presents an issue regarding the application of collateral estoppel where there is mutuality of parties. Further, Peabody, the successful party in Buddie I, is using collateral estoppel in a defensive, not an offensive, **[**52]** posture. *See generally, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979)*. Under these circumstances, Peabody argues that collateral estoppel precludes relitigation of a number of issues decided in Buddie I, while Buddie argues that this Court has discretion to determine the collateral estoppel effect to be given to the Buddie I decision.

Peabody urges a rigid application of collateral estoppel to preclude relitigation of any issues considered in Buddie I. In support of this position, Peabody advances the traditional rule that

> ***HN19***[] when an issue of fact or law is actually litigated and determined by valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Restatement (Second) of Judgments § 27 (1982). Under this rule, the Court has no discretion in determining whether to apply collateral estoppel to preclude relitigation of the issue. Peabody cites *James Talcott, Inc. v. Allahabab Bank, Ltd., 444 F.2d 451 (5th Cir. 1971)* as an example of the application of this rule. In that case, the **[**53]** Fifth Circuit applied collateral estoppel to preclude relitigation of issues decided in a prior state court proceeding. In defense of its position, the Fifth Circuit stated that

> whenever a court considers applying the doctrine of collateral estoppel, there is always a lingering question whether the party might have succeeded in proving his point if he had only been given a second chance at producing evidence. Without more, however, this question is not sufficient to outweigh the extremely important policy underlying the doctrine of collateral estoppel - that litigation of issues at some point must come to an end.

Id. at 463. Under this analysis, ***HN20***[] where parties such as Buddie have previously litigated an issue in a state court proceeding, collateral estoppel always precludes relitigation of the issue in a subsequent federal court proceeding.

In contrast, Buddie argues that the use of collateral estoppel is discretionary with the trial court. In support of this position, Buddie cites the Sixth Circuit's recent decision in *Cleveland v. Cleveland Electric Illuminating Co. (CEI), 734 F.2d 1157 (6th Cir. 1984)*. In that case, the Court upheld the trial judge's exercise **[**54]** of discretion in refusing to grant collateral estoppel effect to a prior administrative agency determination against the defendant in a proceeding to which the plaintiff was not a party. That case involved the offensive use of collateral estoppel absent mutuality. Relying upon the Supreme Court's decision in *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329-30, 58 L. Ed. 2d 552, 99 S. Ct. 645 (1979)*, the Court found that the peculiar circumstances of an individual **[*441]** case may justify a court's refusal to allow an offensive use of collateral estoppel absent mutuality. The *Cleveland v. CEI* and *Parklane Hosiery* decisions, however, do not suggest that this discretionary application of collateral estoppel would carry over to situations where mutuality is present.

While these decisions are instructive on the various considerations which the Court must weigh in determining the appropriate rule of collateral estoppel, neither decision is controlling authority on the issue raised in this case. Under the full faith and credit statute,

> ***HN21***[] Judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by **[**55]** law or usage in the courts of such state . . . from which they are taken.

28 U.S.C. § 1738. ***HN22***[] This authority requires a federal court to give a prior state court judgment the same preclusive effect that it would have had in that state. Determination of the preclusive effect of the Buddie I judgment, therefore, turns on issues of Ohio state law. *See* *Kremer v. Chemical Construction Corp., 456 U.S. 461, 466, 72 L. Ed. 2d 262, 102 S. Ct. 1883 (1982)*; *see generally* *Restatement (Second) of Judgments, § 86* (1982). The Court, therefore, must examine Ohio decisions to determine the appropriate rule of collateral estoppel in this case.

The seminal case on collateral estoppel in Ohio is *Norwood v. McDonald, 142 Ohio St. 299, 52 N.E.2d 67 (1943)*. In that case, the Ohio Supreme Court adopted Restatement (First) approach to issues of *res judicata*. ***HN23***[] With respect to the rule of collateral estoppel, the Court held

> a point or a fact which is actually and directly in issue in a former action and was there passed upon and determined by a court of competent jurisdiction may not be drawn in question in any future action between the same parties or their privies, whether **[**56]** the cause of action in the two actions be identical or different.

142 Ohio St. 299, 300 Syl. 3, 27 Ohio Op. 240, 52 N.E.2d 67 (1943). Under this ruling, the Court lacks discretion to determine whether to apply collateral estoppel in this case. The *Norwood* decision has never been overruled by the Ohio Supreme Court.

Some question remains, however, whether the Ohio Supreme Court would follow the *Norwood* decision today because of the recent development of the Restatement (Second) of Judgments. The Restatement (Second) begins by setting out the traditional rule of collateral estoppel embraced by the *Norwood* court. Restatement (Second) of Judgments § 27 (1982). The restatement then goes on to provide for "exceptions to the general rule of issue preclusion." *Id*. at § 28. [16] Under this **[*442]** rule, the Court retains discretion to determine whether or not to grant collateral estoppel effect to the prior judgment. *See also,* Montana v. United States, 440 U.S. 147, 155, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979).

[57]** The issue that emerges is whether the Ohio Supreme Court would follow the *Norwood* or the Restatement (Second) approach in determining if a trial court is granted discretion with respect to the application of preclusion. The Ohio Supreme Court's recent decision in Goodson v. McDonough Power Equipment, Inc., 2 Ohio St. 3d 193, 443 N.E.2d 978 (1983) merits consideration. In that case, the Ohio Supreme Court ruled that Ohio would not allow offensive use of collateral estoppel absent mutuality in products liability actions. Significantly, the Ohio Supreme Court relied heavily upon the Restatement (Second) in reaching its decision. Although the Court did not consider the exceptions to the general rule of issue preclusion found in § 28 of the Restatement (Second), the Court followed the remainder of the restatement's discussion of issue preclusion. Based upon this authority, this Court concludes that the Ohio Supreme Court would apply the exceptions to the general rule of issue preclusion found in the Restatement (Second).

Having concluded that the Court will exercise discretion in determining the collateral estoppel effect of facts decided in the prior state court litigation, **[**58]** the Court must now determine whether it will exercise that discretion to allow relitigation of the facts raised by Peabody. As noted before, the merit of Peabody's legal defenses depends upon resolution of three factual matters - (1) the existence of a conspiracy amongst the defendants; and (2) the adequacy of Buddie's bid; and (3) Peabody's status as the lowest responsible bidder. If Buddie cannot prevail on these matters, the legal analysis of Buddie's § 1 claim and antitrust standing require entry of judgment in favor of Peabody.

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[16] In relevant part, the exceptions provide:

> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
>
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
>
> (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or
>
> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or
>
> (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Id.

A. *Conspiracy Amongst The Defendants*.

In order to make out a claim under *§ 1* of the Sherman Act, Buddie must prove that there was an agreement between the defendants to divert the contract award to Peabody. Peabody claims that the Buddie I decision resolved this issue against Buddie and that the decision collaterally estops Buddie from relitigating the issue in this Court. Although the judgment entry from the Common Pleas Court does not contain any reference to collusion, the opinion of the Court makes some relevant findings. [17] In relevant part, the opinion states:

> Nor has there been any evidence of impropriety or conduct on the part **[**59]** of any public official or any bidder in the conduct of these negotiations. Nor was there any collusion among bidders presented by the testimony of either the Plaintiffs or Defendants. If anything, there was a strong showing of independence on the part of bidders. . . .

Opinion of the Court at 5. These findings became part of the final judgment when the Court of Appeals affirmed the decision of the Buddie I court and the time for appeal to the Ohio Supreme Court passed.

Subsequently, the relationship between Peabody, Seawright, Plants and Seminole was discovered. On December 21, 1978, Seawright was indicted by the Cuyahoga County Grand Jury on one count of grand theft, one count of having an unlawful interest in a public contract and two counts of complicity. On that same date, Seminole and Plants were indicted **[**60]** for grand theft and having an unlawful interest in a public contract. [18] Three days prior to the return **[*443]** of the indictments, the Common Pleas Court granted immunity to Frank John Gerdnic, Peabody's vice president of marketing, in exchange for his testimony regarding these transactions.

Ultimately, Seawright pled guilty to one count of attempt and complicity under *Ohio Rev. Code 2923.02-03*. Seminole pled guilty to one count of having an unlawful interest in a public contract under *Ohio Rev. Code 2921.42* and Plants pled guilty to attempt to have an unlawful interest in a public contract under *Ohio Rev. Code 2921.42* and *2923.02*. The remaining counts of the indictments were dismissed as part of the plea bargain.

The issue confronting the Court is whether the Buddie I court's findings regarding collusion **[**61]** preclude Buddie from presenting evidence on the conspiracy issue to this Court. Two of the exceptions to the general rule of issue preclusion stated in § 28 of the Restatement (Second) apply to this case.

HN24[] Exception 3 allows relitigation of an issue where there are procedural differences between the two courts. In relevant part, that provision allows relitigation where:

> A new determination of the issue is warranted by differences in the quality or expensiveness of the procedures followed in the two courts. . . .

In Buddie I, the trial judge, apparently upon his own motion, ordered the trial on the merits to be consolidated with the hearing on preliminary injunction. Plaintiffs received only 17 days between the filing of their action and the original hearing in which to prepare their case. Discovery was truncated, unlike the procedure which would be followed in this federal court action. Under these circumstances, the differences in the extensiveness or quality of the procedures followed between this Court and the Common Pleas Courts warrants a new determination on this issue.

Alternatively, ***HN25***[] exception 5, supports allowing a new determination where the party sought **[**62]** to be precluded did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. In relevant part, the exception provides

> There is a clear and convincing need for a new determination of the issue . . . (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

[17] The trial judge incorporated the opinion of the Court into the judgment entry by stating that "the Court's further findings of fact are set forth in its written opinion filed in these proceedings."

[18] While the indictments do not specifically refer to the contract for the solid waste treatment plant, the documents attached to the file clearly indicate that the indictments arise out of this transaction.

In this case, the Court has already found defects in the fullness of the procedures available in the initial action. Further, the Court notes that the existence of collusion was but one of a number of issues raised in Buddie I. A review of the trial judge's opinion indicates that collusion was a matter of only tangential concern to the parties in the initial action. [19] **[**63]** In view of the limited time available for preparation of the initial action and the limited importance of the collusion issue in the Buddie I action, the Court finds that the requirements for exception 5 are also met. [20]

[*444] B. *Adequacy of Buddie's Bid and Propriety of Award to Peabody*.

Regardless of the Court's ruling on the collusion issue, Peabody argues that Buddie is precluded from relitigating the issue of the adequacy of its bid. In relevant part, the Buddie I court found that Buddie

> submitted a bid which was found defective in sixteen specific ways varying from highly critical **[**64]** items to relatively minor engineering issues. There were inconsistencies in the bid of Buddie which justifiably warranted the consultant company in suggesting rejection of Buddie, despite its submission of the lowest bid.

Opinion of the Court at 4. Notwithstanding the ambiguity of the Buddie I Court's findings, Peabody argues that this finding precludes Buddie from proving that it would have received the bid under any circumstances. In contrast, Buddie argues that this fact finding is tainted by the trial court's ignorance of Plants' dubious role in this action and, therefore, need not be followed. [21]

The trial judge **[**65]** also made findings on the propriety of the City's award of the contract to Peabody. In the judgment entry, the trial court found that there was

> No evidence of error, fraud or abuse of discretion was presented and that it would not be a proper exercise of the court's function to substitute its judgment for the carefully determined discretion of the Board of Control of the City of Cleveland on a matter of great public importance.

In the opinion of the Court, the trial judge went on to explain the limited role of a court in reviewing an award of a public contract and explaining his basis for accepting the propriety of that award. Opinion of the Court at 5-6. Based on these findings, Peabody argues that Buddie is foreclosed from proving that Peabody would not have received the contract award.

Both of these fact findings were made in the context of the limited role granted a court under Ohio law in reviewing the awarding of contracts by a municipality. Under Ohio law, contracting authorities are granted a great deal of discretion in their awards of public contracts. *See* *State ex rel Cleveland Trinidad Paving Co. v. Board of Public Service, 81 Ohio St. 218, 90 N.E.* ***[**66]*** *389 (1909)*; *State ex rel Walton v. Hermann, 63 Ohio St. 440, 59 N.E. 104 (1900)*. Judicial review is limited and the courts are not authorized to interfere with the exercise of the discretion of the public authorities in awarding public contracts except in cases of fraud or abuse of discretion. *Altschul v.*

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[19] The Court notes that the presence of an antitrust conspiracy was not, and in fact could not have been, an issue in the state court action. Buddie is attempting to prove an antitrust conspiracy without demonstrating "collusion among bidders." Likewise, the conspiracy alleged in this case was not presented to the state court because Seawright, Plants, and Seminole were not parties to the state court litigation. Finally, the Court concludes that a finding of an absence of collusion among bidders under the public contract laws does not necessarily forecloses a finding of conspiracy under the antitrust laws.

[20] Another basis for denying collateral estoppel effect to the Buddie I court's determination on the collateral estoppel issue is its apparent conflict with the guilty pleas in the common pleas court action. Under the Restatement (Second),

> When in two actions inconsistent final judgments are rendered, it is the later, not the earlier, judgment that is accorded conclusive effect in the third action under the rules of *res judicata*.

Id. at *§ 15*. Assuming that the guilty pleas by Seawright and Plants conflict with the finding of no collusion made by the Buddie I court, this rule applies to preclude granting any collateral estoppel effect to the Buddie I court's findings on collusion.

[21] Under any concept of collateral estoppel, Buddie is not precluded from relitigating an issue unless the "determination was essential to the judgment." Ohio law limits judicial review of a contract award to an abuse of discretion standard. The finding that Buddie's bid was defective, therefore, was not an essential finding to support the Buddie I court's affirmance of the City's award.

Springfield, 48 Ohio App. 356, 193 N.E. 788 (1933). Under these authorities, the trial court imposed a heavy burden of persuasion upon Buddie in evaluating Buddie's challenge to the award.

HN26[] Exception 4 to the general rule of issue preclusion recognizes differences in the burden of persuasion with respect to an issue as a basis for allowing relitigation of that issue. In relevant part, the exception allows relitigation where a

> party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the subsequent action. . . .

Restatement (Second) at § 28(4). In this antitrust action, Buddie might not have to shoulder the heavy burden of persuasion usually applied to a challenge to a state law challenge of an award of a public contract. [22] Under this analysis, the Court concludes **[*445]** that the exception **[**67]** applies to this case, and Buddie will not be estopped from challenging either of these trial court findings.

C. *Conclusion*

Under this analysis, the Court concludes that collateral estoppel will not preclude Buddie from challenging whether Buddie should have received the contract award or whether there was a conspiracy in this case. Accordingly, the motion for summary judgment based on collateral estoppel is denied.

In reaching this conclusion, the Court is mindful that this decision represents a deviation from established concepts of collateral estoppel. This decision should not be interpreted as opening the floodgates to relitigation of the vast majority of factual issues. The peculiar facts presented by this case make **[**68]** this case an unusually good candidate for use of the exceptions to the general rule of issue preclusion. It is important to interpret the exceptions to the general rule of issue preclusion so as not to overwhelm the general rule. Thus, while concluding that the general rule does not apply to this case, the Court emphasizes the narrowness of this holding.

VII. CONCLUSION

Pursuant to the foregoing analysis, and subject to the limitations noted in the opinion, the motion for summary judgment is denied.

[22] As noted before, the Court has reserved decision on the standard it will use in reviewing the City's decision to award the contract to Peabody. *See* note 10, *supra*. Under these circumstances, the Court believes that summary judgment on this issue is inappropriate at this time.

Grado v. Gross

United States District Court for the District of Massachusetts

August 20, 1984

Civil Action No. 84-1087-MA

Reporter

1984 U.S. Dist. LEXIS 24242 *; Fed. Sec. L. Rep. (CCH) P91,660

JOHN GRADO, on behalf of himself and Technographics, Inc., Plaintiffs, V. HENRY GROSS, MAHIR A. REISS, DAVID ALLEN GARDNER, REALEX CAPITAL ASSOCIATES, L.P., and THE REALEX CAPITAL CORPORATION, Defendants and TECHNOGRAPHICS, INC., Nominal Defendant.

Core Terms

investors, stock, legislative history, enterprise, racketeering, defendants', violator, allegations, federal court, acquisition, financing, omissions, acquire, pattern of racketeering activity, estate's assets, predicate act, book value, misrepresentation, convicted, venture, corporate opportunity, sale of securities, plaintiff's claim, funding, courts

LexisNexis® Headnotes

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

HN1[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

A plaintiff does not fail to state a cause of action under the Racketeer Influenced and Corrupt Organizations Act (RICO) because the defendants have not been convicted of predicate acts or RICO violations. A RICO plaintiff must of course meet the statute's technical pleading requirements. A RICO plaintiff must show, first, that the defendants have committed racketeering acts; and that those acts form a pattern within the meaning of the statute. The plaintiff is then required to show that he suffered injury because the defendant either (a) used income derived from that pattern of racketeering to acquire an interest in an enterprise engaged in interstate commerce; (b) acquired or maintained control of such an enterprise through a pattern of racketeering; or (c) that the defendant through a pattern of racketeering activity conducted or participated in the conduct of the affairs of an interstate enterprise with which he was associated or by whom he was employed. He need do no more.

Insurance Law > Liability & Performance Standards > Disclosure Obligations by Insureds > Materiality

Securities Law > ... > Implied Private Rights of Action > Elements of Proof > Causation

Insurance Law > ... > Marine & Inland Marine Insurance > Claims > Proximate Cause

Insurance Law > Liability & Performance Standards > Disclosure Obligations by Insureds > General Overview

Securities Law > ... > Securities Exchange Act of 1934 Actions > Implied Private Rights of Action > Deceptive & Manipulative Devices

HN2[] Disclosure Obligations by Insureds, Materiality

There can be no recovery under *17 C.F.R. § 240.10b-5* unless the plaintiff can show that the defendants' fraudulent act or omission caused the loss about which the plaintiff complains. The distinction is between "transaction causation" and "loss causation." If the investment decision is induced by misstatements or omissions that are material and that were relied on by the claimant, but are not the proximate cause for his pecuniary loss, recovery under the rule is not permitted.

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

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

HN3[] Heightened Pleading Requirements, Fraud Claims

Fed. R. Civ. P. 9(b) provides in part that in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Where the complaint sets out the time, place, and content of the alleged false representations it need not contain allegations concerning the circumstances or evidence from which fraudulent intent could be inferred.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN4[] Complaints, Requirements for Complaint

Fed. R. Civ. P. 8(e) permits pleading claims alternately and regardless of consistency.

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Opinion by: MAZZONE

Opinion

MEMORANDUM AND ORDER

Mazzone, D.J.

This is a shareholder's derivative action. The plaintiff, John Grado, sues on behalf of himself and Technographics, Inc., seeking relief under *Rule 10b-5* of the Securities and Exchange Commission, *17 C.F.R. § 240.10b-5*, and under the treble damages provisions of the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C. §§ 1961-1968* (RICO). The plaintiff also claims damages under a number of state law causes of action. The matter is before me on the defendants' motion to dismiss for failure to state a claim upon which relief can be granted.

The plaintiff's complaint is a lengthy, 43-page recitation of wide-ranging and complex allegations. Stripped to the essentials, the facts alleged -- which, for the purpose of this motion, I take as true -- are as follows. Before June 29, 1983, Grado was a vice president of Litton Industries, Inc., in charge of Litton's Specialty **[*2]** Paper, Printing and Forms Group (PP&F). In 1982, Grado proposed to Litton that Litton sell PP&F to a corporation he would establish, Technographics, Inc. Litton ultimately agreed to sell PP&F to Grado at its approximate book value. Grado was to continue equity financing of about $3,500,000 to $4,000,000; the balance of the acquisition price was to be financed by borrowing. Some of the debt financing was to come from Litton itself.

In the fall of 1983, the plaintiff sought assistance in locating several million dollars of equity funding to be used in the acquisition of PP&F. He turned to the defendant Realex Capital Corporation and its principals,, the individual defendants Henry Gross, Mahir Reiss, and David Gardner, to accomplish this purpose. In early November, 1982, Grado and Realex agreed to work together to buy PP&F. Specifically, the defendants agreed to find foreign equity funding for the acquisition; Grado agreed to work to secure debt financing. The plaintiff contends that, as a matter of law, a joint venture was thus created between Grado and Realex as promoters of Technographics.

At about the same time, Grado also discussed with the defendants the **[*3]** possibility of arranging a sale of one of PP&F's unprofitable operations, Papaterie de Versoix, located in Versoix, Switzerland (Versoix). It is the defendants' allegedly deceptive acts relating to Versoix that lie at the heart of this lawsuit. The plaintiff contends that he asked Realex to explore the possibilities of selling Versoix. The defendants Gross and Reiss went to Versoix, and they eventually learned that Versoix" assets had a market value far in excess of the book value that Litton had placed on them. Hence they became aware that the chance to purchase the Versoix operation at book value, when in fact it was worth more, was a valuable corporate opportunity for Technographics. But the defendnats did not tell Grado about Versoix" true value. Instead, according to the complaint, they engineered a scheme to deprive Technographics of this corporate opportunity and simultaneously acquire for themselves a controlling interest in Technographics. First, they told Grado that Realex had found foreign investors to put up equity financing for Technographics' acquisition of PP&F, in exchange for Technographics stock. They later told Grado that they had also located foreign **[*4]** investors interested in purchasing Versoix. When Grado expressed doubts about the wisdom of Technographics' selling Versoix, the defendants told Grado that the foreign investors who had agreed to purchase Versoix believed that Technographics was obligated to sell Versoix to them. Furthermore, the defendants told Grado that the investors who intended to acquire Versoix were the same investors who intended to invest in Technographics' acquisition of PP&F and that these investors would not provide equity funding for the acquisition of PP&F unless they could buy Versoix. Because Grado was under a deadline from Litton to complete the acquisition, and because he relied on the defendants as joint venturers, he agreed to sell Versoix to these foreign investors, essentially at book value.In fact, the complaint charges, no such foreign investors existed; the defendants intended to acquire both Versoix and a majority interest in Technographics for themselves.

By early 1983 the basic structure of the transactions was set: Realex and its principals told Grado that foreign investors whose identity could not be revealed had agreed to invest $3,500,000 in Technographics. These foreign investors **[*5]** would receive in exchange 57.3% of the stock of Technographics. Grado would become President and Chairman of the Board of Technographics, and would own or control most of the rest of the shares. Versoix" real estate assets were to be sold to an entity to be called P.V. Papeterie de Versoix (PV). Grado understood PV to be an entity controlled by the foreign investors. In fact, the defendants owned 80% of PV's stock.Versoix's non-real estate assets were to be sold to New Versoir, a Cayman islands corporation that Grado believed was controlled by the foreign investors. New Versoir was in fact controlled by the defendants.

A complicated set of agreements governed the transaction. On July 25, 1983, New Versoir and Technographics signed a Purchaser and Sale Agreement covering Versoix" non-real estate assets. This July 25 agreement called for New Versoir to pay $4,028.000 to Technographics for these assets. On the next day, July 26, 1983, New Versoir and PV -- the two corporations which Grado thought were controlled by the foreign investors but which were actually controlled by the defendants -- entered into a purchase and sale agreement, unbeknownst to the plaintiff. **[*6]** Under the July 26 PV/New Versoir agreement, PV agreed to purchase Versoix" non-real estate assets from New Versoir for $8,528,000.PV was to finance this payment by loans secured by Versoix" real estate, which it was to acquire directly from Litton.Under the July 26 PV/New Versoir agreement, New Versoir was to remit the $8,528,000 purchase price to Technographics. But, by the terms of the July 25 New Versoir/Technographics contract, New Versoir was obligated to pay only $4,028,000 to Technographics. On July 29, 1983, Technographics acquired PP&F. Technographics purchased all PP&F's assets except Versoix" real estate assets. These Litton sold at book value to PV, despite the fact that they were worth some $7,000,000 more than book value. Technographics transferred the non-real estate assets of Versoix to New Versoir for $4,028,000.New Versoir transferred these same assets to PV, receiving from PV a purchase price of $8,528,000. As a result of this series of sales, the plaintiff charges, New Versoir had diverted $4,500,000 from Technographics. That $4,500,000 represented part of the actual value of Versoixsoir, invested $3,593,000 of the diverted $4,500,000 in Technographics, **[*7]** purportedly on behalf of foreign investors but actually on their own account. They received 57.3% of Technographics' stock as a result. The plaintiff has alleged that the defendants engaged in other fraudulent conduct as well; however, the allegations set out above are the core of the plaintiff's case.

The defendants argue that the plaintiff's complaint should be dismissed for four reasons. First, they assert that the plaintiff's claim that the defendants violated the RICO statute fails because neither Grado nor Technographics has standing to bring it. Second, the defendants say that the plaintiff's securities fraud claims must be dismissed because the complaint reveals that the plaintiff's loss, if any, was not caused by the sale of Technographics' stock to the plaintiff and, in addition, shows no fraud "in connection with" the sale of securities. Third, the defendants argue that the plaintiff's claims are not specific enough to meet the special pleading requirements of *Fed.R.Civ.P. 9(b)*. Finally, the defendants assert that the plaintiff's M.G.L. c. 93A claim must be dismissed because the kind of conduct alleged here does not fall within the reach of that statute. I consider **[*8]** each of these arguments in turn.

1. RICO.

The plaintiff alleges in paragraphs 102-114 of the complaint that the defendants' conduct violated the RICO statute, *18 U.S.C. § 1962(a)-(d)*. In particular, the plaintiff alleges that the defendants received income derived from a pattern of racketeering activity and used it to acquire an interest in Technographics and in PV, in violation of *18 U.S.C. § 1962(a)*; that the defendants acquired and maintained control of the joint venture, of Technographics, of New Versoir, and of PV through a pattern of racketeering activity, in violation of *§ 1962(b)*; that the defendants are associated with a number of enterprises, including Realex, the joint venture, Technographics, New Versoir, and PV, and have conducted or participated in the conduct of these enterprises through a pattern of racketeering activity, in violation of *§ 1962(c)*; and that the defendants violated *§ 1962(d)* by conspiring to violate *§ 1962(a)-(c)*.

The defendants contend that the plaintiff's RICO claims must be dismissed because the plaintiff has not suffered injury of the kind required to state a claim under RICO's civil remedy provision, *18 U.S.C. § 1964(c)*. **[*9]** The defendants argue that the plaintiff lacks standing to bring a RICO action because the injuries suffered, if any, are not the result of a violation of *§ 1962*, but are rather the direct result of the defendants' predicate acts of mail fraud and securities fraud. In essence, the defendants urge the adoption of a special standing requirement, usually referred to as the "racketeering enterprise injury" requirement, that has been recognized in a number of cases. See, e.g., *Moss v. Morgan, Stanley, Inc., 553 F.Supp. 1347, 1359* (S.D.N.Y.), aff'd on other grounds, *719 F.2d 5 (2d Cir. 1983)*. In an opinion issued on June 14, 1984, I concluded that no such special standing requirement should be adopted. Econo-Car International, Inc. v. Agency Rent-A-Car, Inc., (C.A. 83-2597-MA). I need not repeat at length here the reasons for that decision. I note only that I thought then, and think now, that the question is a close one. It is true, of course, that the language of the statute itself does not suggest that a special racketeering enterprise injury requirement should be imposed.But the courts that have nonetheless adopted such a requirement have done so in response to an important **[*10]** group of policy concerns. Claims that are essentially fraud-based have traditionally been the province of state courts. In an era in which the Supreme Court has been particularly sensitive to the deference properly owed state tribunals, see, e.g., *Younger v. Harris, 401 U.S. 37 (1971)*, it is not surprising that courts have resisted lawyers' attempts to clothe what would have passed ten years ago as ordinary common-law fraud claims in the flashy (and, given the statute's treble-damage provision, expensive) fashion of RICO actions.

Then there is the matter of the legislative history.A fair reading of its suggests that few, if any, members of the Congress that adopted RICO had a clear intent to invite into federal court a wide range of civil matters that would have previously been handled by state court judges. The primary focus of the Congressional debate on RICO was on its criminal provisions. There was debate on the Act's creation of a private civil remedy, and the legislative history shows that some members of Congress sought to point out the dangers attendant upon the grant of a private civil action. See generally Blakey, The RICO Civil Fraud Action in Context: Reflections **[*11]** on Bennet v. Berg, 58 Notre Dame Law. 237 (1982).But I must agree with those courts that have concluded that the legislative history contains no clear signal that Congress wanted cases like this one in federal court.

Thus, a court considering whether a racketeering enterprise injury requirement should be adopted is faced with a classic problem of statutory interpretation: should it give full effect to the words of the RICO statute, or should it limit the statute's reach because the language Congress used sweeps broader than necessary to remedy the evils Congress intended to eradicate? I have decided to follow the approach that gives greater weight to the Act's language. Two sets of concerns prompt me to take this route. First, the Supreme Court -- despite its record of demonstrated sensitivity to the relationship between state and federal courts -- has ruled that RICO represents a significant federal instrusion into areas previously the sole domain of the states. *United States v. Turkette, 452 U.S. 576, 586-87 (1981)*. Moreover, the Supreme Court has done so by looking closely at the words of the statute, and treating as secondary arguments grounded in readings of the **[*12]** legislative history tht seeks to find expression of Congress' "true" intent. Id.; see also *Russello v. United States, U.S. , 104 S.Ct. 296, 299 (1983)*.

Second, the view that a statute's express words prevail unless the legislative history explicitly contradicts them is solidly rooted in our Constitutional structure. The structure calls for Congress to declare its intentions in statutes. That is how our law is made. And, just as there is danger in ascribing meaning to Congress' failure to take some action, see generally L.Tribe, Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence, 57 Ind.L.Rev. 515 (1982), so too is there risk in treating legislative history as dispositive when the express language of a statute is capable of providing an answer to a legal question. Under our Constitution ". . . it seems axiomatic that the words of a statute -- and not the legislators' intent as such -- must be the crucial elements both in the statute's legal force and in its proper interpretation." Id. at 517. As Justice Jackson has written, courts should proceed "by analysis of the statute instead of by psychoanalysis of Congress." **[*13]** *United States v. Public Utilities Commission, 345 U.S. 295, 319 (1953)* (Jackson, J., concurring). Congress voted on, and the President signed, a particular set of words when it enacted RICO. Congress did not vote on the legislative history, and the President did not endorse all that is in the legislative history. Thus, it is the language of the statute, and not the legislative history, that sets out the legal commands that govern our conduct.This language must control: "a committee report or a statement on the floor cannot amend an enacted statute, implicitly or explicitly. . . ." Posner, "Statutory Interpretation -- In the Classroom and in the Courtroom," *50 U.Chi.L.Rev. 800, 810 (1983)*.

As applied to this case, the principles outlined above counsel against the adoption of a racketeering enterprise injury requirement. As Judge Posner noted in *Sutliff, Inc. v. Donovan Companies, Inc., 727 F.2d 648, 654 (7th Cir. 1984)*:

Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden -- variety frauds actionable in federal treble damage proceedings **[*14]** -- the price of eliminating all possible loopholes. We must abide by Congress' decision, made at a time of less sensitivity than today to the workload pressures on the federal courts and to the desirability of maintaining a recognizable balance between state and federal courts, however much we may regret not only the burdens that the decision has cast on the federal courts but also the displacement of state tort law into the federal courts that it has brought about. (citations omitted).

In connection with the defendants' claim that the plaintiff states no RICO cause of action, one further issue requires comment.

On July 31, 1984, the defendants filed copies of three recent opinions from the Court of Appeals for the Second Circuit. In these cases, the Second Circuit adopted a racketeering enterprise injury requirement, and also held that a plaintiff cannot bring a civil RICO action unless the defendant has been convicted of the underlying predicate offenses, or been convicted of violating RICO itself. See, e.g., Sedima, S.P.R.L. v. Imerex Company, No. 83-7965, slip op. (2d Cir. July 25, 1984).

In their motion to dismiss, the defendants did not argue that the **[*15]** plaintiff's case failed because the defendants had not been convicted of any RICO predicate acts or of a violation of RICO itself. But they press this issue now. Although I do not wish to compete with the extensive analysis of the statute undertaken by the Second Circuit (the opinions in the Sedima case alone run some 86 pages), I do wish to explain briefly why I do not accept the view that criminal convitions of either predicate acts or of RICO itself are required before a plaintiff can bring a cause of action under RICO.

First, I believe the language of the statute does not support such a requirement. *18 U.S.C. § 1964(c)* provides civil actions to those persons injured by reason of a "violation" of *18 U.S.C. § 1962*. *18 U.S.C. § 1962* states that certain kinds of acts, when accomplished through a pattern of racketeering activity, are unlawful.As I read the statute, Congress' use of the word "violation" does not imply that only those parties who have been injured by persons convicted of RICO violations can bring actions. A person "violates" a law at the time he does what the law forbids, not when he is convicted of doing so. The violation occurs even if the violator is never **[*16]** caught. And, as anyone whose parked car has overstayed its welcome on metered city streets can testify, the word "violation" has meaning in the civil as well as the criminal context. See also *United States v. Ward, 448 U.S. 242, 251 (1980)* (a "violation" -- the term used by Congress -- of the Federal Water Pollution Control Act leads to civil, not criminal, liability). Furthermore, *18 U.S.C. § 1961(1)* defines predicate acts as acts which are "chargeable," "indictable," and "punishable," and the statute should be read so as to give some effect to Congress' choice of the subjunctive. In short, the language of the statute does not support the criminal conviction requirement; in fact, it supports the opposite view.

The legislative history of the statute reinforces the view that this reading of the statute is correct. Nowhere does the history of RICO indicate that a RICO victim's ability to assert rights created by the statute should rest at the mercy of the local prosecutor's office. A prosecutor may for good reason choose on occasion not to prosecute RICO violators, but the legislative history does not suggest that the private victims of the violator should forego **[*17]** remedy because a prosecutor has decided not to press charges. Neither does the legislative history show that the private victims of RICO violators should lose their RICO rights just because a prosecutor has lost his RICO case. As I see it, the legislative history shows just the opposite. As I see it, the legislative history shows just the opposite. The history shows that Congress modeled *18 U.S.C. § 1964(c)* on the private enforcement provision of the antitrust laws. While I have rejected the view that Congress intended to incorporate wholesale into RICO all of the doctrines that go along with the antitrust civil remedy, see Econo-Car, International, Inc. v. Agency Rent-A-Car, Inc., slip op. at 16, it seems unlikely that Congress did not intend to incorporate what is probably the most noteworthy feature of the ***antitrust law***'s system of private remedies: the fact that private parties are authorized to act as private attorney generals, and are not required to wait until the "public" attorney general has acted.

Finally, I add one point, apparently not touched upon in the Second Circuit. RICO has a broad forfeiture provision which provides that "[u]pon conviction [1] **[*18]** of a person under [*18 U.S.C. § 1963*] the court shall authorize the Attorney General to seize all property declared forfeited under [that section]. . . ." *18 U.S.C. § 1963(a)*. The property declared forfeited under *§ 1963* includes ". . . any interest [the violator] has acquired or maintained in violation of *section 1962*." *18 U.S.C. § 1963(a)(1)*. Thus, where a person has taken over an interstate enterprise through racketeering tactics, the government has a right to seize that enterprise's assets upon the violator's conviction. This forfeiture provision, if read together with the Second Circuit's criminal conviction requirement, would turn RICO's treble damage provision into little more than a mirage: private victims would have to wait for the United States to win convictions, but would be likely to find that those RICO violators that can be read as judgment-proof. I hesitate to ascribe such an intention to RICO's drafters.

The question of the burden of proof by which the plaintiff must prove the predicate acts I leave open for now. But I rule that for the reasons **[*19]** outlined above, as well as the other concerns expressed in Judge Cardomone's

[1] It is worth noting that Congress knew how to use this word, in this statute, when it wished to.

dissent in the Sedima case, see slip op. (Cardomone, J., dissenting), ***HN1***[] I reject the defendant's a rgument that plaintiff has failed to state a cause of action because the defendants have not been convicted of predicate acts or RICO violations.

A RICO plaintiff must of course meet the statute's technical pleading requirements.A RICO plaintiff must show, first, that the defendants have committed racketeering acts; and that those acts form a pattern within the meaning of the statute. The plaintiff is then required to show that he suffered injury because the defendant either (a) used income derived from that pattern of racketeering to acquire an interest in an enterprise engaged in interstate commerce; (b) acquired or maintained control of such an enterprise through a pattern of racketeering; or (c) that the defendant through a pattern of racketeering activity conducted or participated in the conduct of the affairs of an interstate enterprise with which he was associated or by whom he was employed. He need do no more.

In my judgment, the plaintiff's complaint satisfies this standard, and states **[*20]** a claim under RICO. The complaint alleges that the defendants committed a number of acts of mail fraud and securities fraud, and committed them within a time span much shorter than ten years. Thus, the plaintiff has alleged that the defendants engaged in a pattern of racketeering activity.In addition, the plaintiff claims, inter alia, that the defendants used income derived from that pattern to acquire stock in Technographics, gained and maintain control of Technographics through that pattern, and have also operated Technographics and other enterprises by means of racketeering tactics. Whether the plaintiff's allegations will survive an evidentiary scrutiny is a question to be resolved later. Therefore, the plaintiff's RICO claim cannot be dismissed.

2. Securities Fraud.

The plaintiff in paragraph 95-101 of the complaint claims that the defendants violated *Rule 10b-5* of the Securities and Exchange Commission, *17 C.F.R. § 240.10b-5*, and 15 U.S.C. § 78j(b) by using deceptive devices and contrivances in connection with their purchase of securities from Technographics.The defendants argue thta this claim must be dismissed (a) because the plaintiff's loss was not **[*21]** proximately caused by any misrepresentation or omission that the plaintiff relied on and (b) because the plaintiff has failed to show that the defendants' allegedly deceptive acts occurred "in connection with" the purchase or sale of a security.

A. Proximate Cause. The defendants are correct in arguing that ***HN2***[] there can be no recovery under *Rule 10b-5* unless the plaintiff can show that the defendants' fraudulent act or omission caused the loss about which the plaintiff complains. To borrow an example from the Court of Appeals for the Fifth Circuit:

. . . [A]n investor might purchase stock in a shipping venture involving a single vessel in reliance on a misrepresentation that the vessel had a certain capacity when in fact it had less capacity than was represented in the prospectus. However, the prospectus does disclose truthfully that the vessel will not be insured. One week after the investment the vessel sinks as a result of a casualty and the stock becomes worthless. In such circumstances, a fact-finder might conclude that the misrepresentation was material and relied upon by the investor but that it did not cause the loss.

Huddleston v. Herman & McClean, 640 F.2d 534, ***[*22]*** *549 n.25 (1981)*, aff'd in part, rev'd in part, *459 U.S. 375 (1983)*. The distinction is between "transaction causation" and "loss causation." As the Huddleston court noted: "If the investment decision is induced by misstatements or omissions that are material and that were relied on by the claimant, but are not the proximate cause for his pecuniary loss, recovery under the Rule is not permitted." *Id. at 549*. Here, the defendants contend that if the plaintiff suffered any loss at all, that loss was caused by the defendants' alleged theft of a corporate opportunity. The defendants argue that their purchase of Technographics' stock caused no injury, since the defendant Realex paid for the stock. I disagree. The complaint states facts which, if proved, are sufficient to support a finding that the defendants' misrepresentations and omissions caused loss to the plaintiff. On the facts alleged, it appears that the defendants' misrepresentations and omissions about the source of the money used to purchase the stock cost Technographics the opportunity to obtain new value for the stock it sold. Instead, Technographics received the proceeds of a diverted corporate opportunity in **[*23]** payment for the stock.

This conclusion finds support in *Cramer v. General Telephone & Electronics Corp., 582 F.2d 259 (3d Cir. 1978)*, cert. denied, *439 U.S. 1129 (1979)*. In Cramer, the plaintiff shareholder alleged that the defendant company, GTE, had at the urging of officials of a foreign government sold its substantial interest in a private foreign company, a customer of GTE's, to a group of foreign investors. Because this investors' group lacked the funds to purchase GTE's interest in the company, GTE agreed to pay the group commissions on future sales of its product to the foreign company. These omissions financed the purchase of GTE's stock. The court held that the complaint contained allegations sufficient to raise a claim that the corporation had been injured by reason of the sale of its stock in the foreign company to the foreign investor group:

In effect, GTE supplied some of the money which it received in exchange for its own stock. Surely, such a transaction, if proved, would establish a prima facie injury to the corporation.

Id. at 272. See also *Schlick v. Penn-Dixie Cement Corporation, 507 F.2d 374, 381 (2d Cir. 1974)*, cert. denied, *421 U.S. 976 (1975)*. **[*24]**

B. The "In Connection With" Requirement. The defendants also contend that the plaintiff has not met *Rule 10b-5*'s requirement that the misrepresentation or omission occur "in connection with" the sale of a security because the essence of the plaintiff's claim is that the defendants diverted a corporate opportunity or breached a fiduciary duty. Again, I disagree. Under *Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 12-13 (1971)*, the question is whether the fraud alleged was one "touching" the sale of securities. In my judgment, the plaintiff's complaint alleges fraud that is quite closely related to the sale of securities. Indeed, the facts alleged here form a kind of mirror image of the facts alleged in Bankers Life. In Bankers Life, the Manhattan Casualty Co. was allegedly defrauded when it sold bonds, having been "duped" into believing that it would receive the proceeds from the sale. *Id. at 9*. Full market price was paid for the bonds, but Manhattan received none of the proceeds. Here, Technographics sold stock and received value, but, the complaint charges, the value received was the profit on a sale of property that was really Technographics' property. **[*25]** See also *Cramer v. General Telephone & Electronics Corp., 582 F.2d at 271* (Where company sold stock, but paid the purchase price with its own funds, *Rule 10b-5*'s "in connection with" requirement satisfied). Consequently, I rule that the plaintiff's complaint states a claim under *Rule 10b-5*.

3. *Rule 9(b)*. ***HN3***[] *Fed.R.Civ.P. 9(b)* provides in part that "[I]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." In my judgment, the plaintiff's 43 page complaint does so. It sets out ". . . the time, place, and content of [the] alleged false representation[s]" -- it need not contain allegations concerning ". . . the circumstances or evidence from which fraudulent intent could be inferred." *McGinty v. Beranger Volkswagen, Inc., 633 F.2d 226, 228 (1st Cir. 1980)*. Compare Wayne Investment, Inc. v. Gulf Oil Corporation, No. 84-1099, slip op. (1st Cir. July 18, 1984).

4. M.G.L. c. 93A. The defendants, relying on *Newton v. Moffie, 13 Mass. App. 462, 434 N.E.2d 656 (1982)*, argue that the plaintiff's claim must be dismissed because that statute governs conduct of parties dealing at arm's length, not the conduct **[*26]** of alleged partners and joint venturers. As the plaintiff notes, however, ***HN4***[] *Fed.R.Civ.P. 8(e)* permits pleading claims "alternately" and "regardless of consistency." At least one view of the facts alleged in the complaint could, if proved, support a finding of liability under c. 93A. See *Nader v. Citron, 372 Mass. 96, 360 N.E.2d 870 (1977)*. Therefore, I rule that the plaintiff has stated a claim under c. 93A.

Accordingly, for the reasons outlined above, I conclude that the plaintiff's complaint states a claim upon which relief can be granted.The defendants' motion to dismiss is therefore denied. [2]

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[2] While, as I have noted, the allegations presented in this case are wide-ranging and complex, and the pleadings to date indicate that the parties are prepared for a long siege, the issues of fact are relatively straightforward questions involving the credibility of a few major participants. Now the plaintiff has filed an amended complaint. It contains the original complaint's allegations, with a few minor changes, and some new allegations as well.These new allegations are based on the discovery and are included in the amended complaint under a separate heading entitled "Testimony To Date." Because the information revealed by that testimony is not integrated into the body of the original complaint, but is simply tacked on to the end of that complaint's factual

[*27] SO ORDERED.

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allegations, the amended complaint does little to clarify the plaintiff's claims. Although the amended complaint features an expanded cast of character, and a few new mysterious subplot twists, its message is the same as that of the original complaint. Essentially, each contends that the defendants diverted a corporate opportunity and used the profits obtained thereby to buy 57.3% of Technographics. The defendants have filed a motion to dismiss, a lengthy memorandum in support thereof (which does little more than repeat the arguments the defendants made in their earlier memorandum), and appendix, the purpose of which is to point out that it perceives to be misstatements of fact and which, it turns out, is as long and about as helpful to the resolution of this case as the Boston telephone directory. I have reviewed this material and hopefully, this note will abort the plaintiff's anticipated lengthy response. Because the theme of the new complaint is substantially the same as that of the original complaint, I conclude, that it too states a cause of action under RICO and *Rule 10b-5*. But, as the defendants correctly point out, it is not verified, and is subject to dismisssal. I do not believe it would be fruitful to dismiss this new complaint at this time, however. The plaintiff apparently intends to amend his complaint from time to time as new evidence is discovered. Given the length of each complaint, and the weight of the defendants' responses to them, the road that looms ahead is forbidding, not only because of its threat to America's forests and to the structural soundness of the Courthouse, but also because of the effect it will have on the market price of Xerox stock. Consequently, I think it best to take the following course. Pursuant to *Fed.R.Civ.P. 16*, and in response to the motion for *Rule 16* conference, parties are to complete all discovery within six months of this order. Counsel are to confer and agree on a schedule for discovery. When discovery is completed, the plaintiff is directed to file a single amended complaint that sets his claim out plainly and concisely. The defendant may respond, if so inclined, in a single pleading. The case will be called for status conference in January, 1984, and scheduled for trial in the spring of 1985.

Counsel shoudl also consider whether the issues addressed in this opinion -- specifically, the RICO issues -- involve controlling questions of law as to which there is substantial ground for differences of opinion, so that an immediate appeal may materially advance the ultimate termination of the litigation.

Alexander Grant & Co. v. Tiffany Indus.

United States Court of Appeals for the Eighth Circuit

January 13, 1984, Submitted ; August 22, 1984, Decided

No. 83-1608

Reporter
742 F.2d 408 *; 1984 U.S. App. LEXIS 19319 **; Fed. Sec. L. Rep. (CCH) P91,671

Alexander Grant and Company, Appellant, v. Tiffany Industries, Inc., Farrell Kahn and Gail Martin, Appellees

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

Core Terms

enterprise, amended complaint, racketeering, mail, racketeering activity, district court, products, asserts, inventory, suppliers, accounting firm, wire fraud, confirmation, allegations, fraudulent, damages, letters, audit

LexisNexis® Headnotes

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

Civil Procedure > Appeals > Standards of Review > General Overview

HN1[] **Motions to Dismiss, Failure to State Claim**

For purposes of reviewing the district court's dismissal of a plaintiff's complaint under *Fed. R. Civ. P. 12(b)(6)*, the court of appeals must accept as true all of the plaintiff's material allegations and liberally construe the complaint in its favor.

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

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

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

HN2[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Racketeer Influenced and Corrupt Organizations provision of the Organized Crime Control Act of 1970, *18 U.S.C.S. § 1962(c)*, provides that 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.

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

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

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

HN3[] **Racketeer Influenced & Corrupt Organizations Act, Elements**

Racketeering activity is defined as, inter alia, any act which is indictable under *18 U.S.C.S. § 1341* (relating to mail fraud), *18 U.S.C.S. § 1343* (relating to wire fraud), or *18 U.S.C.S. § 1961(1)(B)*. A "pattern of racketeering activity" is defined as at least two acts of racketeering activity, the last of which occurred within 10 years after the commission of a prior act of racketeering activity. *18 U.S.C.S. § 1961(5)*. "Enterprise" includes 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)*.

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

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

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

HN4[] **Racketeer Influenced & Corrupt Organizations, Remedies**

18 U.S.C.S. § 1964(c) provides a civil remedy to any person injured in his business or property by reason of a violation of *18 U.S.C.S. § 1962*.

Governments > Legislation > Interpretation

HN5[] **Legislation, Interpretation**

In the absence of a clearly expressed legislative intent to the contrary, the language of a statute must ordinarily be regarded as conclusive.

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Irl B. Baris, St. Louis, Missouri, for Appellee, Gail Martin.

Guilfoil Petzall & Shoemake, Thomas J. Guilfoil, Jim J. Shoemake, St. Louis, Missouri, for Appellee, Tiffany Industries, Inc.

Judges: Ross, John R. Gibson, and Bowman, Circuit Judges.

Opinion by: GIBSON

Opinion

[*409] JOHN R. GIBSON, Circuit Judge.

Alexander Grant and Company, a public accounting firm, appeals the dismissal of its complaint brought against its former client, Tiffany Industries, and certain Tiffany officials and employees under Title IX, the Racketeer Influenced and Corrupt Organizations (RICO) provision of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 941, codified at *18 U.S.C. §§ 1961-1968 (1982)*. The district court, *563 F. Supp. 35 (E.D.Mo. 1982)*, relying **[**2]** on the Seventh Circuit's decision in *Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449* (7th Cir.), *cert. denied*, *459 U.S. 880, 74 L. Ed. 2d 145, 103 S. Ct. 177 (1982)*, dismissed the complaint under *Fed. R. Civ. P. 12 (b) (6)* on the ground that Grant lacked standing to sue under RICO's civil remedy provision. It also denied Grant's motion to file an amended complaint. Grant argues on appeal that the district court erred in dismissing its RICO claim and that it abused its discretion in denying Grant's motion to file the amended complaint. We reverse and remand for further proceedings.

Grant was retained by Tiffany from 1970 through May, 1978. In 1979, Grant filed an action under RICO's civil remedy provision, *18 U.S.C. § 1964 (c)*, against Tiffany, its president Farrell Kahn, and Kahn's secretary Gail Martin. Grant claimed that it was the target of a pervasive scheme of mail and wire fraud designed by the defendants to obtain a favorable audit for the fiscal year 1977. Tiffany allegedly sought the favorable audit to obtain credit on better terms and to mislead its stockholders and the Securities & Exchange Commission **[**3]** into believing that the company was financially healthy.

HN1[] For purposes of reviewing the district court's dismissal of Grant's complaint under *Fed. R. Civ. P. 12 (b) (6)*, we must accept as true all of Grant's material allegations and liberally construe the complaint in its favor. *Loge v. United States, 662 F.2d 1268, 1270 (8th Cir. 1981)*, *cert. denied*, *456 U.S. 944, 72 L. Ed. 2d 466, 102 S. Ct. 2009 (1982)*. The first allegation is that Kahn, in an effort to inflate the value of Tiffany inventory, falsely represented to Grant that Steelabrade Corporation, a supplier of products to Tiffany, held $500,000 worth of Tiffany inventory as of March, 1978. Grant requested confirmation of this claim from Steelabrade president James Murphy. Kahn and Martin, knowing Murphy would not comply, instead requested that he compile a schedule of all purchases of Steelabrade products by Tiffany during 1977. The two then attached a copy of Grant's confirmation request to the schedule and fraudulently inserted language above Murphy's signature stating that "this inventory was at our premises at December 31, 1977, and March 1, 1978." These documents were then mailed **[**4]** to Grant.

Grant's second claim of fraud concerns an alleged sale of $3,500,000 worth of Tiffany products to the government of Nigeria. Grant learned through the course of its audit that a substantial portion of the products sold had not yet been purchased by Tiffany. Grant questioned whether Tiffany could, under these circumstances, record in its financial statements the substantial earnings resulting from this sale. In response, Tiffany personnel stated that the sale should be certified because they had issued purchase orders for the products as of June 30, 1977, and that the products were held by ten suppliers who were simply awaiting further shipping instructions. Grant requested confirmation of this claim from the ten suppliers. Kahn and Martin backdated purchase orders and mailed to Grant forged letters from the suppliers confirming the representations made by Tiffany personnel. Grant, still apprehensive, sought "reconfirmation" of **[*410]** the same information. Kahn and Martin then pressured six suppliers to sign and mail reconfirmation letters back to Grant.

Grant further asserts that Kahn and Martin typed two letters at Tiffany's St. Louis County offices allegedly **[**5]** from Nigerian bank officials. The two letters, one a forgery and the other "on information and belief" a forgery, represented that the two banks had extended $3,500,000 in loan commitments to the Nigerian government to enable it to purchase the Tiffany products. Grant also claims that Tiffany used false information to persuade four independent public accounting firms to certify the Nigerian sale, thereby pressuring Grant to do the same. These certifications were then mailed to Grant. By April 1978, Grant suspected that it was being defrauded and reported its concerns to the Securities & Exchange Commission as required by SEC regulations.

Grant concludes its complaint with the allegation that Tiffany's actions constitute a substantive RICO violation under *18 U.S.C. § 1962 (c)*. [1] It asserts that mail fraud, *18 U.S.C. § 1341*, and wire fraud, *id.* *§ 1343*, are two of the acts included in the definition of "racketeering activity," [2] that the defendants carried out two or more such acts within a ten-year period, thus establishing a "pattern of racketeering activity," [3] **[**7]** and that Tiffany is an interstate "enterprise" [4] conducted **[**6]** by defendants through a pattern of racketeering activity. Grant further asserts that it is entitled to civil damages for this violation under *18 U.S.C. § 1964 (c)*. [5]

The district court denied Grant's motion to file an amended complaint. The amended complaint names additional Tiffany officials as defendants and recites the foregoing with far greater specificity and clarity. It also incorporates additional claims of fraud; the original complaint includes 26 acts of mail fraud and 4 acts of wire fraud while the amended complaint reveals 48 and 10 instances, respectively. Included in the amended complaint are the following additional allegations: (1) Tiffany officials were negotiating with seven insurance companies for $9,000,000 in loans when it discovered in June, 1977 that, if generally accepted accounting principles were used, it was operating **[**8]** at a loss for the year; (2) Tiffany officials forged at least some of the "reconfirmation" letters from those suppliers who either refused or ignored Kahn's request that they assure Grant that they held Tiffany inventory bound for Nigeria; (3) Tiffany officials forged a third letter and a telex from officers of Nigerian banks that confirmed the $3,500,000 loan commitment to the Nigerian government; and (4) Tiffany officials further defrauded Grant by representing that Tiffany "farm stores" held inventory in excess of its actual value. The officials also pressured the managers of these stores to send false certifications to Grant and to make phony offers to purchase their inventories at inflated prices.

Grant asserts that it was damaged in three respects as a result of Tiffany's fraudulent representations. First, it claims **[*411]** that it suffered "theft of services," *i.e.*, the fraud required it to spend substantially more time on the Tiffany audit with a commensurate increase in fees, none of which have been paid. Second, it contends that the SEC investigation caused it to spend large amounts for attorneys' fees, document requests, and other expenses. Third, Grant argues **[**9]** that the fraud caused it to suffer damages to its business reputation.

I. Standing

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[1] ***HN2***[] *Section 1962 (c)* provides that

> 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.

[2] "***HN3***[] Racketeering activity" is defined as, *inter alia*, "any act which is indictable under any of the following provisions of title 18, United States Code: * * * *section 1341* (relating to mail fraud), *section 1343* (relating to wire fraud) * * *." *18 U.S.C. § 1961 (1)(B)*.

[3] A "pattern of racketeering activity" is defined as "at least two 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)*.

[4] "Enterprise" includes "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)*.

[5] ***HN4***[] *18 U.S.C. § 1964 (c)* provides a civil remedy to "any person injured in his business or property by reason of a violation of *section 1962* * *."

The district court did not hold, nor does Tiffany argue, that Grant has failed to plead facts sufficiently alleging that Tiffany committed a substantive violation of RICO under section 1962 (c). [6] **[**10]** Rather, the district court relied on *Cenco* and its holding that the accounting firm in that case suffered only "indirect" injury insufficient to grant it standing under section 1964 (c). [7] Grant asserts that *Cenco* should not be adopted as the law of this circuit because its restrictive interpretation has no basis in the language or legislative history of RICO. It further argues that, in any event, this case is distinguishable from *Cenco* because Grant has been "directly" injured by Tiffany's fraudulent practices. Tiffany argues that *Cenco* was properly decided and that Grant has suffered the same indirect injury alleged by the accounting firm in that case. [8]

[11]** We believe that *Cenco* is distinguishable from this case. In *Cenco*, the accounting firm of Seidman & Seidman was a co-defendant with Cenco, Inc., in a class action brought by persons who had purchased Cenco stock at allegedly inflated prices due to the company's fraudulent representations. The co-defendants cross-claimed against each other: Seidman argued that it too had been defrauded by Cenco and sought as damages under RICO indemnification for its liability to the shareholders. In this case, Grant seeks not indemnification but damages for the amount of its lost fees, the amount spent by reason of the SEC investigation, and the amount representing its loss of business reputation. We believe these are direct injuries, distinguishable from a claim for indemnification which, by its very nature, is secondary and indirect.

Second, and more compellingly, we are unpersuaded by the reasoning employed in **[*412]** *Cenco*. Judge Posner, writing for the panel, reasoned that the case was one of first impression and that the "language of section 1964 (c) provides no answer * * * and there is no useful legislative history relating to the provision." *Cenco*, 686 F.2d at 457. **[**12]** The opinion thus focused on whether recognizing a cause of action in favor of Seidman would be consistent with the "compensatory and deterrent objectives of RICO" and would comport with its primary purpose of " 'cop[ing] with the infiltration of legitimate businesses. '" *Id.* (quoting *United States v. Turkette, 452 U.S. 576, 591, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981))*. The court concluded that the objectives and purpose of RICO would not be served by permitting such actions, and also expressed concern with the volume of treble damage lawsuits an opposite decision might spawn. [9]

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[6] *See supra* note 1. We do observe that Grant's original complaint alleges that Tiffany is both a "person" and an "enterprise" within the meaning of section 1962 (c). It was precisely because of the possibility of such an identity that we held that count II of the complaint in *Bennett v. Berg, 685 F.2d 1053, 1061-62 (8th Cir. 1982)*, *aff'd in part and rev'd in part*, *710 F.2d 1361 (8th Cir. 1983)* (en banc), *cert. denied*, ***464 U.S. 1008, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983)***, failed to state a claim. Tiffany does not raise this point on appeal. We note, however, that Grant's amended complaint alleges that, in addition to Tiffany, two other distinct "enterprises" existed. The first consists of an association in fact of the six named individuals alleged in the amended complaint to have participated in the fraud. The second consists of all Tiffany employees.

[7] *See supra* note 5. The term "indirect injury" discussed in *Cenco* has also been used as a synonym for the "commercial" or "competitive" injury requirement. *See, e.g., Schacht v. Brown, 711 F.2d 1343, 1356-58* (7th Cir.), *cert. denied*, *464 U.S. 1002, 104 S. Ct. 509, 78 L. Ed. 2d 698 (1983)*. It has been suggested that this requirement, borrowed from ***antitrust law***, is applicable to RICO because the statute's legislative history reveals that it was "intended in part to combat the threat posed by racketeer influences in the free market system." *Bennett, 685 F.2d at 1059*. We explicitly rejected in *Bennett* any "commercial" or "competitive" injury restriction on standing under RICO. *Id. See also Blakey, The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, *58 Notre Dame L. Rev. 237, 255 n.52 (1982)*.

[8] Appellee Kahn argues separately that Grant's injury is insufficient because it was not a victim in the "target area" of the alleged RICO violation. He asserts that this concept, derived from standing tests developed under section 4 of the Clayton Act, *15 U.S.C. § 15 (1982)*, is applicable to RICO plaintiffs. Recognizing that we declined in *Bennett* an invitation to apply antitrust standing restrictions to RICO plaintiffs, *see supra* note 7, Kahn does not argue that Grant satisfies the target area test only if it suffers "commercial" or "competitive" injury. Rather, Kahn asserts that Grant must "loan Tiffany money, buy its stock or otherwise extend economic benefits to [it] * * *" to have standing. Appellee's Brief at 20. We believe that this reasoning is simply an alternative means of characterizing Grant's injury as "indirect," and therefore feel it merits no analysis independent of our discussion of *Cenco*.

[9] The particular language in *Cenco* is as follows:

[13]** We cannot agree that Grant's standing under *section 1964 (c)* is to be determined by means of an appeal to RICO's purpose and objectives. *Section 1964 (c)* provides a civil remedy for "any person injured in his business or property by reason of a violation of *section 1962* * * *." This language is unambiguous and, "***HN5***[] in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive. '" *Russello v. United States, 464 U.S. 16, , 104 S. Ct. 296, 299, 78 L. Ed. 2d 17 (1983)* (quoting *Turkette, 452 U.S. at 580*). We find no legislative history supporting the direct-indirect dichotomy; indeed, to the extent that the concept of indirect injury is a surrogate for concerns of federal-state relations and crowded court dockets, the legislative history indicates that Congress recognized that these were necessary costs in the fight against organized crime. *See* Blakey, *supra* note 7, at 280. It is simply "beyond our authority to restrict the reach of the statute" in this manner. *Bennett v. Berg, 685 F.2d 1053, 1064 (8th Cir. 1982)*, *aff'd in part and rev'd in part* **[**14]** , *710 F.2d 1361 (8th Cir. 1983)* (en banc), *cert. denied*, *464 U.S. 1008, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983)*; *see generally* *Moss v. Morgan Stanley, Inc., 719 F.2d 5, 21 (2d Cir. 1983)*, *cert. denied*, *465 U.S. 1025, 104 S. Ct. 1280, 79 L. Ed. 2d 684 (1984)*; *Schacht v. Brown, 711 F.2d 1343, 1361* (7th Cir.), *cert. denied*, *464 U.S. 1002, 104 S. Ct. 509, 78 L. Ed. 2d 698 (1983)*.

We also observe that Judge Posner, in the post-Cenco decision of *Sutliff, Inc. v. Donovan Cos., 727 F.2d 648 (7th Cir. 1984)*, determined the scope of RICO with considerably greater deference to its plain language than he did in *Cenco*. [10] We believe that *Sutliff* robbed *Cenco* of much of the precedential value accorded it by the district court. Insofar as the approaches in the two cases differ, the task of reconciliation is left to the Seventh Circuit.

[15]** We conclude that Grant has suffered injury within the meaning of *section 1964 (c)*.

[*413] II. Racketeering Enterprise Injury

Section 1964 (c) provides that a civil remedy is available to persons suffering injury "by reason of a violation of *section 1962* * * *." Yet *section 1962 (c)* does not prohibit "racketeering activity;" rather, it makes it unlawful for a person to "conduct or participate * * * in the conduct of [an] enterprise's affairs through a pattern of racketeering activity * * *." Tiffany reasons that the language of these two sections combines to limit civil recovery to persons suffering a "racketeering enterprise injury" -- *the conduct of an enterprise through* a pattern of racketeering -- and does not create a cause of action for those suffering injury only from the underlying predicate acts. Tiffany asserts that Grant's injuries have resulted solely from the particular acts of mail and wire fraud outlined in the complaint.

We have characterized the attempt to limit the scope of RICO by seizing on the "by reason of" language contained in *section 1964 (c)* as a "reiterat[ion] in new guise [of] the argument that no [distinct] 'enterprise' is **[**16]** alleged * *

> It is presumably on behalf of the owners, perhaps also the customers and competitors, of such businesses that the civil damages remedy was created, and not on behalf of the people who supply office equipment or financial or legal services to criminal enterprises that may be violating RICO. It is unlikely that Congress if it had adverted to the issue would have chosen to create in the wake of every RICO violation waves of treble-damage suits by all who may have suffered indirectly from the violation, especially when many of these would inevitably be, as here, the witting or unwitting tools of the violator.

686 F.2d at 457.

[10] In *Sutliff*, Judge Posner made the following observation in the context of rejecting an organized crime connection for civil RICO recovery:

> Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble-damage proceedings -- the price of eliminating all possible loopholes. We must abide by Congress's decision, made at a time of less sensitivity than today to the workload pressures on the federal courts and to the desirability of maintaining a reasonable balance between state and federal courts, however much we may regret not only the burdens that the decision has cast on the federal courts but also the displacement of state tort law into the federal courts that it has brought about.

727 F.2d at 654 (citations omitted). *Sutliff* does not refer to the *Cenco* decision.

*." *Bennett, 685 F.2d at 1059 n.5*. As advanced by Tiffany here, a racketeering enterprise injury also appears to bear some resemblance to the commercial or competitive injury concept and to the requirement that RICO is applicable to only those defendants associated with organized crime. We rejected both of these restrictions in *Bennett. 685 F.2d at 1058-59, 1063-64*. We recognize that a racketeering enterprise injury is a slippery concept whose definition has eluded even those courts professing to recognize it. *See In Re Catanella and E.F. Hutton and Co. Sec. Litigation, 583 F. Supp. 1388, 1434-37 (E.D. Pa. 1984)* (collecting cases). "Underlying this [racketeering enterprise injury] requirement is the familiar judicial discomfort with the potential breadth of RICO's civil component." *Id. at 1434*.

We need not further consider the nature of a racketeering enterprise injury, however, for it is clear that Grant's complaint does not simply allege injury from the underlying predicate acts. It contends that Tiffany was conducted through a pattern of mail and wire fraud that enabled it to remain in business. **[**17]** As a result of this extended life, Grant continued to provide its accounting services to Tiffany for a time greater than it would have had the fraud not occurred. This also increased the harm resulting to Grant's business reputation. We conclude that these allegations sufficiently plead an injury "by reason of" a RICO violation.

The Second Circuit recently held in *Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984)*, that the "by reason of" language in *section 1964 (c)* requires that the injury result from mobster activity or the efforts of organized crime. As indicated previously, this requirement is contrary to our holding in *Bennett*. [11] We do view our decision today as consistent with the Second Circuit's decision in *Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984)*. Both require that civil RICO plaintiffs allege something more than injury from the underlying predicate acts. We recognize, however, that the Second Circuit in *Bankers Trust* defines that "something more" in a far narrower fashion. *Id.* slip op. at 5621. *See also Furman v. Cirrito, 741 F.2d 524 (2d Cir. 1984)* (criticizing the requirement **[**18]** of a racketeering enterprise injury imposed by *Sedima* and *Bankers Trust*).

Appellee Kahn asserts in the alternative that no "racketeering enterprise injury" exists because Tiffany never secured the favorable audit from Grant, and therefore its business operations were never enhanced, nor did it receive any financial advantage, from its racketeering activity. We are not persuaded by this argument. As concluded above, Grant's complaint sufficiently alleges that its injury resulted from the operation of Tiffany through a pattern of racketeering activity. Moreover, Kahn's argument would lead to the anomalous result **[*414]** that the racketeering activity must be allowed to proceed to successful completion before civil recovery is permitted. No interpretation of the plain language of RICO's civil provisions supports the position that **[**19]** Grant must silently tolerate the significant costs and risks associated with ongoing fraud before it seeks redress.

III. Amended Complaint

The district court did not articulate its reasons for refusing to allow Grant to file the amended complaint. Two factors convince us that the district court should on remand give serious consideration to Grant's motion. First, any additional allegations contained in the amended complaint would in all likelihood be permitted in evidence under the original complaint. Second, the amended complaint relates Grant's claim in a far clearer and more specific manner.

In summary, we conclude that Grant has sufficiently pled that it was "injured" by Tiffany's fraudulent practices and that its injury occurred "by reason of" Tiffany's alleged violation of *section 1962 (c)*.

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[11] *Sedima* also holds that a prior criminal conviction is a prerequisite to civil RICO recovery. This issue has not been raised in the district court in this case.

Hood v. Tenneco Texas Life Ins. Co.

United States Court of Appeals for the Fifth Circuit

August 23, 1984

No. 83-2190

Reporter

739 F.2d 1012 *; 1984 U.S. App. LEXIS 19246 **; 1984-2 Trade Cas. (CCH) P66,163

Lonnie C. HOOD, Plaintiff-Appellant, v. TENNECO TEXAS LIFE INSURANCE CO., Southwestern Management & Research Corp., et al., Defendants-Appellees

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

Disposition: Affirmed.

Core Terms

termination, summary judgment, antitrust, Sherman Act, insurance company, brokering, wholly owned subsidiary, insurance code, competitors, horizontal, products, Tube, district court, anticompetitive, subsidiary, concerted, conspire, boycott

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 > Genuine Disputes

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**

The summary judgment standard, under *Fed. R. Civ. P. 56(c)*, is strict, allowing the entry of summary judgment only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

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

Evidence > Inferences & Presumptions > General Overview

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

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

HN2[] **Entitlement as Matter of Law, Genuine Disputes**

In considering a motion for summary judgment, a court must draw all reasonable inferences in favor of the nonmoving party. However, once the moving party makes an initial showing that no genuine issue of material fact exists, the nonmoving party must set forth specific facts, under *Fed. R. Civ. P. 56(e)*, showing that there is a genuine issue for trial.

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

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

HN3[] **Summary Judgment, Entitlement as Matter of Law**

In reviewing a summary judgment on appeal, the appellate court applies the same standard as that used by the district court.

Antitrust & Trade Law > Sherman Act > General Overview

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

HN4[] **Antitrust & Trade Law, Sherman Act**

A parent corporation and its wholly owned subsidiaries are legally incapable of conspiring with each other in violation of the Sherman Act *§ 1*, *15 U.S.C.S. §1*.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

A parent and its wholly owned subsidiary have a complete unity of interest. With or without a formal "agreement," the subsidiary acts for the benefit of its parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for scrutiny under the Sherman Act *§ 1*, *15 U.S.C.S. §1*.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

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

Just as subsidiaries can not conspire with their parent company, neither can they conspire with one another for purposes of the Sherman Act § 1., 15 U.S.C.S. §1.

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

HN7[] **Regulated Practices, Trade Practices & Unfair Competition**

See *Tex. Ins. Code Ann. Art. 21.21*, § 4(4).

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

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

HN8[] **Regulated Practices, Trade Practices & Unfair Competition**

A statutory combination or concerted action in violation of Texas antitrust laws cannot occur unless those combining are independent and in competition with one another.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > Elements

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Insurance Law > Industry Practices > Federal Regulations > General Overview

HN9[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

The McCarran-Ferguson Act, 15 U.S.C.S. § 1012(b), generally exempts the insurance industry from regulation under the federal antitrust laws including the Sherman Act. There is an exception to this general exemption: under 15 U.S.C.S. § 1013(b), the Sherman Act remains applicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

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

Evidence > Inferences & Presumptions > General Overview

HN10[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Horizontal agreements are ordinarily considered illegal per se, because of their pernicious effect on competition and lack of any redeeming virtue. Where a per se violation has occurred, the plaintiff is not required to show any anticompetitive effects; these are presumed.

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

Evidence > Inferences & Presumptions > General Overview

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

HN11[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

The rule of reason inquiry focuses on the competitive significance of a particular restraint. To recover under this rule, the plaintiff must show that the defendant's actions adversely affected competition in the appropriate product and geographic markets.

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

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

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

HN12[] **Regulated Practices, Trade Practices & Unfair Competition**

The termination of a dealer by a supplier lacking market power cannot have an adverse effect on competition.

Counsel: Steven C. Barkley, Evans & Moses, Beaumont, Texas, for Appellant.

Harry M. Reasoner; Page I. Austin; Karl S. Stern, Houston, Texas, for Appellee.

Charles G. Barnett, Dallas, Texas, for Appellee.

Dewey J. Gonsoulin, Beaumont, Texas, for Appellee.

Judges: Thornberry, Williams, and Garwood, Circuit Judges.

Opinion by: GARWOOD

Opinion

[*1013] Garwood, Circuit Judge:

This is an appeal from a summary judgment in an antitrust suit. Plaintiff-appellant, Lonnie C. Hood, who had worked as a career agent for the Southwestern Life Insurance Company (Southwestern Life) for many years, was terminated by the company in September 1980. At about the same time, an affiliated company, Southwestern Management & Research Corporation (Southwestern Management), terminated Hood's employment as a registered representative selling mutual funds and other financial instruments.

Hood sued these companies and three others [1] in federal district court, alleging that his termination constituted a group boycott which substantially restrained competition in violation of *section 1* of the Sherman Act, **[**2]** *15 U.S.C. § 1*, and article 21.21, section 4(4) of the Texas Insurance Code. The district court, after reviewing the pleadings, depositions, and admissions on file, in addition to affidavits submitted by the parties, on March 1, 1983 granted defendants' motion for summary judgment on all of plaintiff's claims. We affirm.

I.

FACTS

Lonnie Hood became a career agent with Southwestern Life in its Beaumont branch office in 1953 and served in this capacity until his termination by the company in September 1980. In 1971 Hood also became a registered representative of Southwestern Management, an affiliated company of Southwestern Life which functions as a service company for Southwestern Life insurance agents who wish to sell mutual funds and annuities.

Although his contract **[**3]** with Southwestern Life provided that Hood would sell only its policies, in 1965 he began to sell policies for other companies. At the time of his termination, Hood had signed agreements with over twenty-five companies and did substantial business with these. He received formal permission from Southwestern Life to do so only on one occasion in 1971. The company, however, apparently did not strictly enforce its restrictions regarding brokering for other companies either as to Hood or as to its other agents.

By 1980 Southwestern Life's competitive position in the Beaumont area had deteriorated. Hood believed that the company **[*1014]** was not competitive in certain areas of the market. He expressed his concerns to officers of the company as well as to other Southwestern Life agents.

In September 1980 Southwestern Life appointed a new manager, Thomas Martin, for the Beaumont branch office. Martin was told by James Cobb, a vice president of Southwestern Life, that the agency needed rebuilding in the form of new agents and increased production. Cobb also told Martin that Lonnie Hood placed a great deal of business outside Southwestern Life and that Hood had a negative attitude toward **[**4]** the company and its products. Shortly after assuming his new duties, Martin recommended the termination of Hood's agency contract. The company accepted his recommendation and on September 25, 1980 sent Hood a letter informing him of its decision. This letter, which was the first notice that Hood received regarding his termination, gave no reasons for the company's action. [2]

On October 6, 1980 Southwestern Management also **[**5]** sent Hood a notification that he had been terminated as a registered representative for that company. It was the usual policy of Southwestern Management to terminate a representative when that individual had also been terminated by Southwestern Life, [3] although some individuals under these circumstances had requested and been allowed to remain representatives of Southwestern Management. There is no evidence that Hood made such a request.

Hood initiated this suit on May 6, 1981 alleging violations of *section 1* of the Sherman Act, *15 U.S.C. § 1*, and alternatively, an illegal tying agreement in violation of section 3 of the Clayton Act, **[**6]** *15 U.S.C. § 14*.

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[1] The others are Southwestern Investors, Inc., Southwestern Investors Income Fund, Inc., and Fund of the Southwest, Inc. There is no claim, however, that these companies were involved in Hood's termination.

[2] Later, in response to a letter from Hood's attorney, Southwestern Life stated that Hood's termination was due to the "fact that he was placing the majority of his business with another life insurance company and had ceased to be a representative primarily for Southwestern Life Insurance Company. . . . Simply stated, Mr. Hood had, by his actions, ceased to be a career agent for Southwestern Life, and our notice of termination merely confirmed that point."

Hood's contract with Southwestern Life provided it could be terminated at any time by either party on written notice to the other.

[3] One reason offered for this policy is that, under the rules of the National Association of Securities Dealers, an individual may work as a registered representative for only one company. The premise is that individuals leaving Southwestern Life would wish to become a representative of a securities firm associated with another life insurance company.

Subsequently, he amended his complaint to add a claim under article 21.21, section 4(4) of the Texas Insurance Code. The district court granted summary judgment on all claims. Hood appeals only his claims under section 1 of the Sherman Act and article 21.21 of the Texas Insurance Code. He does not appeal the district court's judgment on his Clayton Act claim.

II.

SUMMARY JUDGMENT

We are mindful that we review this case under the summary judgment standard. ***HN1***[] This standard is a strict one, allowing the entry of summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed.R. Civ.P. 56(c)*, *see, e.g., Transource International v. Trinity Industries, Inc., 725 F.2d 274, 279 (5th Cir. 1984)*. Moreover, ***HN2***[] in considering a motion **[**7]** for summary judgment, a court must draw all reasonable inferences in favor of the nonmoving party. *In re Municipal Bond Reporting Antitrust Litigation, 672 F.2d 436, 440 (5th Cir.1982)*. However, once the moving party makes an initial showing that no genuine issue of material fact exists, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial." *Fed.R. Civ.P. 56(e)*. ***HN3***[] In reviewing a summary judgment on appeal, we apply the same standard as that used by the district court. *Transource, 725 F.2d at 279*.

[*1015] III.

FEDERAL ANTITRUST CLAIM

Hood's claim that Southwestern Life and Southwestern Management conspired to terminate him in violation of *section 1* of the Sherman Act has been foreclosed by a recent decision of the Supreme Court, *Copperweld Corporation v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*. In *Copperweld* the plaintiff, David Grohne, had formed a new corporation, Independence Tube Company, that would compete in the steel tubing **[**8]** market with Regal Tube Company, [4] a wholly owned subsidiary of Copperweld Corporation. Obviously concerned about this new competitor, Copperweld and Regal Tube took a number of steps to discourage those contemplating doing business with Independence Tube. [5]

A jury found that Copperweld and Regal Tube had violated *section 1* of the **[**9]** Sherman Act through these concerted activities and the Seventh Circuit affirmed. The Supreme Court reversed, however, holding that ***HN4***[] a parent corporation and its wholly owned subsidiaries are legally incapable of conspiring with each other in violation of *section 1* of the Sherman Act. In so holding, the Court rejected in large part [6] the "intra-enterprise conspiracy doctrine," a doctrine applied to allow recovery under the Sherman Act for the coordinated acts of a parent and its subsidiary. The Court expressed as the basis for its decision the unity of purpose shared by the parent and its subsidiary:

> "A ***HN5***[] parent and its wholly owned subsidiary have a complete unity of interest. . . . With or without a formal 'agreement,' the subsidiary acts for the benefit of its parent, its sole shareholder. If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had

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[4] Before its acquisition by Copperweld, Regal Tube was an unincorporated division of Lear Siegler, Inc. Grohne served as president of this division.

[5] For example, they sent to parties with whom Grohne was attempting to deal a letter warning of their intent to protect their rights under the terms of their purchase agreement and to protect the trade secrets purchased from Lear Siegler. After receiving this letter, Yoder Company canceled a contract with Grohne under which the former was to supply a tubing mill. Copperweld and Regal Tube also contacted banks that were considering financing the new company as well as prospective suppliers and customers of Independence Tube.

[6] The Court reserved the question of whether a parent company may conspire with an affiliated company it does not wholly own.

> previously served different interests, and there is no justification for **[**10]** *§ 1* scrutiny." *Id.* at __, 104 S. Ct. at 2742.

Hood's claim of a *section 1* violation concerns the termination of his contract as an agent, a decision that he alleges was jointly made by Southwestern Life and Southwestern Management. Each of these companies, however, is a wholly owned subsidiary of a common parent corporation -- Tenneco. *Copperweld* teaches us that because they share a common purpose with Tenneco they cannot conspire with their parent in violation of the Sherman Act. ***HN6***[] By the same token, neither can they conspire with one another. In light of *Copperweld*, therefore, we must affirm the grant of summary judgment on Hood's federal antitrust claim. [7]

[11] IV.**

STATE ANTITRUST CLAIM

In addition to claiming a violation of federal ***antitrust law***, Hood alleges that the termination of his contract violated article 21.21, section 4(4) of the Texas Insurance Code. [8] *Tex.Ins.Code Ann. art. 21.21* § 4(4) (Vernon 1981). This section states:

> **[*1016]** ***HN7***[] "Sec. 4. The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:
> ". . . .
> "(4) Boycott, Coercion and Intimidation. 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; . . ."

We affirm the district court's grant of summary judgment on this state law claim asserted by Hood.

[12]** At the onset, we are uncertain that Texas law would even recognize the claim asserted by Hood and for much the same reason as expressed by the Supreme Court in *Copperweld*. Texas courts have held that ***HN8***[] a statutory combination or concerted action in violation of the state antitrust laws cannot occur unless those combining are independent and in competition with one another. *See State v. Fairbanks-Morse & Co., 246 S.W.2d 647, 658-59* (Tex. Civ.App. -- Dallas 1952, writ ref'd n.r.e.). "Our Supreme Court from early times has ruled that a statutory combination cannot exist unless the two or more persons are independent and capable of acting in competition with one another . . . ." *Padgitt v. Lone Star Gas Co., 213 S.W.2d 133, 136*, (Tex.Civ.App. -- Dallas 1948, no writ). While these courts were interpreting articles 7426-7428, the predecessor statutes of the general Texas antitrust laws, rather than the insurance code provision at issue in this case, it is probable that the Texas courts would apply the same reasoning to claims such as that made by Hood. Under **[**13]** this reading of Texas law, Southwestern Life and Southwestern Management, which are neither "competitors" nor independent, cannot combine or act in a concerted manner.

We decline, however, to rest our holding on this interpretation. While *Fairbanks-Morse* suggests broadly that those charged with combining in restraint of trade must be capable of acting in competition with one another, the decision in *Padgitt* indicates this requirement applies only to trusts, as the court in that case considered the merits of a claim of conspiracy between a gas company and a customer. Moreover, while we believe that these decisions do reflect a requirement that those conspiring be "independent," [9] we cannot be certain at this point that the Texas courts would apply the rule expressed by the Supreme Court in *Copperweld* regarding subsidiaries of a common parent. This is particularly true as that case at least arguably effected a change from the previous practice and as we have found

[7] Thus, we do not directly address the merits of Hood's federal claim, as such, apart from the *Copperweld* rule, although, as shown by the discussion of his state law claim, the result would be the same.

[8] The district court had jurisdiction over this pendent state claim. *See* *Transource International v. Trinity Industries, Inc., 725 F.2d 274, 285-86 (5th Cir.1984)*.

[9] *See also* *Albin v. Isotron Corporation, 421 S.W.2d 739* (Tex.Civ.App. -- Texarkana 1967, writ ref'd n.r.e.).

no Texas case that specifically addresses this issue. For these reasons, we address the merits of appellant's state claim apart from *Copperweld*.

[14]** Our task is hampered somewhat by the paucity of cases discussing section 4(4) of article 21.21; research has yielded only one -- *Russell v. Hartford Casualty Insurance Co., 548 S.W.2d 737* (Tex.Civ.App. -- Austin 1977, writ ref'd n.r.e.). In *Russell* the plaintiffs claimed that their insurer had violated this provision by attempting to "coerce and intimidate" them through the cancellation of a rental car agreement. The Texas Court of Civil Appeals rejected this claim and affirmed summary judgment for the defendant, stating that the purpose of section 4(4) is "to prevent monopoly or unreasonable restraint in the business of supplying insurance." *548 S.W.2d at 742*. While this decision shows that Texas would not apply this provision to every unfair or potentially intimidating act by an insurer, it does not express the standards to be used in assessing a violation of the section.

The parties both contend, however, that this Court should apply the test under *section 1* of the Sherman Act, *15 U.S.C. § 1*, in assessing Hood's claim. We agree, finding support for this approach in *Russell*, which **[*1017]** shows that the Insurance **[**15]** Code provision is aimed at antitrust violations, and in the common purpose reflected in the two statutes -- to prevent concerted anticompetitive conduct. [10]

[16]** SHERMAN ACT ANALYSIS

Per Se **Restraint Of Trade**. Hood first contends that his termination by Southwestern Management and Southwestern Life was a horizontal boycott and thus constituted a *per se* violation. [11] **[**17]** He argues that through their actions the Tenneco subsidiaries sought to send a message to remaining Southwestern Life agents to stop brokering the products of other insurance companies. For this reason, he argues, his termination was intended to harm other insurance companies which compete on the same level with Southwestern Life in the Beaumont area. While conceding that Hood's termination was due to his low production for Southwestern Life, [12] defendants contend that their action was justified and, in any event, did not violate the anti-trust laws. We find no *per se* restraint.

First, it is established that horizontal combinations in restraint of trade are "agreements among *actual competitors* which restrain competition at the same level of distribution." *Transource International v. Trinity Industries, Inc., 725 F.2d 274, 279 (5th Cir.1984)* (emphasis added). Southwestern Life and Southwestern Management, however, are not actual competitors. The former is an insurance company and sells only insurance products; the latter is a broker/dealer in securities and sells mutual funds and variable annuities. Moreover, the record reflects that

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[10] Supporting this conclusion is the fact that the wording of article 21.21, section 4(4), while differing from that of *section 1* of the Sherman Act, is quite similar to the wording in the McCarran-Ferguson Act. ***HN9***[] This act generally exempts the insurance industry from regulation under the federal antitrust laws including the Sherman Act. *15 U.S.C. § 1012(b)*. There is an exception to this general exemption: the Sherman Act remains applicable "to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." *15 U.S.C. § 1013(b)*. This Court has analyzed claims of boycotts by insurance companies under the test applied for violations of *section 1* of the Sherman Act. *Blackburn v. Crum & Forster, 611 F.2d 102* (5th Cir.), *cert. denied*, ***447 U.S. 906, 100 S. Ct. 2989, 64 L. Ed. 2d 856 (1980)***. *See also* *St. Paul Fire and Marine Ins. Co. v. Barry, 438 U.S. 531, 541, 98 S. Ct. 2923, 2929, 57 L. Ed. 2d 932 (1978)*.

[11] ***HN10***[] Horizontal agreements are ordinarily considered illegal *per se* "' because of their pernicious effect on competition and lack of any redeeming virtue.'" *Transource, 725 F.2d at 279*, quoting *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545 (1958)*. Where a *per se* violation has occurred, the plaintiff is not required to show any anticompetitive effects; these are presumed. *Id.*

[12] From January to September 1980 Hood earned $7,168 in commissions for new business from Southwestern Life; his first year's commissions with all other companies totaled $36,851 during this same time period. His earnings for renewals from January to September were $6,530 and $9,480 respectively. Hood had voluntarily moved from the Southwestern Life branch office in Beaumont in June 1980 because he was placing much of his business with other companies.

Southwestern Management functioned as a service company for **[**18]** Southwestern Life agents; its purpose was to enable them to sell products they could not otherwise offer. [13]

Second, in any event, we find no horizontal component in the termination of Hood by the two companies. Neither company competes with Hood. Hood has not alleged and shown to be a co-conspirator any individual, such as another agent, who is independently a competitor of Hood; nor has he alleged and shown that the asserted conspiracy had as a purpose or effect the restriction of competition among agents who were his competitors. In *Blackburn v. Crum & Forster, 611 F.2d 102, 104* (5th Cir.), *cert. denied*, *447 U.S. 906, 100 S. Ct. 2989, 64 L. Ed. 2d 856 (1980)*, this Court, in considering a similar contention by a terminated insurance broker, found that the case "contains no horizontal aspect, but involves **[**19]** only a vertical action undertaken by suppliers, **[*1018]** the insurance company defendants, against their agent . . . ." *Cf. Black v. Nationwide Mutual Insurance Co., 429 F. Supp. 458 (W.D.Pa. 1977)*, *aff'd*, *571 F.2d 571 (3d Cir.1978)* (no antitrust violation in termination of insurance agent by three related insurance companies). Hood's termination did not constitute a horizontal boycott. [14]

Rule of Reason. Because we have concluded that there was no horizontal restraint of trade, we must analyze Hood's claim under the rule of reason. *Transource at 280*; *Muenster Butane, Inc. v. Stewart Company, 651 F.2d 292, 295 (5th Cir. 1981)*. "The **[**20]** ***HN11***[] rule of reason inquiry focuses on the competitive significance of a particular restraint . . . ." *Hornsby Oil Company, Inc. v. Champion Spark Plug Company , 714 F.2d 1384, 1392 (5th Cir. 1983)*. To recover under this rule, the plaintiff must show that the defendant's actions adversely affected competition in the appropriate product and geographic markets. *Id.* Hood has failed to show sufficient anticompetitive effect to prevail on his claim.

It is undisputed that there was vigorous competition in Beaumont between the twenty to thirty companies selling life insurance there. [15] Further, Hood does not dispute that Southwestern Life's share of the overall ordinary life insurance business in that city was less than five percent [16] and that entry or expansion into the market was not difficult. This is significant as we have held that ***HN12***[] the termination of a dealer by a supplier lacking market power cannot have an adverse effect on competition. *See Carlson Machine Tools, Inc. v. American Tool, Inc., 678 F.2d 1253, 1259-60 (5th Cir. 1982)* **[**21]** (affirming summary judgment against terminated distributor where manufacturer's market share never exceeded ten percent); *Daniels v. All Steel Equipment, Inc., 590 F.2d 111 (5th Cir. 1979)* (summary judgment in case involving termination of a sales representative).

Hood argues, however, that the relevant market in his case was not the entire life insurance business in Beaumont, but rather a discrete market consisting of professional men over the age of forty. He contends that Southwestern Life had a market share of approximately twenty-five percent in this market. It is true, of course, that defining a market is an important consideration in an antitrust action. We have said **[**22]** that market considerations provide the "objective benchmarks" for determining a *section 1* violation. *Hornsby Oil, 714 F.2d at 1393*. And it is also true that "within a broad product market, economically significant submarkets may exist which in themselves constitute product markets." *Id. at 1393*. [17]

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[13] Thus we reject Hood's contention, made during oral argument, that the two companies competed because each offered products relevant to financial planning and security.

[14] Nor is there any other basis for finding a *per se* violation. *See E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee, 467 F.2d 178 (5th Cir. 1972)*, *cert. denied*, ***409 U.S. 1109, 93 S. Ct. 912, 34 L. Ed. 2d 690 (1973)***.

[15] Both Hood and his expert witness testified that the life insurance business in the Beaumont area was intensely competitive.

[16] The record reflects that Southwestern Life's overall share of ordinary life insurance in Texas at this time was 2.33 percent; its share of group insurance in that state was.67 percent.

[17] "The outer boundaries of the product market are drawn in terms of the presence of substitutes to which consumers will turn in response to price changes . . . and the ability of other existing producers or new entrants to expand output . . . ." *Hornsby Oil, 714 F.2d at 1393*.

Hood's showing on this theory, however, is wholly insufficient. His statement is that this twenty-five percent of the market share of executives and professionals over forty in the Greater Beaumont Area consists of those who "either were or had been policyholders of Southwestern Life." This figure, therefore, does not represent a market share at a particular point in time, but rather **[**23]** is a cumulative figure representing a total number of policyholders over some unknown period of time. We must infer that the twenty-five percent figure is overstated as to any particular relevant time. Moreover, Hood does not show how his termination impacted competition. He merely points to figures showing that brokering by Southwestern Life agents with **[*1019]** one company -- Philadelphia Life Insurance Company -- increased significantly in 1980 (to $128,518 from $8,812 in 1979) and decreased to $58,203 in 1981, the year following his termination. We have no information that shows a link between Hood's termination and the decline in brokering by Southwestern Life agents with this one particular company. Nor do we have any information regarding whether Philadelphia Life was unable to sell its products through other agents. In addition, Hood has failed entirely to show how this one-year decline in brokering by Southwestern Life agents with a single insurance company has impacted the product market he seeks to define. His argument seems to be that Philadelphia Life would no longer be privy to the customer lists of Southwestern Life and, thus, could not penetrate the over-forty executive-professional **[**24]** market. The latter conclusion, however, is entirely speculative. The antitrust laws, moreover, do not require companies to share this type of information. Finally, Hood has conceded that Southwestern Life could enforce the provision in its contracts with its agents requiring them to sell only its products. The anticompetitive effects of this action would be no different, however, than those claimed by Hood as a result of his termination. *Cf.* *Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1007* (5th Cir.), *cert. denied*, *454 U.S. 827, 102 S. Ct. 119, 70 L. Ed. 2d 102 (1981)* (finding no antitrust violation where the defendant could have attained the same results through a lawful means as it accomplished by an allegedly illegal means).

Given the admittedly vigorous competition in Beaumont and the ease of entry into the market, there is simply no showing, beyond mere speculation, that Hood's termination, even if we infer some effect on brokering by other Southwestern Life agents, either had or was calculated to have any anticompetitive effect. Hood has thus failed to provide adequate evidence of anticompetitive effect to raise a **[**25]** material fact issue and to preclude summary judgment under the rule of reason.

V.

CONCLUSION

In sum, we find that Hood's federal antitrust claim has been foreclosed by the Supreme Court's decision in *Copperweld* because Southwestern Life and Southwestern Management are wholly owned subsidiaries of a common parent company. In addition, we find that he has failed to prevail on his state law claim. For these reasons, we affirm the decision of the district court.

AFFIRMED.

Hybud Equipment Corp. v. Akron

United States Court of Appeals for the Sixth Circuit

April 16, 1984, Argued ; August 24, 1984, Decided

No. 83-3306

Reporter

742 F.2d 949 *; 1984 U.S. App. LEXIS 19197 **; 1984-2 Trade Cas. (CCH) P66,162; 21 ERC (BNA) 1705; 14 ELR 20809

HYBUD EQUIPMENT CORP., et al., Plaintiffs-Appellants, v. CITY OF AKRON, OHIO, et al., Defendants-Appellees

Prior History: [1]** ON APPEAL from the United States District Court for the Northern District of Ohio.

Core Terms

municipalities, exemption, state policy, supervision, powers, solid waste, disposal, district court, ordinance, finance, waste disposal, articulated, displace, state action, anticompetitive, immune, regulation, delegated, sovereign, antitrust, state legislature, authorization, state supreme court, government agency, facilities, home-rule, monopoly, monopolize, projects, plant

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

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

HN1[] **Exemptions & Immunities, Parker State Action Doctrine**

Whether a city is entitled to a state action exemption from the antitrust laws depends not upon the proprietary character of the city's actions or whether the action is within the general powers delegated to the city by the state. Immunity attaches only if the measures are taken pursuant to a "clearly articulated and affirmatively expressed" state policy.

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

HN2[] **Exemptions & Immunities, Parker State Action Doctrine**

The anticompetitive conduct of a nonsovereign state representative requires a showing that the conduct is pursuant to a "clearly articulated and affirmatively expressed state policy" to replace competition with regulation.

Administrative Law > Agency Rulemaking > General Overview

Governments > Public Improvements > Financing

Governments > Public Improvements > Sanitation & Water

HN3[] Administrative Law, Agency Rulemaking

The Ohio water development authority may: make loans and grants to governmental agencies for the acquisition or construction of development projects by any such governmental agency and adopt rules and procedures for making such loans and grants (*Ohio Rev. Code Ann. § 6123.04(C)*); issue development revenue bonds and notes and development revenue refunding bonds of the state, payable solely from revenues as provided in *Ohio Rev. Code Ann. § 6123.06*, unless the bonds be refunded by refunding bonds, for the purpose of paying any part of the cost of one or more development projects or parts thereof (*Ohio Rev. Code Ann. § 6123.04(F)*); make and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its duties and the execution of its powers under Ohio Rev. Code Ann. ch. 6123 (*Ohio Rev. Code Ann. § 6123.04(I)*); do all acts necessary or proper to carry out the powers expressly granted in Ohio Rev. Code Ann. ch. 6123, (*Ohio Rev. Code Ann. § 6123.04(P)*).

Business & Corporate Law > Cooperatives > General Overview

Governments > Public Improvements > Financing

Governments > Public Improvements > Sanitation & Water

HN4[] Business & Corporate Law, Cooperatives

Ohio Rev. Code Ann. § 6123.13 provides that any government agency or combination thereof may cooperate with the authority in the acquisition or construction of a development project and shall enter into such agreements with the authority as are necessary, with a view to effective cooperative action and safeguarding of the respective interests of the parties thereto, including, without limitation, contracting for the operation, leasing, or subleasing for such terms and with such person or governmental agency as maybe agreed upon. The authority shall not enter into such a cooperative agreement with any governmental agency if the authority determines that the project to be acquired or constructed under the agreement would undermine the financial feasibility of an existing development project acquired or constructed under a cooperative agreement between the authority and another governmental agency because the proposed project would serve substantially the same geographic area as the existing project.

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

Governments > State & Territorial Governments > Legislatures

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

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

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

HN5[] Energy & Utilities, State Regulation

Where a restraint is not expressly set forth in a legislative scheme for regulation but is imposed by a nonsovereign state representative as an exercise of delegated powers, the court must examine the relationship between the restraint and the regulatory aims of the state. If the challenged actions bear an attenuated relationship to the statutory aims and the express powers so delegated, the actions cannot be deemed to have resulted from a clearly articulated and affirmatively expressed state policy to displace competition.

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

Governments > Local Governments > Claims By & Against

HN6[] **Exemptions & Immunities, Parker State Action Doctrine**

If a challenged anticompetitive restraint of a nonsovereign state representative, for which there is no express statutory provision, is necessary to carry out the representative's mandate, then a legislative intent to displace competition may be inferred from the legislature's delegation of authority.

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

HN7[] **Exemptions & Immunities, Parker State Action Doctrine**

An adequate expression of state policy may be found in the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Environmental Law > Solid Wastes > General Overview

Real Property Law > Torts > General Overview

Governments > Public Improvements > General Overview

HN8[] **Antitrust & Trade Law, Exemptions & Immunities**

Under Ohio law, municipalities are expressly authorized to regulate the disposal of waste and construct facilities for the disposal of waste. A municipality may exercise this power through a monopoly.

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

Governments > Public Improvements > Financing

HN9[] **Cooperatives, Formation**

The Ohio Water Development Agency is expressly authorized to enter into cooperative agreements with government agencies for the financing of development projects. The term "government agency" includes any county, town, or municipality of the state. *Ohio Rev. Code Ann. § 6123.01(A)*.

Environmental Law > Solid Wastes > General Overview

Governments > Public Improvements > Sanitation & Water

HN10[] Environmental Law, Solid Wastes

Ohio Rev. Code Ann. § 715.43 provides that any municipal corporation may provide for the collection and disposition of sewage, garbage, ashes, animal and vegetable refuse, dead animals, and animal offal, and may establish, maintain, and regulate plants for the disposal thereof.

Environmental Law > Solid Wastes > General Overview

Governments > Public Improvements > Sanitation & Water

HN11[] Environmental Law, Solid Wastes

Ohio Rev. Code Ann. § 717.01(C) provides that each municipal corporation may erect a crematory or provide other means for disposing of garbage or refuse, and erect public comfort stations.

Governments > Public Improvements > Financing

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

Governments > Courts > Judicial Precedent

Governments > Public Improvements > Sanitation & Water

HN12[] Public Improvements, Financing

Where there is a reasonable exercise of the state's broad authorization for the financing of waste facilities within a municipality's statutory power to regulate waste disposal, the court is satisfied that the restraint is pursuant to the clear articulation and affirmative expression of state policy as required by precedent.

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

HN13[] Exemptions & Immunities, Parker State Action Doctrine

Where a suit challenges the particular exercise of state power, the court should consider the nature and extent of supervision by the state as part of the general inquiry into whether the challenged actions are those of the state as sovereign. The court should give close scrutiny to the existence of supervision where the circumstances indicate the possibility of an improper exercise of that power.

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Edward J. Riegler, W. F. Spicer, James L. Bickett, Akron, Ohio, Eben Crawford, Cleveland, Ohio, John E. Holcomb, Akron Ohio, William E. Schultz, Assistant Prosecuting Attorney, Akron, Ohio, Steven J. Schwartz, Timothy M. Hartman, William Baughman, Jr., Squire, Sanders and Dempsey, Cleveland, Ohio, for Appellees.

John W. Pestle, Randall W. Kraker, Jeffrey S. Rueble, Varnum, Riddering, Schmidt & Howlett, Grand Rapids, Michigan, for Amicus Curiae Public Corp. Law Sectiono of the State Bar of Michigan, the Michigan Townships Assoc. and Michigan CitesS of Ann Arbor, Battle Creek, Dearborn, Detroit, Flint, Grand Haven, Grand Rapids, Holland, Kalamazoo, Lansing, Livonia, Pontiac, Southfield, Traverse City and Troy.

Judges: Merritt and Martin, Circuit Judges; Brown, Senior Circuit Judge. Merritt, Circuit Judge, concurring.

Opinion by: BROWN

Opinion

[*950] This case, **[**2]** which now makes its third appearance before this court, is one of the increasingly frequent challenges under the federal antitrust laws to the actions of state and municipal bodies. These actions raise fundamental questions about the balance of federal and state power and pose the inherent conflict between the national policy of free competition and the anticompetitive consequences of state regulation. This rapidly evolving area of the law portends far-reaching changes in the role of the federal courts in reviewing the exercise of regulatory authority by the states and, ultimately, in the relationship between states and their political subdivisions. [1]

[3]** **[*951]** The plaintiffs in the instant case allege that the City of Akron, as part of a comprehensive program to dispose of solid waste and create steam energy, has monopolized the business of solid waste processing in violation of the Sherman Antitrust Act. *15 U.S.C. § 1 et seq.* The defendants, including the City and a state agency, contend that their actions are protected by the "state action exemption" to the ***antitrust law*** developed by *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)* and its progeny. The plaintiffs appeal from summary judgment holding that the defendants' actions were within the state action exemption and therefore immune to antitrust attack.

I.

A. History of the Recycle Energy System and the Ordinance Under Challenge.

The facts in this case are set forth in detail in the original district court opinion, *Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671 (N.D. Ohio 1979)*. Those facts relevant to the issues before us are summarized below.

The plaintiffs in this case challenge an ordinance adopted as part of a plan to solve two pressing problems **[**4]** confronting the City of Akron. In the late 1960's, Akron had exhausted all but one sanitary landfill for solid waste disposal. A proposal to open a new site encountered immediate legal challenges. As the City struggled to find alternatives for waste disposal, Ohio Edison petitioned the Public Utilities Commission to permit the company to abandon its steam heating system and halt the supply of steam for Akron's downtown business district.

In an effort to find a single solution to its difficulties, the City began to consider constructing a "Recycle Energy System" ("RES") to convert solid waste into steam. After several studies and a public hearing, the City Council, in April 1973, authorized the City administration to retain a firm to design an RES project. By December 1974, final plans and specifications were completed and construction contracts were let out for bid. Financing, however, proved to be a substantial barrier. The City intended to issue revenue bonds to finance the project, but in mid-1975 the underwriters for the bond issue informed the City that the bonds would not be marketable.

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[1] The implications of recent Supreme Court decisions in this area have provoked much scholarly discussion. *See e.g., Posner, The Proper Relationship between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. Rev. 693 (1974); Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 Nw. U.L. Rev. 71 (1974); Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 Ariz. St. L.J. 305; Areeda, *Antitrust Immunity for State Action After Lafayette*, 95 Harv. L. Rev. 435 (1981); Civiletti, *The Fallout from Communications Co. v. City of Boulder*, *32 Cath. U.L. Rev. 379 (1983)*. These decisions have also given rise to much litigation presenting serious and unsettled questions. *See e.g., Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983)*, *cert. granted*, ***467 U.S. 1240, 104 S. Ct. 3508, 82 L. Ed. 2d 818, 52 U.S.L.W. 3891 (1984)***; *Central Iowa Refuse Systems v. Des Moines Metropolitan Solid Waste Agency, 715 F.2d 419 (8th Cir. 1983)*, *petition for cert. filed*, ***52 U.S.L.W. 3441*** (U.S. Nov. 18, 1983) (No. 83-825).

The City turned to the Ohio Water Development Agency ("OWDA") for assistance, and **[**5]** in September 1975, OWDA agreed to finance the project by issuing revenue bonds. When OWDA found that the bond issue could not be secured by the City's general fund, the proposed financing package was restructured with new underwriters. The new underwriters renegotiated steam supply contracts for the project and required the creation of a special contingency fund by the City and county governments to cover construction cost overruns. The underwriters also determined that the RES must be assured a steady supply of waste in order to market the bonds. Following this evaluation, the City and OWDA decided that it would be necessary to require, by ordinance, that all solid waste collected within the City limits be transported to the RES facility.

In 1976, the City and OWDA entered into a Cooperative Agreement to finance the RES project. Section 5.5 of the Agreement provides that the City ("LGA") covenants with the OWDA for the benefit of the bond holders that:

> I. For the term of this Agreement, the LGA shall require that all collectors and **[*952]** haulers of Solid Waste within the LGA be licensed by the LGA and all such licenses shall provide that all collectors or haulers **[**6]** of Solid Waste shall dispose of all Solid Waste generated within the corporate limits of the LGA which is acceptable for disposal by the Project to be delivered to the Project for disposal through the Project and require that such haulers and collectors and the LGA pay or cause to be paid the fees and charges imposed by the LGA for the disposal of Solid Wastes at the Project. The LGA will take all available action, administrative, judicial and legislative, to cause all Solid Waste generated within the corporate limits of the LGA and which is acceptable for disposal by the Project, to be delivered to the Project for disposal through the Project.

The Agreement further provides that the City would prohibit the establishment of alternative waste disposal sites. [2] In December 1976, the OWDA issued an Official Statement announcing the offering of $46,000,000 of special obligation bonds to finance the project. The Statement contained a copy of the Cooperative Agreement.

[7]** To carry out the terms of the Agreement, the Akron City Council adopted Ordinance No. 841-76 in October, 1976. The ordinance requires all rubbish collected within the corporate limits of the City to be deposited at the RES plant. The ordinance also authorizes the Director of Public Service to establish a service charge ("tipping fee") for disposal of solid waste at the RES facility. Persons who violate the ordinance may lose their licenses and face criminal prosecution. [3]

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[2] Two other sections of the Agreement provide:

> H. The LGA will not establish, construct or operate nor consent to the establishment, construction or operation of any facility for the disposal or other treatment of Solid Waste which is acceptable for disposal by the Project, and further, to the extent legally permissible, it will oppose the establishment, construction or operation of such a facility. The LGA System shall not charge to or collect from the Project. . . .

> O. . . . The LGA shall use its best efforts to establish rates and charges for the disposal of Solid Waste through the Project at a level which assures an adequate supply of Solid Waste for the purpose of the Project and, subject to the foregoing, shall be comparable with competitive charges for such services. . . .

[3] *Section 1(a)* of the ordinance provides:

> Until such time as the City's recycle energy plant begins accepting rubbish for disposal, no rubbish shall be deposited by the Holder of a rubbish bailer's license within the corporate limits of the City except at a place designated in writing by the Mayor. From and after the date on which such plant begins accepting rubbish for disposal, all rubbish collected within the corporate limits of the City by a holder of a rubbish hauler's license shall be deposited at such plant; provided that rubbish which is not acceptable for disposal by such plant shall not be deposited within the City except at a place designated by the Mayor.

Section 2 provides:

> No person, except duly authorized collectors of the City or private haulers licensed pursuant to law, shall collect or remove any garbage or rubbish accumulating within the City or use the streets, avenues and alleys of the City for the purpose of collecting or transporting the same. All licenses granted to such private haulers and all contracts or other forms of authorization of duly authorized collectors shall require that all garbage or rubbish collected and transported under authority

[8]** Before the adoption of the ordinance, plaintiff Hybud Equipment Corp. was a licensed hauler of waste in the Akron area. Under agreements with various commercial and industrial firms, Hybud collected solid waste in return for a fee. An affiliated company, plaintiff Budoff Iron and Metal Corp., operated a transfer station that separated out recyclables -- primarily cardboard and metals -- to be sold. Nonrecyclable solid waste was transported to landfills where a tipping fee was charged to the haulers for each ton of waste disposed.

The ordinance affects the plaintiffs' business in several ways. All waste collected within the City limits must be transported to the RES plant and haulers must pay a uniform tipping fee to the RES plant. This exclusive right eliminates any possible competition among disposal sites within the **[*953]** City and prohibits haulers from seeking lower tipping fees at sites outside the City. Furthermore, the separation and sale of recyclable materials by collectors is curtailed by the ordinance. All solid waste -- including waste containing recyclables -- must be delivered to the RES facility. Recyclable materials may be burned as fuel or separated **[**9]** by the plant operator and sold to generate additional income. As part of an incentive agreement, the operator of the plant, Teledyne National, is permitted to retain one-half of all revenues recovered from the sale of recyclable materials. The remainder is to be used to offset operating expenses.

B. Prior Proceedings

The plaintiffs brought suit in federal court alleging that the ordinance and agreement deprived them of due process, constituted a restraint of commerce, and violated the Sherman Antitrust Act. In *Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671 (N.D. Ohio 1979)*, the district court awarded summary judgment to the defendants on all issues.

The district court ruled that the defendants' activities were protected from antitrust liability under the state action exemption of *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. The district court rested its decision on two alternative grounds. First, the court found that OWDA was acting for the state in advancing legitimate state interests. The restrictions in the Cooperative Agreement, the court found, were within OWDA's authority to finance **[**10]** solid waste facilities. This exercise of this state power, the court held, was beyond the reach of the antitrust laws. *485 F. Supp. at 676-77*. Second, the court found that the state of Ohio had authorized the City of Akron through its home-rule powers to regulate waste collection. "The Ohio Constitution declares that cities act as agents of the state when they exercise governmental powers within their city limits." *485 F. Supp. at 677*. The Ohio courts, moreover, had held that such power could lawfully be exerted through a monopoly. Therefore, the district court concluded, the state action exemption protected the City's exercise of state power.

The district court's decision was affirmed on appeal. *Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981)*. The collection of garbage and the operation of incineration plants, this court noted, were within the traditional activities of local governments. The home-rule provisions of the Ohio Constitution as interpreted by the State Supreme Court authorized municipal monopolies to carry out these functions. Moreover, an agency of the state, the OWDA, would oversee the exercise **[**11]** of this authority. Thus, this court held that the ordinance and agreement were immune from antitrust liability as actions of the state.

The Supreme Court granted the plaintiffs' petition for writ of certiorari and vacated this court's judgment. The case was remanded for consideration in light of the Court's decision in *Community Communications Co. v. City of Boulder, 455 U.S. 40, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982)*. *Hybud Equipment Corp. v. City of Akron, 455 U.S. 931, 71 L. Ed. 2d 640, 102 S. Ct. 1416 (1982)*. This court, in turn, remanded the case to the district court with instructions to reconsider only the plaintiffs' claims under the *Sherman Antitrust Act. 701 F.2d 178*.

On remand, the district court again held that the defendants' activities were protected by the state action exemption. Eschewing this court's reliance on Akron's home-rule powers, the district court found "sufficient grounds for antitrust exemption within the Ohio statutes governing the OWDA." The court found that these statutes demonstrated that the state legislature contemplated the anticompetitive consequences of OWDA's exercise of its bonding authority.

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for disposal by the City's energy plant, be disposed of at such plant from and after the date on which such plant begins accepting garbage and rubbish for disposal.

[12]** This expression of state policy coupled with OWDA's supervision of the RES project, the district court held, shielded the City from liability under the federal antitrust laws and satisfied the requirements of *City of Boulder*. This determination is the sole issue now before us.

[*954] II.

A. The Development of the State Action Exemption.

The Supreme Court's decision in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, the original declaration of the state action exemption, continues to exert a strong influence on the recent development of that doctrine. [4] In *Parker*, the Court considered whether a state program restricting agricultural production could be attacked under the Sherman Act. Under California's Agricultural Prorate Act, the State Agricultural Prorate Advisory Commission authorized the creation of local cooperatives to establish marketing policies for raisin production. The Commission, appointed by the Governor pursuant to the statute, had to approve the cooperative's plans. To become effective, these plans then had to be ratified by a specified number of the producers in each area.

[13]** In *Parker*, the Court held that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *317 U.S. at 350-51*. Absent a clear indication from Congress, the States are entitled to immunity as an aspect of the federal system. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id. at 351*. The Court held that the prorate program was protected by this immunity. "It is the state which has created the machinery for establishing the prorate program." The participation of private producers and the referendum system did not detract from the character of the program. "The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions." *Id. at 352*. **[**14]**

The decisions following *Parker* have been primarily concerned with determining the nature and extent of state involvement necessary to establish the exemption. In *Goldfarb v. Virginia State Bar, 421 U.S. 773, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975)*, the Court considered a challenge to minimum fee schedules established by a county bar association and enforced by the state bar. Although the state bar was a "state agency" for purposes of investigating and reporting violations of disciplinary rules, the final statutory authority for regulating the practice of law was vested in the state supreme court. The state supreme court, however, had not directed the establishment of such schedules. The Court rejected the argument that the schedules were protected because they "complemented the objectives of the ethical codes." To claim the protection of the exemption, "it is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather the anticompetitive activities must be compelled by direction of the State acting as sovereign." *421 U.S. at 791*. Because the state, acting through the legislature or through the state supreme court, had **[**15]** not directed or authorized the anticompetitive action, the Court held that the schedules were not exempt from the Sherman Act as state action.

The implication of *Goldfarb* is that a rule adopted by a sovereign authority of the state would be entitled to antitrust immunity. The Court followed this reasoning in *Bates v. State Bar of Arizona, 433 U.S. 350, 53 L. Ed. 2d 810, 97 S. Ct. 2691, 45 U.S.L.W. 4895 (1977)*, and granted immunity to a rule adopted by the state supreme court banning the advertising of legal services. The measures, the Court held, "reflect a clear articulation of the State's policy with regard to professional **[*955]** behavior." The Court also found it significant that "the state policy is so clearly and affirmatively expressed and that the state's supervision is so active." *433 U.S. at 362*. The Court in *Bates* stressed the difference between the facts of that case and the situation presented in *Cantor v. Detroit Edison Co., 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976)*. In *Cantor* a state public utility commission approved a utility's practice of distributing light bulbs for no charge and passing **[**16]** the costs to consumers through their utility bills.

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[4] "In the years since the decision in *Parker*, the Court has had occasion in several cases to determine the scope of the state action doctrine. It has never departed, however, from *Parker's* basic reasoning." *Hoover v. Ronwin, 466 U.S. 558, 104 S. Ct. 1989, 1995, 80 L. Ed. 2d 590 (1984)*.

The Court held that the commission's acquiescence in the program was insufficient to immunize the practice as state action. The Court found that the challenged program bore a remote relationship to the regulatory aims of the state, and, with respect to light bulb sales, there was no official state policy to displace competition.

In *Parker*, the anticompetitive conduct under attack was directed by the state legislature and supervised by state officers. In *Bates*, the rules in question were adopted by the state supreme court acting in its capacity as a legislative body with ultimate authority over the legal profession. In such cases, the challenged restraints are easily ascribed to the state as sovereign. Where the activity, however, "is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization," the application of the exemption requires a more searching analysis. *Hoover v. Ronwin, 466 U.S. 558, 104 S. Ct. 1989, 1995, 80 L. Ed. 2d 590 (1984)*. In these cases, the Court has required a showing that the challenged restraint is "one clearly articulated **[**17]** and affirmatively expressed as state policy." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*. *See also, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)*; *Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 54, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982)*. The Court has also considered the degree to which the state "actively supervises" the policy. *Midcal Aluminum, 445 U.S. at 105*; *New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 110, 58 L. Ed. 2d 361, 99 S. Ct. 403 (1978)*. Thus, a state law authorizing wine suppliers to establish and enforce resale prices is not exempt if the state fails to exercise active supervision over the arrangements. *Midcal Aluminum*.

B. Municipal Immunity.

In *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)*, the Court held that Congress did not intend to exempt cities from the antitrust laws merely because of their status as political **[**18]** subdivisions of the states. At issue was a challenge to the practices of utilities owned and operated by two cities. Justice Brennan, writing for a plurality, held that only municipal actions "pursuant to state policy to displace competition with regulation or monopoly public service" would be entitled to the exemption. *435 U.S. at 413*. The Chief Justice, in a separate opinion, concurred with the plurality's holding that the activities under challenge were exempt only if they were the result of a state policy to displace competition. The Chief Justice reasoned, however, that such authorization was required because the cities were engaging in proprietary activities, implying that nonproprietary activities would be immune from antitrust attack without an inquiry into state policy. *435 U.S. at 423-26*.

The split decision in *Lafayette* produced no little confusion among lower courts. [5] **[*956]** Some of the questions raised in *Lafayette* were settled by the Court's decision in *Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982)*. In that case, the plaintiff challenged a three-month **[**19]** emergency ordinance imposing a moratorium on the extension of cable television services in Boulder. The City claimed that the moratorium was a proper exercise of its home-rule powers. Justice Brennan, writing for a majority, affirmed *Lafayette's* holding that cities are not automatically immune from antitrust liability. The Court, moreover, rejected the City's argument that its actions were protected as an exercise of state sovereign power delegated to the City. For purposes of the *Parker* exemption, sovereignty is exclusively reserved to the state and cannot be transferred to a political subdivision. Municipalities, the Court held, "could partake of the *Parker* exemption only to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy." *Id. at 54*.

[20]** The City of Boulder maintained, in the alternative, that its actions were immune because the grant of home-rule powers by the state constitution met the requirement of "clear articulation and affirmative expression." This grant of authority, the City contended, demonstrated that the legislature "contemplated the kind of action" that was

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[5] "Of late the state action doctrine has become a road well-traveled by the Court. Its signposts, however, remain less than clear." *First American Title Co. v. South Dakota Land Title Ass'n, 714 F.2d 1439 (8th Cir. 1983)*, *cert. denied*, ***464 U.S. 1042, 104 S. Ct. 709, 79 L. Ed. 2d 173 (1984)***. *See also Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187, 1195 (6th Cir. 1981)* ("It is difficult for us to apply the *Lafayette* decision since the plurality and dissenting opinions are each supported by four justices, and no line of reasoning commands a majority of the Court.").

under attack. Again, the Court squarely rejected the City's position. The Court characterized the state's position as one of "mere neutrality." "A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought." *Id. at 55*. Accepting a general grant of legislative authority as a mandate for specific anticompetitive measures, the Court held, "would eviscerate the concepts of 'clear articulation and affirmative expression. '" *Id. at 56*.

The *Boulder* decision clarified the basis of municipal immunity. ***HN1***[] Whether a city is entitled to the *Parker* exemption depends not upon the proprietary character of the city's actions or whether the action is within the general powers delegated to the city by the state. Immunity would attach **[**21]** only if the measures were taken pursuant to a "clearly articulated and affirmatively expressed" state policy. Left unresolved, however, were related issues of critical importance. The Court reserved the question of whether a city's actions must also satisfy the test of "active state supervision." [6] Further, although it is clear that home-rule powers alone are insufficient, the Court did not describe what degree of specific statutory authorization is necessary to invoke the exemption. [7]

[22] C. Immunity for State Agencies.**

The plurality in *Lafayette* stressed that an exacting standard for municipalities was necessary to maintain economic order within a state and avoid a multitude of conflicts with national policy. "Serious economic dislocation" could result if each city were free to pursue its own parochial interests. *435 U.S. at 412-13*. This emphasis on economic atomization within a state suggests that a different standard might apply to agencies with state-wide jurisdiction. [8] Arguably, an agency with **[*957]** statewide powers, especially if it has authority to make policy, should not be required to show that its conduct was "pursuant to an affirmatively expressed and clearly articulated policy" to displace competition.

[23]** The Supreme Court discussed the standard applied to agencies in the recent case of *Hoover v. Ronwin, 466 U.S. 558, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984)*. There, the Court considered an antitrust attack on the grading of bar examinations by the Arizona Supreme Court's Committee on Examinations and Admissions. In a four-to-three decision, the Court held that the actions of the Committee were, for purposes of the exemption, those of the "state acting as sovereign." The Court's decision turned on the special relationship between the committee and the state supreme court. The state supreme court "retained strict supervisory power over the committee and ultimate full authority over its actions." *Id. 104 S. Ct. at 1997*. Although the committee administered and graded the examinations, the "court itself approved the particular grading formula and retained the sole authority to determine who should be admitted to the practice of law in Arizona." *Id. at 1998*. Where such provisions are absent, the

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[6] "Because we conclude in the present case that Boulder's moratorium ordinance does not satisfy the 'clear articulation and affirmative expression ' criterion, we do not reach the question whether that ordinance must or could satisfy the 'active state supervision ' test focused upon in *Midcal*." *City of Boulder, 455 U.S. at 51 n.14*.

[7] The Boulder decision could have a sweeping impact on the assertion of legislative authority by municipalities. Thirty-five states have made provisions for home-rule powers either through legislation or through their constitutions. Note, *Community Communications Co. v. City of Boulder*, 31 De Paul L. Rev. 819, 821 (1982).

[8]

> Although the *Lafayette* requirement of state authorization clearly applies to cities and other subordinate local units, its application to state agencies is uncertain. On the one hand, the majority's belief that "authorization" helps ensure that governmental activity is truly *state* action could logically be extended to state executive departments and administrative agencies. On the other hand, Justice Brennan's reasoning was predicated on the existence of a large number of municipalities and other subordinate governmental units, each pursuing parochial and perhaps conflicting policies. Their ordinances are locally formulated, with a possible anticompetitive impact beyond city or district limits . . . State agencies, by contract, formulate statewide rules and policies.

Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv. L. Rev. 435, 444 (1981).

challenged action cannot be attributed to the actions of the state as sovereign and the agency must satisfy the standard applied to municipalities. *HN2*[] "The **[**24]** anticompetitive conduct of a nonsovereign state representative . . . require[s] a showing that the conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy ' to replace competition with regulation." *Id. at 1995*. The Court limited "sovereignty" to the state legislature and supreme court. The Court did not reach, however, the question of whether such sovereign authority may be attributed to the governor of a state. *Id. at 1995 n.17*.

In the case at bar, the parties do not contend that OWDA is so closely related to a sovereign body that the actions of the agency may be attributed directly to the state as sovereign. Thus, OWDA's actions are protected by the exemption only if taken pursuant to a "clearly articulated and affirmatively expressed state policy" to displace competition. With that standard in mind, we turn to consider the district court's precise holding in the instant case.

III.

A. The District Court's Decision.

On remand, the district court held that the statutes governing the OWDA demonstrated a "clearly articulated and affirmatively expressed state policy" to displace competition. The court found that "the cooperative **[**25]** agreement and ordinance in the present case were clearly 'comprehended within the powers granted ' by the state legislature" to OWDA. The state legislature's intent to displace competition was evinced by OWDA's authority "to finance waste disposal facilities and to enter into agreements to safeguard the financial interests of the respective governmental agencies." These provisions, the court held, provided a sufficient basis for the exemption; therefore, the court did not consider whether Akron's power under state law to regulate sanitation and waste disposal would satisfy the requirements for the exemption.

The OWDA was created to "provide for the comfort, health, safety, and general welfare of all employees and other inhabitants of the state . . . through efficient and proper methods" of solid waste disposal. *Ohio Rev. Code § 6123.03*. To this end, OWDA is authorized to finance solid waste facilities through revenue bonds to pay for the costs of such projects. The district **[*958]** court noted the following powers and duties of the OWDA:

> *HN3*[] For the purposes of Chapter 6123. of the Revised Code, the Ohio water development authority may:
> . . .
>
> (C) Make loans and grants **[**26]** to governmental agencies for the acquisition or construction of development projects by any such governmental agency and adopt rules and procedures for making such loans and grants;
> . . .
>
> (F) Issue development revenue bonds and notes and development revenue refunding bonds of the state, payable solely from revenues as provided in *section 6123.06* of the Revised Code, unless the bonds be refunded by refunding bonds, for the purpose of paying any part of the cost of one or more development projects or parts thereof;
> . . .
> (I) Make and enter into all contracts and agreements and execute all instruments necessary or incidental to the performance of its duties and the execution of its powers under Chapter 6123. . . .
> . . .
> (P) Do all acts necessary or proper to carry out the powers expressly granted in Chapter 6123. of the Revised Code.

Ohio Rev. Code § 6123.04. The OWDA may also contract with government agencies and private persons to fix the terms and conditions for the use or service of a facility financed by OWDA. *HN4*[] The statute provides:

> Any government agency or combination thereof may cooperate with the authority in the acquisition or construction of **[**27]** a development project and shall enter into such agreements with the authority as are necessary, with a view to effective cooperative action and safeguarding of the respective interests of the parties thereto, . . . including, without limitation, . . . contracting for the operation, leasing, or subleasing for

> such terms and with such person or governmental agency as maybe agreed upon . . . . The authority shall not enter into such a cooperative agreement with any governmental agency if the authority determines that the project to be acquired or constructed under the agreement would undermine the financial feasibility of an existing development project acquired or constructed under a cooperative agreement between the authority and another governmental agency because the proposed project would serve substantially the same geographic area as the existing project . . . .

Ohio Rev. Code § 6123.13.

The district court found it "unquestionable" that the legislature contemplated the "use of anti-competitive measures to ensure the financial viability of its waste disposal facilities." The court determined that OWDA's general authority to carry out powers expressly granted, that **[**28]** the agency's duty to protect its financial interests in development projects, and that the prohibition on the financing of facilities competing with existing projects demonstrated a clearly articulated and affirmatively expressed state policy to displace competition with regulation.

The district court relied on *Boulder* as authority for its holding that the ordinance and agreement under challenge were "clearly comprehended" within the powers granted OWDA. In *Boulder* the Court held that "the term 'granted' necessarily implies an affirmative addressing of the subject by the State." *455 U.S. at 55*. In *Boulder*, there was no specific grant of authority to regulate cable television from the state legislature; the city merely claimed the power under Colorado's Home Rule Amendment. By contrast, in the instant case there was a specific grant of power by the state to OWDA to operate in the area of waste disposal and recovery. This grant of authority, the district court ruled, satisfied the requirement that the challenged anticompetitive action result from a state policy.

[*959] B. Analysis.

The validity of the district court's finding that OWDA's **[**29]** statutory mandate met the standard of a clearly articulated and affirmatively expressed state policy turns on a crucial ambiguity in *Lafayette* and *Boulder*. In those decisions the Court left unclear the degree of specificity in state law necessary to satisfy the standard applied to a nonsovereign state representative. [9] A municipality, the plurality held in *Lafayette*, is not necessarily required "to point to a specific, detailed legislative authorization before it properly may assert a *Parker* defense." However, there must be evidence that the state "authorized or directed a given municipality to act as it did." *435 U.S. at 414*. It is clear, however, that merely having the legal authority to engage in the challenged activities is insufficient. The municipalities in *Lafayette* were authorized by state law to own and operate utilities, but this power standing alone did not protect the allegedly anticompetitive actions of those utilities. Likewise, the City of Boulder was empowered under state home-rule provisions to take the actions that were attacked under the antitrust laws. The city's power "to do as [it] please[s]," however, demonstrated only **[**30]** a "neutral" state policy regarding the ways and means that the city chose to exert its power. *455 U.S. at 55*.

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[9] We noted this problem in *Gambrel v. Kentucky Bd. of Dentistry, 689 F.2d 612 (6th Cir. 1982)*, *cert. denied*, ***459 U.S. 1208, 103 S. Ct. 1198, 75 L. Ed. 2d 441 (1983)***.

> Because we believe the meaning of the statute in this case is clear and unambiguous, we need not decide a more subtle question, namely whether the interpretation of an ambiguous or open-ended regulatory statute by a state agency can ever constitute "state action" in and of itself under the *Parker v. Brown* doctrine. Certainly the first part of the *Midcal Aluminum* test, whether the challenged restraint is "clearly articulated and affirmatively expressed as state policy," at a minimum covers state policy explicitly declared in a statute. However, state regulatory statutes are often drafted in general terms and delegate broad policymaking discretion to a state regulatory agency. The result is administrative policymaking, either by authorized rulemaking or by enforcement practices.

689 F.2d at 619 n. 3.

[31]** OWDA's authority to engage in the actions under challenge is somewhere in between a specific state directive and a general, "neutral" grant of powers. Although OWDA may have the power to enter into the agreement now in issue, the statute clearly does not express a state preference for regulation -- or monopolistic control -- of waste disposal. OWDA's existence and function are perfectly consistent with a regime of open and free competition among private businesses that engage in waste disposal. Nothing in the statute declares a state policy regarding the organization of municipal waste disposal systems. As to the type of projects OWDA may finance -- whether the projects monopolize or merely compete with private industry -- the statute is silent. On the other hand, OWDA is authorized to promote the development of "safe and proper" waste disposal projects. To finance such developments, the agency is empowered to enter agreements "necessary or incidental" to the performance of its duties.

There is no question that a restraint which is expressly set forth in a legislative scheme for regulation is one that reflects a state policy to displace competition. *See, e.g., California* **[**32]** *Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*. [10] **[**33]** ***HN5***[] Where the restraint is not so expressed but is imposed by a nonsovereign state representative as an exercise of delegated powers, **[*960]** the court must examine the relationship between the restraint and the regulatory aims of the state. If the challenged actions bear an attenuated relationship to the statutory aims and the express powers so delegated, the actions cannot be deemed to have resulted from a clearly articulated and affirmatively expressed state policy to displace competition. For example, public regulation of utilities is justified as necessary to protect consumers from exploitation by a natural monopoly. This justification, however, will not support regulation that reaches beyond the scope of a natural monopoly's powers into competitive markets. Absent express legislative direction for such a restraint, the regulation is not protected as state action under *Parker.* *Cantor v. Detroit Edison, 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976)*. [11]

HN6[]

If the challenged anticompetitive restraint of a nonsovereign state representative, for which there is no express statutory provision, is necessary to carry out the representative's mandate, then a legislative intent to displace competition may be inferred from the legislature's delegation of authority. In *Corey v. Look, 641 F.2d 32 (1st Cir. 1981)*, the plaintiff, a parking lot operator, brought an antitrust suit against a municipality and a public steamship authority. The plaintiff claimed that the town and authority had conspired to drive the plaintiff out of business in an effort to monopolize the market. The First Circuit held that the government bodies must demonstrate "by convincing reasoning that the challenged restraint is necessary to the successful operation of the legislative **[**34]** scheme that the state as sovereign had established." This test was not satisfied by a showing that the authority was permitted, under state law, to purchase and operate parking lots. The law "simply empowers the Authority to behave as an ordinary competitive economic agent; we see no necessary anti-competitive implication." *Id. at 37*.

Requiring a showing of a necessary relationship, as in *Corey v. Look*, may place, in some circumstances, an unduly heavy burden on the state agency. An agency vested with broad discretionary powers will rarely find that only one course of action is available to accomplish its mission. Courts, moreover, are ill-equipped to determine in many cases whether a restraint was necessary in the strict sense implied by the court in *Corey v. Look*. Indeed, that decision may be explained on the grounds that the challenged actions -- monopolization of parking lots -- bore a

[10] For example, in *Town of Hallie v. City of Eau Claire, 700 F.2d 376, 383 (7th Cir. 1983)*, *cert. granted*, ***467 U.S. 1240, 104 S. Ct. 3508, 82 L. Ed. 2d 818, 52 U.S.L.W. 3891***, (1984), the court upheld the exemption for a municipality that conditioned extension of sewer service on annexation. A state statute expressly provided that extension of sewer services could be refused if an adjoining area elected not be become annexed. In *Gambrel v. Kentucky Bd. of Dentistry, 689 F.2d 612, 619 (6th Cir. 1982)*, *cert. denied*, ***459 U.S. 1208, 103 S. Ct. 1198, 75 L. Ed. 2d 441 (1983)***, this court applied the exemption to protect a restraint on denture products where the challenged conduct was "compelled by the statute itself."

[11] Similarly, state law authorizing a medical society to investigate charges of willful overcharging by physicians will not extend to justify society's efforts to enforce price-fixing. *Ratino v. Medical Service of Dist. of Columbia, 718 F.2d 1260, 1268 (4th Cir. 1983)*.

tenuous relationship to the central mission of the steamship authority. The Supreme Court, moreover, has not required a showing of necessity, holding that ***HN7***[] an adequate expression of state policy may be found in "the authority given a governmental entity to operate **[**35]** in a particular area, that the legislature contemplated the kind of action complained of." *Lafayette, 435 U.S. at 415*. [12]

Our task, therefore, is to determine whether the restraints in question are a reasonable and foreseeable exercise of delegated powers within the scope of an agency's authority. [13] **[**36]** If the challenged restraints **[*961]** are reasonably related to an agency's express powers and reasonably designed to promote the state aims within a designated field of regulation, they can be found to result from a "clearly and affirmatively expressed state policy" to displace competition. [14]

[37]** Unlike the general guarantee of legislative autonomy in *Boulder*, OWDA's powers are expressly limited to the promotion of safe waste disposal systems. OWDA's exercise of this power, however, is restricted to the financing of waste treatment projects; it has no independent regulatory authority. The agency could not enforce the restrictive agreement now under challenge without the regulatory power of the City of Akron. Thus, OWDA's participation in a private scheme to monopolize a waste disposal market would not be entitled to the *Parker* exemption.

Although we cannot agree with the district court that the statutes governing OWDA meet the requirement of a clear and affirmative state policy, we find that the standard is satisfied by other considerations. OWDA's statutory mandate expressly provides that the agency may contract with other government agencies, including municipalities, to carry out state policy. [15] ***HN8***[] Under Ohio law, municipalities are expressly authorized to regulate the disposal

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[12] "The state need not have contemplated the precise action complained of as long as it contemplated the kind of action to which objection was made." *Princeton Community Phone Book, Inc. v. Bate, 582 F.2d 706, 717* (3rd Cir.), *cert. denied*, ***439 U.S. 966, 58 L. Ed. 2d 424, 99 S. Ct. 454 (1978)***.

[13] Professor Areeda, in an article prior to *Boulder*, writes:

> *Lafayette* does not require that governmental acts be "compelled" or supervised by the state. Rather, it demands that the legislature have authorized the challenged activity with an intent to displace the antitrust laws. Unfortunately, state statutes seldom speak with clarity on either matter. In practice, therefore, express statements of authority or intent cannot be required. The Supreme Court has found it sufficient that "the legislature contemplated the kind of action complained of." A policy to displace the antitrust laws will then be inferred if the challenged restraint of competition is a necessary or reasonable consequence of engaging in the authorized activity.

Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv. L. Rev. 435, 445-46 (1981). *See also* P. Areeda, ***Antitrust Law***, para. 212.3 (Supp. 1981).

[14] Several courts have adopted this approach. In *Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983)*, *petition for cert. filed*, ***52 U.S.L.W. 3039*** (U.S. July 25, 1983) (No. 83-138), the court considered a challenge to a city's decision to grant a contract for exclusive ambulance services within the city to a single operator. The court held that a "sufficient state policy to displace competition exists if the challenged restraint is a necessary or reasonable consequence of engaging in the authorized activity." State law permitted the city to contract with "one or more" ambulance operators. The court held that the city's actions were protected by the exemption because monopoly service is "the necessary consequence of having only one municipal ambulance operator." *705 F.2d at 1013*. *Accord* *First American Title Co. v. South Dakota Land Title Ass'n, 714 F.2d 1439, 1454 (8th Cir. 1983)*, *cert. denied*, ***464 U.S. 1042, 104 S. Ct. 709, 79 L. Ed. 2d 173 (1984)***. *See also* *Benson v. Arizona State Bd. of Dental Examiners, 673 F.2d 272 (9th Cir. 1982)* (anticompetitive restraints contemplated by statutes creating a licensing board to regulate the practice of dentistry); *Euster v. Eagle Downs Racing Ass'n, 677 F.2d 992, 995* (3rd Cir.), *cert. denied*, ***450 U.S. 1022, 103 S. Ct. 388, 74 L. Ed. 2d 519 (1982)*** (imposition of a fee on jockeys by public agency is necessary to accomplish legislative goals of regulation of horse racing.).

of waste and construct facilities for the disposal of waste. [16] This authority is granted by statute and not merely claimed by virtue of constitutional home-rule powers as in *Boulder* **[**38]** . The Ohio courts, as the district court noted in its first decision in this suit, have held that a municipality may exercise this power through a monopoly. *See* *State ex rel. Moock v. Cincinnati, 120 Ohio St. 500, 166 N.E. 583 (1929)*; *City of Canton v. Van Voorhis, 61 Ohio App. 419, 22 N.E.2d 651, 14 Ohio Op. 413 (1939)*.

[39]** We find that the ordinance and agreement under challenge bear a reasonable relationship to the state policy promoted by OWDA and the express powers delegated to OWDA and Akron. The ordinance is limited in scope to the collection and disposal of solid waste, and its promulgation was an essential element of a plan to carry out OWDA's statutory mandate. **[*962]** OWDA's reliance on the statutory authority of a municipality to regulate -- even by monopoly -- the disposal of refuse was a foreseeable result of the legislative grant of power to contract with municipalities. We hold, therefore, that the statutory delegation of regulatory power to the City conjoined with the powers and aims of OWDA satisfy the requirement that the challenged actions result from a clearly articulated and affirmatively stated policy to displace competition.

Our holding is consistent with that of the Seventh Circuit in *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency, 715 F.2d 419 (8th Cir. 1983)*, *petition for cert. filed*, *52 U.S.L.W. 3441* (U.S. Nov. 18, 1983) (No. 83-825), a case strikingly similar to the one now before us. In that case, **[**40]** several municipalities joined together to establish an agency, "Metro," to issue revenue bonds for the construction of a modern waste disposal facility. On the recommendation of a bond consultant, the municipalities covenanted for the benefit of bond holders that all waste generated within their jurisdictions would be processed at the facility. An operator of a sanitary landfill outside the jurisdiction of the new plant brought suit, alleging that the cities had attempted to illegally monopolize the market for waste disposal. The court held that the restriction was protected by the state action exemption.

The court noted that, while statutes authorized the creation of agencies such as Metro, no statute indicated that the state legislature actually contemplated that a facility financed by such an agency would have an exclusive right to dispose of waste. *Id. at 426*. However, the court found authorization for the restriction in the broad authority granted such agencies by the state legislature.

> We believe that the Iowa legislature did indeed contemplate these restrictions on competition. [A statutory provision] expressly authorizes municipalities to finance **[**41]** collective projects by issuing revenue bonds. When ascertaining what was in the minds of the legislators, we cannot ignore the realities of the municipal bond market in the mid-1970s. . . . Common sense and experience suggest that the Iowa legislature must have intended Metro to have the latitude necessary to promote the sale of the bonds. . . . In short, even though the legislation does not speak to the precise question whether restraints of trade could be employed to guarantee the financial vitality of Metro, the comprehensive legislative scheme favoring the development of solid waste facilities demonstrates that the legislature intended the localities to have broad authority to act in

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[15] ***HN9***[] OWDA is expressly authorized to enter into cooperative agreements with government agencies for the financing of development projects. The term 'government agency ' includes any county, town, or municipality of the state. *Ohio Rev. Code Ann. § 6123.01(A)*.

[16] ***HN10***[] *Ohio Rev. Code Ann. § 715.43* provides:

> Any municipal corporation may provide for the collection and disposition of sewage, garbage, ashes, animal and vegetable refuse, dead animals, and animal offal, and may establish, maintain, and regulate plants for the disposal thereof.

HN11[]

Ohio Rev. Code Ann. § 717.01 provides:

> Each municipal corporation may:
>
> (C) Erect a crematory or provide other means for disposing of garbage or refuse, and erect public comfort stations. . . .

> furtherance of the legislative mandate. Thus, we believe that the restraint on competition was a "necessary or reasonable consequence" of engaging in the authorized activity of constructing a waste disposal facility with funds raised by revenue bonds.

715 F.2d at 427. The court distinguished the case from *Boulder*. The Iowa legislature had provided that municipalities could join together to create agencies such as Metro. Such an agency could satisfy a municipality's **[**42]** duty to provide sanitary facilities for the disposal of solid waste. By contrast, in *Boulder* there was no reference in state law to the types of industry to be regulated under Colorado's home-rule provision.

We agree with the reasoning in *Central Iowa Refuse Systems, Inc.*, that a state's broad authorization for the financing of waste facilities is not a "neutral" grant of powers as in *Boulder*. ***HN12***[] Where, as in the instant case, there is a reasonable exercise of that authorization within a municipality's statutory power to regulate waste disposal, we are satisfied that the restraint is pursuant to the clear articulation and affirmative expression of state policy required by precedent.

C. Active State Supervision.

As noted earlier, the Supreme Court has not yet determined whether a municipal ordinance that satisfies the criterion of "clear articulation and affirmative expression" **[*963]** must also meet the requirement of active state supervision to be entitled to the state action exemption. *See* Boulder, 455 U.S. at 51 n.14. The several circuits that have considered this issue have held that active state supervision is not necessary where **[**43]** the challenged activity is within a traditional function of a municipality. *See* *Golden State Transit Corp. v. City of Los Angeles, 726 F.2d 1430 (9th Cir. 1984)*; *Gold Cross Ambulance & Transfer v. City of Kansas City, 705 F.2d 1005 (8th Cir. 1983)*, *petition for cert. filed*, *52 U.S.L.W. 3039* (U.S. July 25, 1983) (No. 83-138); *Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983)*, *cert. granted*, *467 U.S. 1240, 104 S. Ct. 3508, 82 L. Ed. 2d 818, 52 U.S.L.W. 3891 (U.S. 1984)*.

The requirement of active state supervision had its greatest force in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*. In that case, a state statute authorized wine wholesalers to file price schedules, and retailers were required to comply with those prices. These price controls were clearly imposed by state law, but the state exercised no control or supervision over the system. Although the restraints resulted from an undeniable state policy to displace competition, the Court held that the activities were not protected **[**44]** by the exemption because of the absence of active state supervision over the regulatory scheme.

The fact that the price restraints at issue in *Midcal* were established by private parties lead some courts and commentators to conclude that the requirement of active state supervision was limited to the activities of private parties. [17] **[**45]** In *Midcal* the Court seemed primarily concerned with the risks of private abuse of state-created regulatory schemes. [18] This danger is diminished where the challenged activities are undertaken by state agencies that are not tempted by private gain. Requiring active state supervision may also undermine the traditional functions of self-governing municipalities. Imposing such a requirement on municipalities, one court declared,

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[17] *See* *Central Iowa Refuse Sys. v. Des Moines Metropolitan Solid Waste Agency, 715 F.2d 419, 428 (8th Cir. 1983)*, *petition for cert. filed*, ***52 U.S.L.W. 3441*** (U.S. Nov. 18, 1983) (No. 83-825); *Town of Hallie v. City of Eau Claire, 700 F.2d 376 (7th Cir. 1983)*, *cert. granted*, ***467 U.S. 1240, 104 S. Ct. 3508, 82 L. Ed. 2d 818, 52 U.S.L.W. 3891 (1984)***. *See also* Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 Harv. L. Rev. 435, 445 (1981); Rogers, *Municipal Antitrust Liability in a Federalist System*, 1980 Ariz. St. L.J. 305, 340-42.

[18] In *Midcal* the Court concluded: "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what it essentially a private price-fixing arrangement." 445 U.S. at 106.

"would erode the concept of local autonomy and home rule authority." Town of Hallie v. City of Eau Claire, 700 F.2d at 384.

While there are reasons in logic and in policy for the distinction between state and private actors, there is slight support for such a position in the opinions of the Supreme Court. In its most recent discussion of the requirement, *Hoover v. Ronwin*, the Court made no distinction between state and private actors, referring only to the activities of a "nonsovereign state representative." The Court stated that the "degree to which the state legislature or supreme court supervises its representative is relevant" to a determination of whether the conduct is protected by the *Parker* exemption. 104 S. Ct. at 1995. In *Bates v. State Bar of Arizona*, the Court noted that the restraint under attack was subject to pointed reexamination by the state supreme court, a fact that the Court characterized as active state supervision. 433 U.S. at 362. **[**46]**

The Court in *Hoover v. Ronwin* mentions supervision by the state legislature or supreme court. Yet, where the inquiry is relevant, it would be extremely impractical to limit "active state supervision" to the oversight by those bodies. By necessity, actual supervision must be delegated to subordinate officials. In *Parker*, the price support system was administered by the state's director of agriculture and a commission **[*964]** appointed by the governor. In New Motor Vehicle Bd. v. Orrin W. Fox Co., 439 U.S. 96, 58 L. Ed. 2d 361, 99 S. Ct. 403 (1978), the Court applied the exemption to protect a state's automobile franchise act from a challenge under the antitrust laws. The law permitted existing franchisees to block the establishment of new competitors merely by filing a complaint with a state board, which would permit entry thereafter upon a showing of good cause. The act itself was a system of regulation clearly designed to displace competition. The interim restraints imposed by the objections of existing franchisees, the Court noted, were subject to the board's "ongoing regulatory supervision." 439 U.S. at 110.

We believe that it **[**47]** is unnecessary and inappropriate in this case to establish strict rules setting forth the circumstances requiring rigorous application of the test of state supervision. ***HN13***[] Where a suit challenges the particular exercise of state power, the court should consider the nature and extent of supervision by the state as part of the general inquiry into whether the challenged actions are those of the state as sovereign. *See Hoover v. Ronwin*. The court should give close scrutiny to the existence of supervision where the circumstances indicate the possibility of an improper exercise of that power. *See New Motor Vehicle Bd.; Midcal Aluminum*.

We find that the participation of OWDA in the agreement and in the continued operation of the RES satisfies the concerns underlying the test of active state supervision. OWDA's participation in the agreement insures that the exclusive rights granted the facility were designed to meet the legislative goals set forth in OWDA's mandate. As the district court noted, the cooperative agreement requires periodic reporting to OWDA and authorizes the agency to assume operating responsibility for the RES should the City fail to meet its obligations under **[**48]** the agreement. OWDA's interest and duty to protect the bond owners is an important safeguard against the abuses that motivated the decision in *Midcal*.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

Concur by: MERRITT

Concur

MERRITT, Circuit Judge, concurring.

I agree with the Court's holding and its reasoning in this case in full: the financing authority for solid waste projects expressly granted to the Ohio Water Development Agency, when joined with the city's expressly granted authority to regulate garbage disposal, establishes a clearly expressed state policy permitting a municipal monopoly over garbage disposal. I agree also that the state supervision requirement is met by the Water Development Agency's authority to enforce its contract with the city requiring the displacement of competition.

In addition, it seems to me that the city's powers, standing alone, are sufficient to satisfy the state action exemption. The State Legislature in Ohio has expressly granted to the city the authority to "regulate" garbage disposal, including the authority to "establish" and "maintain" garbage disposal plants. The Legislature has delegated to the chief legislative **[**49]** body of the city the power to set policy on waste disposal and to oversee the implementation of that policy. The Legislature gives the city both the power to go into the garbage disposal business itself and the power to control competitors by law -- hence the power to monopolize. This state delegation to the local legislative body of the power to monopolize and the power to implement and oversee the operation of the monopoly is sufficient to satisfy the "active state supervision" aspect of the state action test as well as the state delegation aspect.

Lemelson v. Bendix Corp.

United States District Court for the District of Delaware

August 24, 1984

Civil Action No. 82-308 CMW

Reporter

104 F.R.D. 13 *; 1984 U.S. Dist. LEXIS 24106 **; 39 Fed. R. Serv. 2d (Callaghan) 1312; 1984-2 Trade Cas. (CCH) P66,303

Jerome H. LEMELSON, Plaintiff, v. The BENDIX Corp. and Brown & Sharpe Manufacturing Co., Defendants

Core Terms

settlement, attorney-client, conspiracy, documents, license, patents, motion to compel, prima facie case, work product doctrine, negotiate, anti trust law, joint defense, infringed, machines, work product protection, burden of establishing

LexisNexis® Headnotes

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

Evidence > Privileges > Attorney-Client Privilege > Scope

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Civil Procedure > ... > Privileged Communications > Work Product Doctrine > General Overview

Evidence > Privileges > Attorney-Client Privilege > General Overview

HN1[] **Discovery, Methods of Discovery**

In determining a plaintiff's motion to compel discovery, the first and most obvious point is that the parties who invoke the attorney-client privilege have the burden of establishing both the existence of the attorney-client relationship and the confidential nature of the communication. Similarly, the party claiming work product protection must show that the disputed documents were prepared in anticipation of litigation or for trial by or for that party or by or for that party's representative. Often, the determination of whether documents are protected by the work product doctrine and the attorney-client privilege is made by in camera inspection.

Civil Procedure > Attorneys > General Overview

Evidence > Privileges > Attorney-Client Privilege > Exceptions

Civil Procedure > ... > Discovery > Privileged Communications > General Overview

Civil Procedure > ... > Privileged Communications > Work Product Doctrine > General Overview

HN2[] **Civil Procedure, Attorneys**

Typically, work product protection can be overcome only by a showing that the party seeking discovery has substantial need of the materials in preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In addition, both the attorney-client privilege and work product protection can be overcome by a showing that the documents claimed to be protected were made in furtherance of a crime of fraud. In order to overcome work product and attorney-client protection through the crime/fraud exception, the moving party bears the burden of showing: (1) a prima facie case of crime or fraud (such as to subject the opposing party to the risk of non-persuasion if the evidence as to the disputed fact is left unrebutted), and (2) that the communications were made in furtherance of the fraud.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Settlement Agreements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN3[] **Types of Contracts, Settlement Agreements**

A prima facie case of conspiracy can be established by either direct or circumstantial evidence showing an agreement among defendants refusing to take a license or to negotiate with a plaintiff. It could also be shown by evidence of an agreement not to take any action with respect to settlement or licensing without notifying and seeking the approval of the other members of the conspiracy.

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

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

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

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

HN4[] **Conveyances, Licenses**

Unless a plaintiff can prove that each participating member of the group agreed, as alleged, not to recognize the validity of the patent and not to accept licensing except upon terms approved by the group, the plaintiff's antitrust claim must fail. The crucial inquiry is whether plaintiff has produced evidence of an agreement among defendants which had the effect of restraining individual freedom of action and preventing settlement negotiations or licensing except upon terms acceptable to the group.

Antitrust & Trade Law > Sherman Act > Defenses

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

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

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN5[] **Sherman Act, Defenses**

Joint defense, standing alone, cannot provide any basis for antitrust liability.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN6[] **Inequitable Conduct, Anticompetitive Conduct**

Proof of consciously parallel business behavior, without more, is insufficient evidence of an agreement in violation of the antitrust laws unless the circumstances under which the parallel behavior occurred make the inference of rational independent choice less attractive than that of concerted action. These circumstances include a showing of acts by defendants in contradiction of their own economic interests and satisfactory demonstration of a motivation to enter an agreement.

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Joseph J. Farnan, Jr., U.S. Atty., and Sue L. Robinson, Asst. U.S. Atty., Wilmington, Delaware, (Thomas J. Byrnes, Dept. of Justice, Washington, District of Columbia), for U.S. Government, for defendants.

Judges: Wright, Sr. Judge

Opinion by: WRIGHT

Opinion

[*14] Memorandum Opinion

WRIGHT, Sr. Judge.

This action was filed by plaintiff Jerome H. Lemelson (hereinafter "Lemelson") against defendants The Bendix Corporation (hereinafter "Bendix") and Brown & Sharpe Manufacturing Company (hereinafter "Brown & Sharpe") on June 1, 1982. The complaint essentially alleges that Bendix and Brown & Sharpe unlawfully "combined and conspired with one another to boycott Lemelson" and refused to negotiate independently with Lemelson **[**2]** to take a license under his patents in violation of the antitrust laws. (Complaint para. 17) (Dkt.No. 1). The answers of defendants deny the material allegations of the complaint.

Presently pending before the Court is plaintiff's motion to compel the production of certain documents which the defendants and the United States Government claim to be protected by the attorney-client privilege and work product doctrine. The documents at issue have been submitted to the Court for *in camera* inspection. After a careful review of those documents, the Court finds that defendants and the government have generally met their burden of establishing that the documents are protected by the attorney-client privilege and work product doctrine. The Court also finds that plaintiff has not met his burden of establishing a prima facie case of conspiracy to violate the antitrust laws sufficient to vitiate attorney-client or work product protection. Accordingly, an order will be entered denying plaintiff's motion to compel with respect to most of the documents in issue.

FACTS

This case has a long and complicated factual history. However, for purposes of this motion, the Court believes that **[**3]** a brief summary of the relevant events will be sufficient. Plaintiff, a holder of numerous patents, began in the late 1960s to contact various manufacturers of coordinate measuring machines, including defendants, in an attempt to induce these manufacturers to take a license under certain patents which plaintiff believed to be infringed by these machines. From 1969 to 1973, there were numerous contacts between plaintiff and defendants regarding whether defendants would take a license under plaintiff's **[*15]** patents. Both defendants persistently refused to take a license, believing that plaintiff's patents were invalid and that their machines were non-infringing. *See* Exhibit A to Plaintiff's Opening Brief in Support of His Motion to Compel (Dkt. No. 134). From 1973 to 1979, there was no apparent contact between plaintiff and defendants. During that period of time, defendants marketed computer-controlled coordinate measuring machines (hereinafter "CCMMs") and sold them, *inter alia,* to the United States Navy, Army, DOE and NASA. [1] Plaintiff, believing his patents to be infringed, filed an administrative claim with the Navy. In 1979, with his administrative claim still **[**4]** unresolved, he brought suit in the United States Claims Court. Both Bendix and Brown & Sharpe voluntarily entered that suit as third-party defendants.

After the Claims Court litigation was filed, plaintiff, in December, 1979, again wrote to both defendants, seeking a license and a settlement of his patent infringement claims. In January, 1980, Bendix responded, indicating again that, while the company was willing to discuss settlement, it did not believe that plaintiff's patents were valid or that its machines infringed plaintiff's patents. Subsequent discussions did not result in settlement. *See* Exhibit B-1 to Plaintiff's Opening Brief in Support of His Motion to Compel (Dkt. No. 134). In March, 1980, the law firm of Barlow & Barlow, outside **[**5]** counsel for Brown & Sharpe, responded to plaintiff, stating that, while there was no basis for plaintiff's claims, they were willing to discuss the matter. Settlement discussions with Brown & Sharpe also occurred; however, plaintiff's demands again were refused. *See* Appendix A to Brief of Brown & Sharpe in Opposition to Plaintiff's Motion to Compel (Dkt. No. 139) (Deposition of William Jackson).

In March, 1980, the law firm of Pennie & Edmonds filed an appearance on behalf of both defendants in the Claims Court litigation. On April 7, 1980, John Kidd, a partner at Pennie & Edmonds, and lead counsel in the Claims Court litigation, wrote to William Jackson, plaintiff's attorney in the Claims Court litigation, objecting to Jackson's direct contact with the parties. *See* Exhibit A-2 to Plaintiff's Opening Brief in Support of His Motion to Compel (Dkt. No. 134). Plaintiff alleges that the appearance of Pennie & Edmonds as joint counsel, and the letter of Kidd dated April 7, 1980, resulted in the frustration of promising settlement discussions and the prevention of direct discussions between plaintiff and each of the defendants. Defendants allege that direct discussions with **[**6]** each defendant continued to occur and that the joint counsel arrangement in the Claims Court litigation did not interfere with their individual freedom of action in pursuing settlement with plaintiff.

Subsequent to the appearance of Pennie & Edmonds as joint counsel in the Claims Court litigation, settlement discussions with each defendant did in fact occur. [2] **[**8]** **[*16]** However, plaintiff's subsequent offers were

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[1] According to plaintiff, defendants are the leading United States manufacturers of CCMMs and account for substantially more than one-half of such sales in the United States. *See* Plaintiff's Opening Brief in Support of His Motion to Compel at 5 (Dkt. No. 37).

[2] Plaintiff's settlement discussions with Brown & Sharpe after the appearance of Pennie & Edmonds as joint counsel are set out in Brown & Sharpe's Brief in Opposition to Plaintiff's Motion to Compel at 6 (Dkt. No. 139). According to Jackson, individual settlement discussions with officers of Brown & Sharpe took place without the presence of joint counsel on several occasions. In the late spring or summer of 1980, Jackson met with Richard Duncan, Brown & Sharpe's Treasurer, at the offices of Brown & Sharpe in Rhode Island. At that meeting, Duncan refused plaintiff's demand of $350,000. In February of 1981, plaintiff made a demand of $500,000; this offer expired without acceptance. On June 25, 1981, plaintiff and Jackson met with James Hayes, in house counsel for Brown & Sharpe, in New York. At that meeting, Hayes offered $15,000 and plaintiff refused. Subsequent discussions did not produce a settlement; but even during the Claims Court trial, Jackson was told by Kidd to contact Hayes if he wanted to discuss settlement with Brown & Sharpe.

Plaintiff's settlement discussions with Bendix after the appearance of Pennie & Edmonds are set out in Exhibit A to Bendix's Answering Brief in Opposition to Plaintiff's Motion to Compel (Dkt. No. 140) (Jackson deposition). At Jackson's request, rejected and the Claims Court trial commenced. The Claims Court, in an Opinion dated June 26, 1983, rejected plaintiff's claims and held that the machines sold by defendants and used by the government did not infringe plaintiff's patents. [3] *See* Lemelson v. United States, 3 Cl.Ct. 161 (1983). Before the Claims Court rendered its decision, plaintiff sued defendants in this District, alleging a conspiracy in violation of Section One of the Sherman Act. [4] The present motion to compel was filed in an attempt to uncover evidence to support plaintiff's allegations. Plaintiff argues that he has established a prima facie case of conspiracy and that any protection afforded to the documents submitted to the Court for *in camera* inspection by the attorney-client privilege **[**7]** or work product doctrine has been vitiated. Defendants claim that no prima facie case of conspiracy has been established and that the protection afforded by the attorney-client privilege and work product doctrine remains intact. For the reasons discussed below, the Court agrees with defendants.

Discussion

HN1[] In determining plaintiff's motion to compel, the first and most obvious point **[**9]** is that the parties who invoke the attorney-client privilege have the burden of establishing both the existence of the attorney-client relationship and the confidential nature of the communication. *See, e.g.,* U.S. v. Flores, 628 F.2d 521, 526 (9th Cir. 1980); U.S. v. Kelly, 569 F.2d 928, 938 (5th Cir. 1978). Similarly, the party claiming work product protection must show that the disputed documents were prepared in anticipation of litigation or for trial by or for that party or by or for that party's representative. *Fed.R.Civ.P. 26(b)(3)*. Often, as in this case, the determination of whether documents are protected by the work product doctrine and the attorney-client privilege is made by *in camera* inspection.

HN2[] Typically, work product protection can be overcome only by a showing "that the party seeking discovery has substantial need of the materials in preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." *Fed.R.Civ.P. 26(b)(3)*. In addition, both the attorney-client privilege and work product protection can be overcome by a showing that the documents claimed to be protected were made **[**10]** in furtherance of a crime of fraud. *See* In re Grand Jury Proceedings, 604 F.2d 798, 802-03 (3d Cir. 1979) (crime/fraud exception applies to both work product doctrine and attorney-client privilege); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 155 (D.Del. 1977) (same). In order to overcome work product and attorney-client protection through the crime/fraud exception, the moving party bears the burden of showing: (1) a prima facie case of crime or fraud ("such as to subject the opposing party to the risk of non-persuasion if the evidence as to the **[*17]** disputed fact is left unrebutted"), [5] and (2) that the communications were made in furtherance of the fraud. Id. at 155.

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settlement discussions with Kenneth Seaman, in house counsel for Bendix, took place without the presence of joint counsel on numerous occasions. As a result of these discussions, a meeting between plaintiff and officers of Bendix was held in New York without counsel for either side in attendance. That meeting failed to produce a settlement; however, even during the Claims Court trial, Jackson was told by Kidd to contact H. G. Massung, in house counsel for Bendix, if he wanted to discuss settlement with Bendix.

[3] That decision is now on appeal before the Court of Appeals for the Federal Circuit. Oral argument before the Federal Circuit was held on March 6, 1984 and the parties now await a decision by that Court.

[4] At this point in the litigation, plaintiff primarily relies on the following facts to establish his claim of conspiracy: (1) the December 7, 1979 meeting of defendants in which they agreed that "a strong unified approach against Mr. Lemelson is mandatory"; (2) the government attorney's comments during a March 25, 1980 telephone conversation that plaintiff would face a "united front"; (3) the March, 1980, appearance of Pennie & Edmonds as joint counsel and Kidd's objection, by letter dated April 7, 1980, to direct discussions between Jackson and defendants; and (4) various occasions on which settlement information relating to one defendant was exchanged or made known to the other defendant. *See* Plaintiff's Supplemental Memorandum in Support of His Motion to Compel at 3-6 (Dkt. No. 164).

[5] Some courts have required that the prima facie showing be based on evidence exclusive of the disputed documents themselves, *see, e.g.,* United States v. Shewfelt, 455 F.2d 836, 840 (9th Cir. 1972); Kockums Industries v. Salem Equipment, 561 F. Supp. 168, 171 (D.Or. 1983), while other courts have considered both the independent evidence and the disputed documents in determining whether a prima facie case has been shown, *see, e.g.,* In re Berkley Co., 629 F.2d 548, 553 (8th Cir.

[11]** In deciding plaintiff's motion to compel and in applying the legal principles discussed above to the facts of this case, the critical issue (assuming that defendants have met their burden of establishing attorney-client and work product protection) is whether plaintiff has established a prima facie case of conspiracy to refuse to negotiate independently or to refuse to take a license under plaintiff's patents in violation of the antitrust laws. If plaintiff has established a prima facie case, then the Court must also consider whether plaintiff has demonstrated that the documents at issue were made in furtherance of the conspiracy. [6] If no prima facie case has been established, then the protections of the attorney-client privilege and work product doctrine should remain inviolate.

[12]** ***HN3***[]

A prima facie case could be established by either direct or circumstantial evidence showing an agreement among defendants refusing to take a license or to negotiate with plaintiff. It could also be shown by evidence of an agreement not to take any action with respect to settlement or licensing without notifying and seeking the approval of the other members of the conspiracy. [7] *See* *Jones Knitting Corp. v. Morgan, 244 F. Supp. 235, 238 (E.D.Pa. 1965)*, *aff'd. in pertinent part,* *361 F.2d 451 (3d Cir. 1966)*. Plaintiff concedes that he has no direct evidence of an agreement preventing settlement negotiations or licensing except upon terms acceptable to the group. However, plaintiff argues that the circumstantial evidence here is sufficient to establish a prima facie case. In addition to evidence of the joint counsel arrangement and several meetings and correspondence between the defendants in the Claims Court litigation, plaintiff points to a number of depositions and documents which arguably suggest that defendants exchanged information regarding settlement negotiations. Plaintiff argues that such an exchange necessarily restricted each defendant from acting independently. **[**13]** Plaintiff, therefore, concludes that the exchange of settlement information through the device of joint counsel violated the antitrust laws by displacing an individual pattern of decision making with what, in essence, amounts to a group boycott. *See* Plaintiff's Opening Brief in Support of His Motion to Compel at 8-9 (Dkt. No. 134); Plaintiff's Reply Brief in Support of His Motion to Compel at 6-8 (Dkt. No. 141).

[14]** However, plaintiff's argument suffers from a "leap in logic" by assuming that the **[*18]** exchange of settlement information, in the context of a joint defense with common counsel representing both of the alleged conspirators, constitutes prima facie evidence of an agreement not to settle or take a license except upon terms approved by the group. None of these circumstances support plaintiff's conspiracy claim. First, as plaintiff concedes, defendants had a right to take joint legal action and to hire joint counsel in response to a common problem. Their ***HN5***[] joint defense, standing alone, cannot provide any basis for antitrust liability. *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1155-57 (E.D.Pa. 1983)*, *rev'd in part and aff'd. in part*, *723 F.2d 238 (3d Cir. 1983)* (Noerr-Pennington doctrine protects joint defense of legal proceedings from Sherman Act liability absent showing that litigation is pursued in bad faith as mere sham). Second, defendants' attendance at meetings concerning plaintiff's infringement claims, particularly in the context of a joint defense, is insufficient without more to give rise to any inference of conspiracy. *Id.* ***[**15]*** *at 1149* (attendance at meeting is

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1980). The Court does not need to resolve that issue here since, under either standard, plaintiff has failed to demonstrate a prima facie case. In fact, the disputed documents submitted to the Court for *in camera* inspection lend further support to defendant's position that no conspiracy or refusal to negotiate independently with plaintiff ever existed. Therefore, even assuming *arguendo* that the Court should consider the disputed documents themselves in determining whether plaintiff has established a prima facie case, plaintiff has not satisfied his burden of proof.

[6] The Court notes that plaintiff has made no showing at all with respect to this requirement of the crime/fraud exception. Moreover, the Court is convinced, after carefully viewing the documents *in camera,* that none of the documents were prepared in furtherance of the alleged conspiracy to violate the antitrust laws. Instead, the documents were prepared in order to effectively litigate the Claims Court action.

[7] As stated in *Gould v. Control Laser Corp. [1978-2 TRADE CASES P62,385], 462 F. Supp. 685, 692-93 (M.D.Fla. 1978)*, *aff'd.,* *650 F.2d 617 (5th Cir. 1981)*: "***HN4***[] Unless [plaintiff] can prove that each participating member of the group agreed, as alleged, not to recognize the validity of the patent and not to accept licensing except upon terms approved by the group, [plaintiff's antitrust] claim must fail." The crucial inquiry is whether plaintiff has produced evidence of an agreement among defendants which had the effect of restraining individual freedom of action and preventing settlement negotiations or licensing except upon terms acceptable to the group.

insufficient without more to give rise to inference of conspiracy). Finally, defendants' exchange of settlement information is, in the absence of any evidence that the exchange restrained individual freedom of action, insufficient to permit an inference of conspiracy since, as Judge Becker has recently pointed out, no case has ever held that the mere exchange of information, in itself, is a violation of the antitrust laws. [8] *Id. at 1150-52*.

[16]** Indeed, in the circumstances of this case, where each defendant independently refused to take a license or settle with plaintiff long before the joint defense of the Claims Court litigation began, where other third party defendants present at the December 7, 1979 meeting did in fact settle with plaintiff after the joint defense began, and where individual settlement discussions with both Bendix and Brown & Sharpe continued after the appearance of common counsel, it is inherently implausible to suggest that the exchange of settlement information had the effect of restraining individual freedom of action. Absent some evidence that the exchange of information had such an effect, it is difficult to see how there could be any possible anticompetitive consequences violating Section One of the Sherman Act. As I suggested in *Jones Knitting Corp. v. Morgan, supra, 244 F. Supp. at 239*, it is entirely reasonable for joint defendants to keep each other advised of individual settlement negotiations. What was illegal in *Jones Knitting Corp. v. Morgan* was the conspirators' agreement to communicate with and gain the approval of each other before negotiating. The illegality of that agreement **[**17]** was based on the restraining effect it had on each individual company's freedom of action. Here, by contrast, there is no evidence of any promise that one defendant would seek the approval **[*19]** of the other before negotiating, nor is there any evidence that each defendant's refusal to settle was in any way influenced or affected by the other's. At best, the evidence shows that counsel may have informed each defendant of settlement decisions or information made or known by the other. In these circumstances, the Court cannot conclude that plaintiff has met his burden of establishing a prima facie case of a conspiracy in violation of the antitrust laws. Accordingly, any protection afforded to the documents submitted for *in camera* inspection by the attorney-client privilege or work product doctrine should remain intact.

An appropriate Order shall be entered.

End of Document

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[8] The fact that defendants exchanged settlement information can be viewed as evidence that defendants were aware of each other's actions and therefore engaged in consciously parallel business behavior. However, the Third Circuit has consistently held that ***HN6***[] proof of consciously parallel business behavior, without more, is insufficient evidence of an agreement in violation of the antitrust laws unless the circumstances under which the parallel behavior occurred make the inference of rational independent choice less attractive than that of concerted action. These circumstances include a showing of acts by defendants in contradition of their own economic interests and satisfactory demonstration of a motivation to enter an agreement. *See Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 114 (3d Cir. 1980)*; *Bogosian v. Gulf Oil Corp., 561 F.2d 434, 446 (3d Cir. 1977)*, *cert. denied*, ***434 U.S. 1086, 98 S. Ct. 1280, 55 L. Ed. 2d 791 (1978)***; *Venzie Corp. v. United States Mineral Products, 521 F.2d 1309, 1314 (3d Cir. 1975)*. Here, while both defendants determined to refuse to take a license from plaintiff and could thus be found to have engaged in parallel business behavior, there is nothing to suggest that defendants acted against their independent economic interests in refusing to settle or that defendants had any motive or reason to limit their individual freedom by agreeing to refuse to deal with plaintiff. In this situation, the inference that defendants independently refused to settle is much more plausible than an inference that their refusal was the result of concerted action. Therefore, the Court concludes that, absent proof that defendants' actions were against their independent economic interests, the exchange of settlement information is insufficient to permit an inference of conspiracy.

James Julian, Inc. v. Raytheon Co.

United States District Court for the District of Delaware

August 31, 1984

Civil Action No. 80-30 MMS

Reporter

593 F. Supp. 915 *; 1984 U.S. Dist. LEXIS 23927 **; 117 L.R.R.M. 2708; 1984-2 Trade Cas. (CCH) P66,236

JAMES JULIAN, INC., Plaintiff, v. RAYTHEON COMPANY, et al., Defendants

Core Terms

Trades, antitrust, picketing, summary judgment, exemption, conspiracy, collective bargaining, working conditions, anti trust law, non-statutory, subcontract, contractor, employees, immune, wages, non-union, rule of reason, anticompetitive, defendants', predatory, antitrust liability, attendance, bargaining, secondary, terminate, meetings, demands, proviso, hire

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN1[] **Labor, Statutory Exemptions**

When unions act alone in their self interest their actions are statutorily exempt from the antitrust laws.

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

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

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

HN2[] **Entitlement as Matter of Law, Genuine Disputes**

Summary judgment is a drastic remedy which a court may resort to only if the moving party demonstrates 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.

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

HN3[] **Summary Judgment, Entitlement as Matter of Law**

All inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion.

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

HN4[] **Summary Judgment, Supporting Materials**

If defendants have filed sworn affidavits denying the existence of material facts, plaintiff is not entitled to rest solely on its complaint, but must produce "significant probative evidence" demonstrating the existence of a factual dispute as to the allegations in its complaint.

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

Evidence > ... > Illegally Obtained Evidence > Eavesdropping, Interception & Wiretapping > Elements

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

Evidence > ... > Illegally Obtained Evidence > Eavesdropping, Interception & Wiretapping > General Overview

Evidence > ... > Illegally Obtained Evidence > Eavesdropping, Interception & Wiretapping > Scope

HN5[] **Conspiracy, Elements**

In assessing summary judgment motions which turn on whether evidence exists to support the existence of a conspiracy, because conspirators rarely leave trails of direct evidence proving the agreement, broad latitude is permitted for the inference of facts from the totality of the circumstances.

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

Evidence > Inferences & Presumptions > Inferences

HN6[] **Summary Judgment, Entitlement as Matter of Law**

Only when reasonable inference-drawing degenerates into groundless speculation will circumstantial evidence prove insufficient support an inference of conspiracy for summary judgment.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN7[] **Summary Judgment, Evidentiary Considerations**

In a motion for summary judgment, all admissible evidence, direct and circumstantial, must be examined in order to determine what legitimate inferences could be drawn as to the ultimate facts in issue, and this must be done without fragmentizing or compartmentalizing the evidence.

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

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

HN8[] **Summary Judgment, Entitlement as Matter of Law**

Although the evidence might not be compelling to a jury, and although proceeding to trial might prove costly and wasteful, a court is not permitted to grant summary judgment merely because it believes that the plaintiff's case might be stronger. Only in the absence of any significant probative evidence of a conspiracy may a court cut short a plaintiff's right to a full trial on the merits.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN9[] **Exemptions & Immunities, Labor**

That an agreement may have been produced by coercion does not immunize it from antitrust liability.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN10[] **Exemptions & Immunities, Labor**

Liability in antitrust actions has been extended not only to unions who coerce agreements from employers, but also to employers who accede to union demands.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

HN11[] **Labor, Nonstatutory Exemptions**

The non-statutory antitrust immunity exemption generally applies when a union, acting with a non-labor party, seeks to attain goals which are mandatory or permissive subjects of bargaining under the National Labor Relations Act, *29 U.S.C.S. § 158 (1982)* et seq., unless the Union acts with a predatory anti-competitive purpose.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Right to Organize

HN12[] **Exemptions & Immunities, Labor**

Section 8(e) of the Labor Management Relations Act, *29 U.S.C.S. § 158(e)*, generally makes it an unfair labor practice for a labor organization to enter into a "hot cargo" agreement with an employer. Nonetheless, the construction industry proviso to section 8(e) protects agreements between unions and employers in the construction industry relating to the contracting or subcontracting of work to be done at the site of construction.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN13[] **Exemptions & Immunities, Labor**

See section 8(e), *29 U.S.C.S. § 158(e)*.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN14[] **Exemptions & Immunities, Labor**

The proviso does not exempt subcontracting agreements from antitrust liability that were not sought or obtained in the context of a collective bargaining relationship, even though they are covered by the plain language of the statute.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN15[] **Exemptions & Immunities, Labor**

Where an agreement entered into outside of the collective bargaining context imposes a direct restraint on the business market with anticompetitive effects not flowing naturally from the elimination of competition over wages and working conditions, predatory intent is irrelevant.

Antitrust & Trade Law > Sherman Act > General Overview

HN16[] **Antitrust & Trade Law, Sherman Act**

An agreement is unlawful under the Sherman Act, *15 U.S.C.S. § 1*, only if it results in an unreasonable restraint of trade.

Antitrust & Trade Law > Sherman Act > General Overview

HN17[] **Antitrust & Trade Law, Sherman Act**

The mere fact that an agreement has some anticompetitive effects not flowing naturally from the elimination of competition over wages and working conditions does not lead automatically to a conclusion that the agreement violates the antitrust laws. An agreement which is found unprotected by the labor exemption must still be examined under traditional antitrust analysis to determine if it has a sufficient anticompetitive effect to constitute an antitrust infraction.

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

Civil Procedure > ... > Summary Judgment > Supporting Materials > Memoranda of Law

HN18[] **Regulated Practices, Price Fixing & Restraints of Trade**

Under the per se rule the alleged agreement would be presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm it caused or the business excuse for its use. In contrast, a rule of reason approach would require the trier of fact to conduct a detailed examination of the affected business and the nature of the restraint imposed.

Counsel: [1]** John Van Brunt, Jr., Esq., Wilmington, Delaware, for Plaintiff.

Robert Burton Coonin, Esq., Berkowitz, Greenstein, Schagrin & Coonin, P.A., Wilmington, Delaware, Martin Wald, Esq., Schnader, Harrison, Segal & Lewis, Philadelphia, Pennsylvania, for Defendants Operating Engineers Local No. 542 and Spanich, Clifford B. Hearn, Esq., Wilmington, Delaware, William J. Einhorn, Esq., Sagot & Jennings, Philadelphia, Pennsylvania, for Defendant Wharf & Dock Builders Local 454, Harvey B. Rubenstein, Esq., Wilmington, Delaware, for Defendants Ironworkers No. 451 and Peterson, Joseph Benson, Esq., Wilmington, Delaware, Richard B. Sigmond, Esq., Mernaze, Katz, Spear & Wilderman, Philadelphia, Pennsylvania, for Defendants Building Trades Council of Delaware & DiMauro.

Judges: Schwartz, District Judge.

Opinion by: SCHWARTZ

Opinion

[*918] SCHWARTZ, District Judge.

James Julian, Inc. ("Julian"), a construction contractor, brought this action to obtain relief from various union, non-union, and individual defendants under *sections 1* and *2* of the Sherman Antitrust Act (*15 U.S.C. §§ 1*, *2*), under section 303 of the Labor Management Relations Act (*29 U.S.C. § 187*) and under state tort law. The non-union **[**2]** defendants, Raytheon Company ("Raytheon") and Raytheon Service Company ("RSC"), [1] reached a settlement with Julian and have been dismissed from the action. [2] The remaining union defendants are: Building

[1] Raytheon and RSC will, for convenience's sake, be referred to jointly as "Raytheon."

[2] Two other defendants were voluntarily dismissed under *Fed. R. Civ. Pro. 41(a)*: Dean E. Bensley and Metropolitan District Council of Philadelphia and Vicinity, United Brotherhood of Carpenters and Joiners of America. Docket Item ("Dkt.") 93.

and Construction Trades Council of Delaware ("Trades Council") and its President, Frank E. DiMauro, Operating Engineers Local 542 ("Operating Engineers") and its agent Albert W. Spanich, Iron Workers Local 451 ("Iron Workers") and its agent Edward F. Peterson, and Wharf and Dock Builders and Pile Drivers Local Union No. 454 of the United Brotherhood of Carpenters and Joiners of America ("Wharf and Dock Builders").

Prior opinions may be consulted for a more detailed factual background. **[**3]** [3] The central facts are as follows. Julian and RSC signed a letter of intent, or "teaming agreement," in 1976 under which Julian was to act as general contractor in the construction of a solid waste disposal plant **[*919]** for the Delaware Solid Waste Authority (the "Authority"). Julian's troubles began in 1978, when work on the project commenced. Its employees were represented by United Mineworkers District 50, now Local 15253 of the United Steel Workers of America, which was not a member of the Trades Council. At two meetings held in November of 1978, Raytheon representatives met with the Trades Council and its member unions. There is evidence that various union spokesman demanded at those meetings that project work be assigned to Trades Council unions and threatened to disrupt construction if their demands were not met. Picketing later occurred on several occasions. Raytheon, allegedly succumbing to union pressures, contracted a portion of project work to Raymond International Buildings, Inc. ("Raymond"), which employed Trades Council workers, and ultimately terminated Julian's contract.

[4]** The Iron Workers and Albert W. Spanich have moved for partial summary judgment on Count I of Julian's complaint, which alleges the Sherman Act violations. The remaining defendants have moved for summary judgment not only on the Sherman Act claim but also on the LMRA section 303 claim (Count III) and state tort claim (Count VI). [4]

The Court has already denied two potentially case dispositive motions in this case. In 1980 the Court denied a motion to dismiss for failure to state a claim upon which relief could be granted and for lack of subject matter jurisdiction. In that opinion the Court held that Julian alleged sufficient facts to state a Sherman Act claim against the defendants and that the claim fell outside of the "statutory" and "non-statutory" labor exemptions to the antitrust laws. *James Julian, 499 F. Supp. at 955-58*. In addition, the Court held that Julian's complaint alleged **[**5]** a valid claim under section 303 of the LMRA for damages resulting from a violation of section 8(b)(4) of the National Labor Relations Act ("NLRA"), *29 U.S.C. § 158(b)(4) (1982)*. [5] Finally, the Court held that it had pendent jurisdiction to hear the state tort claims under *United Mine Workers of America v. Gibbs, 383 U.S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*.

In February, 1983, the Court denied a motion for summary judgment brought by defendants Iron Workers and Peterson. Sufficient admissible and probative evidence existed, **[**6]** the Court held, to permit the question of an antitrust conspiracy to proceed to trial. *James Julian, 557 F. Supp. at 1063-66*. The Court also denied summary judgment on the section 303 and pendent state claims. *Id. at 1066-67*.

Although some new legal theories are now raised in the recent briefing, and although additional defendants have joined in this second summary judgment motion, the essence of the pending motion is a repeat of the prior motion:

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[3] *See* *James Julian, Inc. v. Raytheon Co., 557 F. Supp. 1058 (D. Del. 1983)*; *James Julian, Inc. v. Raytheon Co., 499 F. Supp. 949 (D. Del. 1980)*; *James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138 (D.Del. 1982)*.

[4] Counts II, IV and V were limited to claims against the non-union defendants who are no longer parties to this action.

[5] Section 8(b)(4) makes it an unfair labor practice for a labor organization, *inter alia*, to

> threaten, coerce, or restrain any person engaged in commerce or in any industry affecting commerce, where . . . an object thereof is --
>
> (A) forcing or requiring any employer . . . to enter into any agreement which is prohibited by [section 8(e)];
>
> (B) forcing or requiring any person . . . to cease doing business with any other person. . . .

29 U.S.C. § 158(b)(4).

defendants contend that insufficient evidence exists to support an antitrust claim because of the various exemptions from antitrust liability enjoyed by labor unions. No significant discovery is relied upon in this motion that was not available at the time of the prior summary judgment motion. Thus, for the third time, the Court must deny defendants' motion and move this case towards trial.

I. *Antitrust Claims*

Defendants claim that insufficient evidence exists of a conspiracy between themselves and Raytheon. Because the unions acted alone, defendants assert, the unions **[*920]** are immune from antitrust liability under the "statutory" antitrust exemption provided by sections 6 and 20 of the Clayton Act, *15 U.S.C. § [**7] 17* and *29 U.S.C. § 52*, and the Norris-LaGuardia Act, *29 U.S.C. §§ 104*, *105*, and *113*. *See* *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616, 621-22, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975)*; *United Mine Workers v. Pennington, 381 U.S. 657, 661-62, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*. In any event, defendants argue, even if the unions did reach an agreement with Raytheon, such an agreement is entitled to "non-statutory" immunity because it was related to collective bargaining and was not entered into for the purpose of restraining competition. Finally, defendants contend, even if an agreement between themselves and Raytheon existed, and even if such an agreement is unprotected by an antitrust exemption, plaintiff's claim still must fail because Julian cannot show antitrust injury or unreasonable restraint of trade.

Plaintiff concedes that an agreement solely among the union defendants would be immune to antitrust attack. It is well settled that ***HN1***[] when unions act alone in their self interest their actions are statutorily exempt from the antitrust laws. *See* *Connell, 421 U.S. at 622-23*; *United States v. Hutcheson, 312 U.S. 219, 232-33, [**8] 85 L. Ed. 788, 61 S. Ct. 463 (1941)*; *Feather v. United Mine Workers, 711 F.2d 530, 541 (3d Cir. 1983)*; *Jou-Jou Designs, Inc. v. International Ladies Garment Workers Union, 643 F.2d 905, 910 (2d Cir. 1981)*. Instead, Julian contends that the Trades Council and its member unions pressured Raytheon into reaching an agreement to contract work to Raymond and then to terminate its contract with Julian. Although some agreements with non-union entities are entitled to nonstatutory antitrust immunity, this agreement, Julian asserts, is not immune because it was not "sought or obtained in the context of a collective-bargaining relationship," *Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 653, 72 L. Ed. 2d 398, 102 S. Ct. 2071 (1982)*.

A. *Agreement with Non-Union Entities*

The Court must first address defendants' primary argument on summary judgment: that the unions acted alone, not in concert with a non-union entity.

HN2[] Summary judgment is a drastic remedy which the Court may resort to only if the moving party demonstrates 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. *Sunshine Books, Ltd. v. Temple [**9] University, 697 F.2d 90, 95 (3d Cir. 1982)*. Moreover, ***HN3***[] all inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Id*. ***HN4***[] In this case defendants have filed sworn affidavits denying the existence of an agreement or conspiracy. Plaintiff is therefore not entitled to rest solely on its complaint. It must produce "significant probative evidence" demonstrating the existence of a factual dispute as to the allegations in its complaint. *Sunshine Books, 697 F.2d at 96*; *James Julian, 557 F. Supp. at 1062*.

Special difficulties arise ***HN5***[] in assessing summary judgment motions which turn on whether evidence exists to support the existence of a conspiracy. As the Third Circuit Court of Appeals recently observed in *In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238 (3d Cir. 1983)*, conspirators in an illegal enterprise rarely leave trails of direct evidence proving the agreement. *Id. at 304*. "Broad latitude" is therefore permitted for the inference of facts from "the totality of the circumstances." *Id*. ***HN6***[] Only when "reasonable inference-drawing degenerates into groundless speculation" will circumstantial **[**10]** evidence prove insufficient to support an inference of conspiracy. *Id*. "All ***HN7***[] admissible evidence, direct and circumstantial," must be examined "in order to determine what legitimate inferences could be drawn as to the ultimate facts in issue," and this must be done without "fragmentizing or compartmentalizing the evidence." *Id. at 305*. *See* *Continental Ore Co. v. Union [*921] Carbide & Carbon Corp., 370 U.S. 690, 698-99, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*.

As in the prior opinion, the Court believes plaintiff has produced significant probative evidence demonstrating the presence of a factual dispute as to existence of a conspiracy with Raytheon. ***HN8***[] Although this evidence might not be compelling to a jury, and although proceeding to trial might prove costly and wasteful, the Court is not permitted to grant summary judgment merely because it believes that the plaintiff's case might be stronger. Only in the absence of any significant probative evidence of a conspiracy may a district judge cut short a plaintiff's right to a full trial on the merits.

Three incidents in particular motivated the Court's earlier holding denying the Iron Workers' summary judgment motion: Peterson's **[**11]** attendance at the November 8, 1978, meeting between the Authority, the Trades Council and Raytheon; his attendance at the July 5, 1979, meeting of the Trades Council; and the Iron Workers' participation in October, 1979, picketing. *James Julian, 557 F. Supp. at 1063*. The Court explained: "The act of picketing, when coupled with attendance at the November 8, 1978, meeting where unlawful actions were discussed, adequately links moving defendants with the unlawful purpose." *Id. at 1065*.

> Julian conclusively has demonstrated participation in picketing and attendance at meetings. The existence of a conspiracy is very much an issue and this case should go to a jury. While Julian may not ultimately prevail against moving defendants, it is not the province of this Court, at this juncture, to deprive it of the right to proceed."

James Julian, 557 F. Supp. at 1065. [6]

[12]** The above is as true today as it was last February. The Court will not parse in detail the evidence for a second time. Plaintiff has produced evidence placing defendants at meetings with Raytheon and connecting defendants with the picketing of Julian's job site. Plaintiff further has produced evidence of communications between Raytheon, Authority and union personnel, relating to the Trade Council's jurisdictional complaint, up until the time of Julian's termination. Briefing by defendants isolates various communications made by specific individuals and segregates events in an effort to establish that the occurrences in 1978 and 1979 do not, in aggregate, form a conspiracy. [7] That effort constitutes precisely the sort of fragmentizing and compartmentalizing forbidden in summary judgment.

[13]** **[*922]** Defendants further argue that an antitrust conspiracy between Raytheon and the union defendants may not be inferred merely from evidence that Raytheon responded to union secondary pressures. They rely on Judge Shapiro's recent opinion in *Altemose Construction Co. v. Building & Construction Trades Council*, No. 73-773 (E.D. Pa. July 5, 1983). Judge Shapiro explained in *Altemose* that

> It would at best be "mere speculation." as well as contradictory to the intent of labor's statutory exemption, if a jury were permitted to draw an inference of conspiracy from the favorable results of union secondary tactics.

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[6] Although the prior opinion focused on the Iron Workers' involvement in a conspiracy with the *other unions* rather than on the role played by *Raytheon* in the alleged conspiracy, the briefing did contend that no conspiracy with non-labor parties existed. *See* Opening Brief of Defendants Iron Workers and Peterson in Support of Motion for Summary Judgment, Dkt. 112 at 8; Reply Brief of Defendants Iron Workers and Peterson in Support of Motion for Summary Judgment, Dkt. 121 at 14-15. Thus, despite defense counsel's contention to the contrary at oral argument, *see* Transcript of June 12, 1984, Hearing, Dkt. 161, at 59-60, the issue of Raytheon's involvement in the alleged conspiracy was not raised for the first time in the pending motions.

[7] They also argue that Julian needs "clear proof" that statements by various individuals were authorized or ratified by each defendant and needs "hard evidence" of a conspiracy. Those are not, however, appropriate summary judgment standards. There is significant probative evidence tending to show that the union defendants acted jointly in furtherance of a common goal. *See* Minutes of November 16, 1978 Business Agents Meeting, Dkt. 157, at A-370 (describing "Raytheon Problem" and "possible meeting tomorrow with Operating Engineers, Wharf and Dock Builders and Raytheon"); Deposition of James Au, Dkt. 157, at A-421-A-422 (describing job site encounter with John McCrae, Business Manager and President of Wharf and Dock Builders, Joe O'Donoghue, Business Manager of Local 542, and Al Spanich, President of Local 542); Deposition of James Au, Dkt. 157, at A-466 (describing picketing in October 1979 as a "combination of all the Building Trades Council"); Minutes of December 17, 1979 Special Business Agents Meeting, Dkt. 157, at 371 (describing President DiMauro's report on "present status of developments at Pigeon Point Landfill Project").

Id., slip op. at 63. *See also* *C & K Coal Co. v. United Mine Workers, 704 F.2d 690, 699 (3d Cir. 1983)*.

Julian, however, unlike Altemose Construction Co., rests its case on more than evidence that employers responded to secondary tactics. Julian has produced evidence of meetings attended by representatives of Raytheon and of communications between union officials and Raytheon. [8] Evidence of an agreement in this case therefore surpasses mere speculation. This is evidence which "tends to exclude the possibility that the [Unions] and [Raytheon] **[**14]** were acting independently," *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 1471, 79 L. Ed. 2d 775 (1984)*, and tends to prove a "conscious commitment to a common scheme designed to obtain an unlawful objective." *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980)*, *cert. denied*, *451 U.S. 911, 68 L. Ed. 2d 300, 101 S. Ct. 1981 (1981)*.

[15]** That the agreement, if any, may have been produced by coercion, does not immunize it from antitrust liability. In *Connell*, a union picketed a general contractor to extract an agreement under which the contractor would subcontract work only to firms under contract with the union. The contractor signed the agreement under protest and brought suit to challenge its legality. The Supreme Court held that the agreement was subject to antitrust scrutiny. [9]

[16]** **[*923]** The Third Circuit Court of Appeals has ventured even further than the *Connell* ***HN10***[] Court, extending liability not only to *unions* who coerce agreements from employers, but also to *employers* who accede to

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[8] Evidence that seeds of conspiracy were planted at the November 8, 1978, meeting include a memorandum by Robert J. Storella, RSC's Senior Contract Administrator, which states, in part:

> a. Since the present pile testing is almost completed anyway, the Operating Engineers will not insist on replacing the 4 "non-union" workers with union operators provided that Raytheon assures the Building and Trades that 100% union personnel (i.e. Building and Trades) will be used when the job itself is actually started.
>
> b. They want our answer by this Friday (11/10). If it is not a favorable reply, the Operating Engineers and the Dock Workers will put up a picket line at the site on Monday morning.
>
> c. We told them we would give them our answer by Friday.

Dkt. 157, at A-307. Storella later explained that RSC "required Julian to utilize a Building Trades Contractor, Raymond International, to drive piles rather than his own work force," and described this move as "a concession to achieve labor peace based on threats of a picket." Letter from Robert J. Storella to N. C. Vasuki, June 27, 1979, Dkt. 157, at A-324. Evidence further shows that Theodore W. Ryan, President of the Trades Council, knew of the contract modification giving Raymond the pile work through conversations with Vasuki, Contract Officer at the Delaware Solid Waste Authority. *See* Deposition of T. Ryan at 76-77, Dkt. 157, at 534-335.

With respect to Julian's ultimate termination, there is further evidence of conspiracy. Evidence shows that Jacob Kreshtool, an attorney for the Operating Engineers, told Vasuki in late October, 1979, that he would file suit challenging an Authority bond issue but that the suit would be dropped if the entire project were given to Building Trade workers. *See* November 1, 1974, Memorandum from J. J. Mahon to E. L. Kane, Dkt. 157, at A-348. Furthermore, on December 5, 1979, Dean Bensley, RSC's President, wrote to Vasuki and explained that he had been "in direct contact with Mr. DiMauro," and had told DiMauro that RSC considered the Building Trades "as potential allies on this project." Dkt. 157, at A-350. Although this evidence is merely circumstantial, and although it is far from convincing, the Court cannot conclude that it is neither significant nor probative of a conspiracy.

HN9[] -

[9] Justice Douglas dissented specifically on the grounds that no conspiracy was alleged because Connell "maintained only that Local 100 coerced it into signing the subcontracting agreement." *Connell, 421 U.S. at 638* (Douglas, J., dissenting).

The concept of a coerced agreement violating ***antitrust law*** is not peculiar to the labor arena. It has long been held that group boycotts and vertical price restraints imposed by a manufacturers or suppliers on their retailers through threats or coercion may constitute "agreements" subject to antitrust attack. *See, e.g.,* *Monsanto Co. v. Spray-Rite Service Corp., 104 S. Ct. at 1471* & n.10. *Altemose*, where no evidence of an agreement existed, is fully consistent with this rule.

union demands. In *Consolidated Express, Inc. v. New York Shipping Association, 602 F.2d 494 (3d Cir. 1979)* ("*Conex*"), the Court of Appeals explained that it was not unfair to require employees to "resist excessive union claims." *Id. at 520*.

> Employers are not, after all, without remedies against illegal demands. They can refuse to bargain and the Board will, we must presume, sustain that refusal to bargain. They can accede to the union demand, and then sue, as Jewel Tea Company and Connell Construction Company did, to invalidate the agreement under federal law. Or they can simply refuse to implement the agreement, once adopted, because it is in violation of § 8(e). . . . Affirmative obligations imposed by nonlabor federal statute may on occasion require an employer to resist illegal union demands even at the cost of a strike.

*Id. See also Larry V. Muko, Inc. v. Southwestern Pennsylvania Building & Construction Trades Council, 609 F.2d **[**17]** 1368, 1375 (3d Cir. 1979)* ("*Muko I*") (agreement entered into as result of union handbilling could be found to violate antitrust laws). [10]

In this case, so long as an agreement existed between Raytheon and the defendants, it is irrelevant for antitrust purposes whether Raytheon entered the agreement happily or grudgingly.

B. *Non-Statutory Exemption*

Defendants argue that even if an agreement existed between themselves and Raytheon, the agreement is entitled to non-statutory antitrust **[**18]** immunity because 1) the unions' purpose was to protect and standardize area wage standards and working conditions; 2) the unions' actions were lawful under section 8(e) of the NLRA (the "construction industry proviso"); and 3) the unions lacked predatory intent.

1. *Area Standards Protest*

HN11[] The non-statutory exemption generally applies "when a union, acting with a non-labor party, seeks to attain goals which are mandatory or permissive subjects of bargaining under the National Labor Relations Act, unless the Union acts with a predatory anti-competitive purpose." *Feather v. United Mine Workers of America, 711 F.2d 530, 542 (3d Cir. 1983)*. The non-statutory exemption thus serves as an accommodation to labor goals by protecting conduct that otherwise might constitute a violation of federal ***antitrust law***. *See Connell, 421 U.S. at 622-23*; *James Julian, 499 F. Supp. at 956*. [11]

[19]** Defendants claim exemption for their activities because, they argue, their picketing was confined to the purpose of standardizing area wages and working conditions. Such a purpose, they correctly argue, **[*924]** even if achieved through agreement with non-union entities, is immune from antitrust liability. As the Supreme Court in *Connell* explained:

> The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organized workers and standardizing wages ultimately will effect price competition among employers, but the goals of federal labor law

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[10] Professor Areeda, commenting on *Muko I*, argues that it is "strange to extract treble damages from the victim of lawful union pressure who had no choice but to acquiesce in the union's demands if he wished to survive." P. Areeda, ***Antitrust Law*** para. 229.2a, at 83 (Supp. 1982). He nonetheless recognizes the existence of a contrary argument, similar to that raised in the *Conex* case, that "antitrust liability would stiffen the resistance of the victim so as to discourage the union from exerting the pressure." *Id*.

[11] The outer limits of the exemption were delineated by the Third Circuit Court of Appeals in *Muko I*:

> An agreement between a union and a business organization, outside a collective bargaining relationship, which imposes a direct restraint upon a business market, and which is not justified by congressional labor policy because it has actual or potential anticompetitive effects that would not flow naturally from the elimination of competition over wages and working conditions, is not exempt from antitrust scrutiny.

Muko I, 609 F.2d at 1373.

> never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions.

Connell, 421 U.S. at 622. *See also* Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 689, 14 L. Ed. 2d 640, 85 S. Ct. 1596 (1965).

Evidence exists in this case, however, from which a jury could conclude that defendants' **[**20]** purpose was not restricted to protecting area wages and working conditions. Rather, record evidence exists supporting Julian's contention that the defendants picketed to force Julian to hire Trades Council labor in place of Steel Workers labor and to force Raytheon to agree to terminate Julian. The unions' use of signs announcing an area standards protest during certain picketing does not establish as a matter of law that the unions were not also pursuing a less publicized objective. *See* N.L.R.B. v. International Brotherhood of Electrical Workers, Local 265, 604 F.2d 1091, 1097 (8th Cir. 1979); San Francisco Local Joint Executive Board of Culinary Workers, Bartenders, Hotel, Motel and Club Service Workers, 203 NLRB 199 (1973), *aff'd*, 166 U.S. App. D.C. 204, 509 F.2d 537 (D.C. Cir. 1975). As this Court previously stated:

> what might facially appear as a legitimate picket line may well have illegitimate, secondary motives. *See* Bexar Plumbing Co., Inc. v. NLRB, 536 F.2d 634, 636 (5th Cir. 1976); NLRB v. Local 307, Plumbers United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (ALC-CIO), 469 ***[**21]*** F.2d 403, 408 (7th Cir. 1972). The current factual scenario neatly fits within these cases -- despite avowed legitimate goals of picketing, substantial evidence supports an inference that the real goal was the preclusion of Julian. As such, summary judgment is inappropriate.

Julian, 557 F. Supp. at 1066-7 (footnote omitted).

2. *Section 8(e): Construction Industry Proviso*

The unions claim exemption under section 8(e) of the ***HN12***[] Labor Management Relations Act, 29 U.S.C. § 158(e). [12] Section 8(e) generally makes it an unfair labor practice for a labor organization to enter into a "hot cargo" agreement with an employer. Nonetheless, the "construction industry proviso" to section 8(e) protects agreements between unions and employers in the construction industry "relating to the contracting **[*925]** or subcontracting of work to be done at the site of construction. . . ."

[22]** The proviso is not, however, as broad as it might literally appear. According to the Supreme Court, ***HN14***[] the proviso does not exempt subcontracting agreements "that were not sought or obtained in the context of a collective bargaining relationship, even though they [are] covered by the plain language of the statute." Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. at 653. Thus, where "stranger" picketing is used to pressure an employer with whom the union has no collective bargaining relationship, "and whose employees it has no interest in

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[12] ***HN13***[] Section 8(e) provides in part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work. . . .

29 U.S.C. § 158(e).

Agreements protected by the construction industry proviso to section 8(e) are also protected from antitrust liability. *See* Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 85, 70 L. Ed. 2d 833, 102 S. Ct. 851 (1982); *Altemose*, slip op. at 43-44 & n.67.

representing, into signing union signatory subcontracting agreements," the agreements are unprotected. *Id. at 653-54 n.8*.

Here, evidence supports Julian's allegation that Raytheon agreed with the unions to cease doing business with Julian in order to replace Steel Workers with Trades Council employees. The unions and Raytheon were not in a collective bargaining relationship nor did they execute a subcontracting agreement such as that approved in *Woelke and Romero*. Rather, as in *Connell*, there is evidence to suggest that the unions had no interest in representing Julian's or Raytheon's employees and instead sought to require Julian **[**23]** or Raytheon to subcontract with *other* companies hiring Trades Council employees. Furthermore, evidence suggests that the unions' final goal was to require Raytheon to replace Julian with a different contractor entirely, and have *that* contractor hire (or subcontract others to hire) Trades Council labor. [13]

[24]** Defendants Operating Engineers and Spanich argue that "if Local 542 had succeeded and Julian had been forced to employ Operating Engineers, it would *not* have occurred in the absence of Julian signing a collective bargaining agreement." Opening Brief of Operating Engineers and Spanich, Dkt. 152, at 40. The record, however, does not evidence union desire to form a collective bargaining relationship with Julian, nor is that Julian's theory. Instead, Julian contends that defendants sought to pressure Raytheon to subcontract work to employers *other than Julian* and, eventually, to force Julian off the project entirely. These actions do not fall within a collective bargaining relationship any more than did those in *Connell*.

Taking a different approach, the other defendants argue that a collective bargaining relationship existed because Julian and Raytheon were engaged in a "joint venture" and should be treated as "joint employers" of all project employees. *See* Opening Brief of Defendants Building Trades Council, DiMauro, Ironworkers, Peterson and Wharf & Dock Builders, Dkt. 150 at 28-29. "An agreement between the unions and Raytheon would possess a sufficient collective **[**25]** bargaining nexus," they argue, to satisfy *Connell. Id.* at 29. Defendants cite no support for their joint venture theory, nor does the court believe that Julian should be considered a "joint employer" of workers who are engaged in work for a subcontractor which was assigned work against Julian's wishes allegedly belonging to Julian. In any event, Julian certainly cannot be considered a joint employer under an arrangement between the unions and Raytheon which provided for Julian's termination from the construction project.

3. *Predatory Intent*

Defendants argue that Julian must, under Supreme Court precedent, prove that **[*926]** the unions acted with predatory intent in order to establish a valid antitrust claim. The evidence in this case, defendants argue, shows only that the unions sought to preserve area wage standards, not that they intended to ruin competition.

The Court cannot agree with either contention. The Supreme Court's plurality opinion in *Pennington* has generally been interpreted as requiring proof of predatory intent where the challenged agreement concerns "subjects at the 'very heart' of the collective bargaining process." *Conex, 602 F.2d at 516*; **[**26]** *Smitty Baker Coal Co. v. United Mine Workers, 620 F.2d 416, 428-30 (4th Cir. 1980)*, *cert. denied*, *449 U.S. 870, 66 L. Ed. 2d 89, 101 S. Ct. 207 (1980)*; 1 P. Areeda & A. Turner, ***Antitrust Law***, para. 229e, at 211 (1978). A different analysis, however, has been applied in other contexts. As the Third Circuit Court of Appeals explained in *Conex*, the Supreme Court in *Connell* abandoned the intent requirement of *Pennington*. ***HN15***[] Where an agreement entered into outside of the collective bargaining context imposes a "direct restraint on the business market" with anticompetitive effects not

[13] This case does not involve a dispute, outside the collective bargaining context, involving "shoulder-to-shoulder" friction between union and non-union workers. *See* *James Julian, 499 F. Supp. at 957*; *Pacific Northwest Chapter of the Associated Builders & Contractors, Inc. v. N.L.R.B., 654 F.2d 1301, 1319-21 (9th Cir. 1981)* (en banc), *aff'd sub nom, Woelke & Romero, 456 U.S. 645, 72 L. Ed. 2d 398, 102 S. Ct. 2071* (*Connell* presents alternative requirements of either a collective bargaining relationship or a threat of shoulder-to-shoulder friction with non-union workers). Rather, it involves a territorial dispute between workers represented by *different* unions, not the type of "shoulder-to-shoulder" friction described by the Supreme Court in *Connell* or *Woelke & Ramero*.

flowing "naturally from the elimination of competition over wages and working conditions," predatory intent is irrelevant. *See* Conex, 602 F.2d at 517, *quoting* Connell, 420 U.S. at 625. [14]

[27]** As explained earlier, the Court cannot decide on summary judgment that defendants' goal was limited to preserving area standards. The jury must decide whether defendants sought only to protect area wage standards or whether they sought to eliminate Julian from the project site in order to replace Steel Worker members with Trades Council union members. If the latter was their purpose, their alleged agreement with Raytheon would, indeed, have a direct anticompetitive effect on the business market not flowing naturally from the elimination of competition over wages and working conditions. As in *Connell*, it would have the effect of excluding an employer from the market despite a competitive advantage the employer might enjoy because of efficiencies and would thus restrain trade more than was necessary to achieve a legitimate labor goal. Conex, 602 F.2d at 518-20. [15]

[28]** C. *Anticompetitive Effects*

Defendants argue that Julian has not established sufficient injury to competition to support its antitrust claim.

HN16[] An agreement is unlawful under section 1 of the Sherman Act [16] **[**29]** only if it results in an *unreasonable* restraint of trade. Chicago Board of Trade v. United States, 246 U.S. 231, 62 L. Ed. 683, 38 S. Ct. 242 (1918); Larry V. Muko, Inc. v. Southwestern Pennsylvania Building & Construction Trades Council, 670 F.2d 421, 428 (3d Cir. 1982) ("*Muko II*"). ***HN17***[] The mere fact that an agreement, like that in *Connell*, **[*927]** has some anticompetitive effects not flowing naturally from the elimination of competition over wages and working conditions does not lead automatically to a conclusion that the agreement violates the antitrust laws. That is, an agreement which under *Connell* is found unprotected by the labor exemption must still be examined under traditional antitrust analysis to determine if it has a sufficient anticompetitive effect to constitute an antitrust infraction. Muko II, 670 F.2d at 426-27. [17]

The parties have not briefed the issue of whether a rule of reason or *per se* analysis should apply, although implicit in defendants' briefs is the assumption that rule of reason is appropriate. Plaintiff's brief argues that even under rule of reason analysis it has demonstrated sufficient competitive injury to survive summary judgment. ***HN18***[] Under the *per se* rule the alleged agreement between defendants and Raytheon would be "presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm [it] caused or the business excuse for [its] use." Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958). In

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[14] The Third Circuit's brief one-sentence summary of the non-statutory exemption in *Feather* which indicated that "generally" a predatory purpose is required, Feather, 711 F.2d at 542, cannot be read as overruling the extensive interpretation of *Connell* contained in *Conex* and reaffirmed in *Muko II*.

[15] The *Conex* court created a defense in damage actions, not available in declaratory judgment or injunctive actions, for cases in which the defendant "could not reasonably have foreseen that the subject matter of the agreement being challenged would be held to be unlawful under § 8(b) (4) or § 8(e)" and where the agreement was "'intimately related' to the object of collective bargaining thought at the time to be legitimate, and went no further in imposing restraints in the secondary market than was reasonably necessary to accomplish it." Conex, 602 F.2d at 521; *see also* Feather, 711 F.2d at 542. The availability of this defense is an issue which must be litigated at trial.

[16] Defendants have ignored entirely plaintiff's Sherman Act section 2 claim. To the extent plaintiff alleges an attempt to monopolize, effect on the market place is irrelevant (although probable effect is very relevant). *See* United States v. Columbia Steel Co., 334 U.S. 495, 531-32, 92 L. Ed. 1533, 68 S. Ct. 1107 (1948) (reasonable restraint of trade not in violation of section 1 may nonetheless constitute an attempt to monopolize under section 2); Swift & Co. v. United States, 196 U.S. 375, 396, 49 L. Ed. 518, 25 S. Ct. 276 (1905) (attempt to monopolize claim needs proof of intent and dangerous probability of success).

[17] Nor does a finding that the agreement violates section 8(e) *per se* make the agreement illegal. Muko II, 670 F.2d at 427 n.5.

contrast, a rule of reason approach would require the trier of fact to conduct "a detailed examination of the affected business and the nature of the restraint imposed." Muko II, 670 F.2d at 428.

The Court holds in this case that rule of reason analysis must apply and agrees **[**30]** with Julian that the issue of antitrust liability must await trial. The Third Circuit Court of Appeals in *Muko II*, while rejecting the position offered by some commentators that conduct in the labor area should never be *per se* unlawful, warned against "mechanical or imprudent application of the *per se* rule in the labor context." Muko II, 670 F.2d at 427; *see* Handler & Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 Colum. L. Rev. 459, 511 (1981). [18] The Court explained that only "classic" group boycotts -- those involving attempts by competitors to exclude horizontal competitors -- are *per se* unlawful. Muko II, 670 F.2d at 430. *Muko II* involved an action by a non-union contractor against a fast-food chain operator and two labor trades councils challenging an agreement between the councils and the fast-food operator to hire only trades council labor. The agreement was not, the *Muko II* court held, a classic group boycott. 670 F.2d at 432.

> Simply put, a small retailer has been picketed by a union. To preserve its business, the firm agrees to purchase union-made goods in the future. We **[**31]** cannot agree with Muko . . . that this is the kind of behavior against which the *per se* rule traditionally has been invoked.

Id.

Similarly, in this case Julian alleges only picketing of a local builder and an agreement to purchase services of particular unions in the future. To borrow language from *Muko II*, "this is not a case in which one competitor, through concerted action with a supplier or customer, attempts to cut another, horizontal competitor out of the market place." [19] Muko II, 670 F.2d at 432. There is no "suggestion of attempted price fixing." *Id*. "The record is barren of anything to suggest that either of the defendants wished, through their **[**32]** concerted action, to gain advantage over [Julian] in an *economic* or *competitive* sense." *Id*. "Unlike *Conex*, in which the defendant union imposed a widespread restraint of trade affecting the entire shipping industry, **[*928]** the 'refusal to deal' in this case involved only one relatively small buyer." *Id*. [20]

Under a rule of reason analysis, the Court is unable to state as a matter of law that defendants did not unreasonably restrain competition in the relevant market. [21] Plaintiff has presented expert evidence tending to show that defendants **[**33]** harmed competition in several geographic and product markets. *See* Report of Dr. Jeffrey Perloff, Dkt. 157, at A-205. Defendants have offered no expert rebuttal evidence and, in fact, have entirely ignored Julian's expert report in their briefs. Thus, the Court cannot grant summary judgment on the issue of whether defendants unreasonably restrained trade.

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[18] Earlier language in *Conex* had suggested that conduct which stripped a union of its antitrust exemption would necessarily constitute an antitrust violation, *see* Conex, 602 F.2d at 523-24, but *Muko II* limited the holding of *Conex* as applying to a case involving a classic group boycott. Muko II, 670 F.2d at 427.

[19] It may be a case in which one *union* attempts to cut another *union* from the marketplace, but plaintiffs wisely have not suggested that such action would lose the protection of Clayton Act sections 6 and 20.

[20] While this case is distinguishable from *Muko II* as involving a termination of an existing contract, that distinction, alone, is insufficient to make defendants' alleged actions *per se* illegal under the antitrust laws.

[21] If the Trades Council unions had sought solely to substitute themselves as Julian's employees in place of the Steel Workers, that effort would not constitute an antitrust violation because it would not have lead to a net increase in restraint of trade over that created by the existing arrangement between Julian and the Steel Workers. *See* Jou-Jou Designs v. International Ladies Garment Workers Union, 643 F.2d 905, 910 (2d Cir. 1981). Evidence supports Julian's theory, however, that the unions forced Julian off the project site, thus affecting competition beyond the substitution in a collective bargaining relationship of one group of employees for another.

[34]** II. *Section 303 and State Tort Claims*

Defendants other than Operating Engineers and Spanich have moved for summary judgment on Julian's remaining claims, arguing, first, that picketing and violent conduct by the Operating Engineers cannot be attributed to their organizations and, second, that any picketing they themselves conducted was limited to the "primary" objective of protecting area standards. [22] **[**35]** As explained earlier, however, these issues cannot be decided on summary judgment. Although plaintiff's task at trial will be burdensome, the Court cannot hold that no material issue of fact remains to be litigated. Some evidence exists suggesting a secondary objective behind the unions' picketing, thus precluding summary judgment on the section 303 claim. In addition, evidence supports a conspiracy or agency theory, which might impose liability on defendants for the tortious acts committed by others. [23] As a consequence, defendants' motion must be denied on Julian's remaining claims.

An appropriate order will issue.

End of Document

[22] Section 8(b)(4) prohibits only picketing for "secondary" objectives, not "primary" objectives. *See* *National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612, 619-33, 18 L. Ed. 2d 357, 87 S. Ct. 1250 (1967)*. Area standards picketing would not involve an unlawful objective, while picketing to force one party to cease doing business with another would. *See id*.

[23] The parties have not briefed the state tort law question of vicarious tort liability under a conspiracy or agency theory.

[Roland Machinery Co. v. Dresser Industries, Inc.]

United States Court of Appeals for the Seventh Circuit

June 7, 1984, Argued ; August 31, 1984

No. 84-1509

Reporter

749 F.2d 380 *; 1984 U.S. App. LEXIS 19012 **; 1985-1 Trade Cas. (CCH) P66,329; 79 A.L.R. Fed. 1

ROLAND MACHINERY COMPANY, Plaintiff-Appellee, v. DRESSER INDUSTRIES, INC., Defendant-Appellant

Subsequent History: [1]** AsAmended, and Petition for Rehearing, with Suggestion of Rehearing En Banc, Denied, December 21, 1984. *

Prior History: Appeal from the United States District Court for the Central District of Illinois, Springfield Division. **[**2]** No. 84 C 3038 -- J. Waldo Ackerman, Judge.

Core Terms

preliminary injunction, dealer, injunction, cases, district court, terminated, merits, abuse of discretion, construction equipment, irreparable harm, distributor, harms, manufacturer, parties, district judge, reviewing court, factors, adequate remedy at law, appellate review, exclusive-dealing, dealership, distributorship, preliminary injunctive relief, competitor, Antitrust, decree, standard of review, deference, percent, slip opinion

LexisNexis® Headnotes

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

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

Antitrust & Trade Law > Clayton Act > General Overview

* Upon consideration of the petition for rehearing with suggestion for rehearing en banc, filed by the appellee, a majority of the panel has voted to deny rehearing, and a majority of the judges of the court in active service has voted not to rehear the case en banc; the petition is therefore DENIED. Judge Swygert of the panel voted to rehear the case. Judge Wood's position is as follows: "Judge Wood voted to grant en banc consideration of the original majority opinion, but takes no position with regard to the amended opinion from which Judge Swygert again dissents as the amended opinion and dissent have not been seen or considered by the parties." Judge Coffey joins in Judge Wood's comment.

The panel majority and dissenting opinions have been amended with regard to the standard of judicial review of orders granting or denying preliminary injunctions. The amended opinions are issued herewith and supersede the original opinions issued on August 31, 1984.

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

HN1[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Section 3 of the Clayton Act, *15 U.S.C.S. § 14*, makes it unlawful to sell goods on the condition, agreement, or understanding that the purchaser shall not use or deal in the goods of a competitor or competitors of the seller, where the effect of such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] **Grounds for Injunctions, Irreparable Harm**

In every case in which the plaintiff wants a preliminary injunction he must show that he has "no adequate remedy at law", and, unless the statute under which he is suing excuses a showing of irreparable harm, that he will suffer "irreparable harm" if the preliminary injunction is not granted. The plaintiff must also show that an award of damages at the end of trial will be inadequate, which does not mean wholly ineffectual, but does mean seriously deficient as a remedy for the harm suffered.

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[] **Private Actions, Remedies**

Where the only remedy sought at trial is damages, the two requirements of irreparable harm and no adequate remedy at law merge. The question is then whether the plaintiff will be made whole if he prevails on the merits and is awarded damages.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN4[] **Injunctions, Preliminary & Temporary Injunctions**

In deciding whether to grant a preliminary injunction, the court must also consider any irreparable harm that the defendant might suffer from the injunction, that is, harm that would neither be cured by the defendant's ultimately prevailing on the merits or fully compensated by a *Fed. R. Civ. P. 65(c)* injunction bond. If the plaintiff does show some likelihood of success, the court must then determine how likely that success is, because this affects the balance of relative harms. The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor. Sometimes an order granting or denying a preliminary injunction will have consequences affecting the public interest, which must be weighed as well.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN5[] Injunctions, Preliminary & Temporary Injunctions

The application of the principles regarding the determination of whether a preliminary injunction should be granted requires the seasoned judgment of the district court, what is usually called the court's "discretion."

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN6[] Standards of Review, Abuse of Discretion

The standard of review in cases involving preliminary injunctions is whether the judge exceeded the bounds of permissible choice in the circumstances, not what the appellate court would have done if it had been in his shoes.

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

Civil Procedure > Judicial Officers > Judges > General Overview

HN7[] Standards of Review, Clearly Erroneous Review

Ordinarily the trial judge's balancing of the harms to the parties would be entitled to substantial deference by the reviewing court, but not if the balancing is infected by a clear error of fact, or an error of law.

Antitrust & Trade Law > Clayton Act > General Overview

HN8[] Antitrust & Trade Law, Clayton Act

In order to prevail on its claim that a defendant violated § 3 of the Clayton Act, *15 U.S.C.S. § 14*, a plaintiff will have to show both that there was an agreement, though not necessarily an explicit agreement between it and defendant that plaintiff would not carry a product line competitive with defendant's and that the agreement was likely to have a substantial though not necessarily an immediate anticompetitive effect.

Civil Procedure > Judicial Officers > Judges > General Overview

Energy & Utilities Law > Pipelines & Transportation > Eminent Domain Proceedings

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Clayton Act > Scope

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

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

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

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

HN9[] **Judicial Officers, Judges**

It now appears most unlikely that exclusive-dealing agreements, whether challenged under § 3 of the Clayton Act, *15 U.S.C.S. § 14* or *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, will be judged by the simple and strict test of Standard Stations. They will be judged under the Rule of Reason, and thus condemned only if found to restrain trade unreasonably.

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**

The exclusion of one or even several competitors, for a short time or even a long time, is not ipso facto unreasonable. The welfare of a particular competitor who may be hurt as the result of some trade practice is the concern not of the federal antitrust laws, but of state unfair competition law.

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

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

The exclusion of competitors is cause for antitrust concern only if it impairs the health of the competitive process itself.

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

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

A plaintiff must prove two things to show that an exclusive-dealing agreement is unreasonable. First he must prove that it is likely to keep at least one significant competitor of the defendant from doing business in a relevant market. If there is no exclusion of a significant competitor, the agreement cannot possibly harm competition. Second, he must prove that the probable, but not certain, effect of the exclusion will be to raise prices above, and therefore reduce output below, the competitive level, or otherwise injure competition; he must show in other words that the anticompetitive effects, if any, of the exclusion outweigh any benefits to competition from it.

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

Antitrust & Trade Law > Clayton Act > General Overview

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

HN13[] **Exclusive & Reciprocal Dealing, Exclusive Dealing**

Exclusive-dealing contracts terminable in less than a year are presumptively lawful under § 3 of the Clayton Act, *15 U.S.C.S. § 14*.

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

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

The calculus of competitive effect must also include some consideration of the possible competitive benefits of exclusive dealing in the industry. Competition is the allocation of resources in which economic welfare or consumer welfare is maximized; it is not rivalry per se, or a particular form of rivalry, or some minimum number of competitors.

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Judges: Bauer and Posner, Circuit Judges, and Swygert, Senior Circuit Judge. Swygert, Senior Circuit Judge, dissenting.

Opinion by: POSNER

Opinion

[*381] POSNER, Circuit Judge.

This appeal requires us to consider both the standard for granting (and reviewing grants of) preliminary injunctions, and substantive issues of exclusive dealing under ***HN1***[] section 3 of the Clayton Act, *15 U.S.C. § 14*, which makes it unlawful to sell goods "on the condition, agreement, or understanding that the . . . purchaser . . . shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller, where the effect of such . . . condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Roland Machinery Company, a substantial **[**3]** dealer (its gross revenues exceed $10 million a year) in construction equipment and related items, serving a 45-county area in central Illinois, was for many years the area's exclusive distributor of International Harvester's line of construction equipment. International Harvester got into serious financial trouble and in 1982 sold its construction-equipment division to Dresser Industries. Dresser promptly signed a dealership agreement with Roland. The agreement provided that it could be terminated by either party, without cause, on 90 days' notice. It did not contain an exclusive-dealing clause (that is, a clause forbidding the dealer to sell any competing manufacturer's construction equipment). Eight months after signing the agreement Roland **[*382]** signed a similar agreement with Komatsu, a Japanese manufacturer of construction equipment. Several months after discovering that Roland had done this, Dresser gave notice that it would exercise its contract right to terminate its dealership agreement with Roland without cause. Roland brought this suit shortly before the end of the 90-day notice period, charging that Dresser had violated section 3 of the Clayton Act and other **[**4]** provisions of federal and state law. The district judge granted Roland a preliminary injunction based solely on the section 3 charges, and Dresser has appealed under *28 U.S.C. § 1292(a)(1)*. None of Roland's other charges is before us on this appeal.

At the hearing on Roland's motion for preliminary injunction, Dresser presented evidence that it had cut off Roland because it was afraid that Roland intended to phase out the Dresser line and become an exclusive Komatsu dealer, and because it believed that as long as Roland (a well-established firm) remained a Dresser dealer, no other dealer in the area would be willing to handle Dresser equipment, as this would mean competing with Roland. The usual practice in the industry is for dealers not to carry competing lines, and Dresser presented evidence that this makes for more aggressive promotion of each line. Roland, however, presented evidence that it had no intention of phasing out Dresser equipment, that it was terminated because the dealership contract contained what Roland at argument called a "secret" term requiring Roland to deal exclusively in Dresser equipment, and that the sudden termination would **[**5]** bankrupt it or at least cause it serious loss. But it seems that only about 50 percent of Roland's revenues are derived directly or indirectly from Dresser equipment, and only about 10 percent from selling new Dresser equipment (the other 40 percent coming from renting and servicing equipment, and from selling parts); and Dresser argues that Roland could survive simply by promoting Komatsu equipment aggressively -- which it intended to do anyway.

After a two and a half day hearing, the district judge concluded that if Dresser were allowed to cut off Roland pending the trial of the case Roland would probably go out of business -- an injury to Roland greater than the harm to Dresser from being forced to continue dealing with Roland in the interim. But because comments by Roland's general manager "raise some doubts as to the sincerity of Roland's current claims that it plans to aggressively distribute Dresser products both now and in the future," the judge conditioned the preliminary injunction on Roland's "maintain[ing], within normal economic fluctuations, the approximate market share which it now has obtained for Dresser products."

On the probable merits of Roland's section **[**6]** 3 claim, the judge found that while Dresser's contract with Roland contained no exclusive-dealing requirement, Roland "has adequately shown that an implied exclusive dealing arrangement existed between itself and Dresser. The Defendant's own evidence showed that it considered a distributor which carried a competing line as inimical to its own interest. In the mind of Dresser, a distributor must either live or die with the manufacturer's product." Having thus found an agreement (which is a prerequisite to liability under section 3 of the Clayton Act, see, e.g., *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc., 637 F.2d 1376, 1389 (9th Cir. 1981)*, and cases cited there), the judge considered whether Roland had raised a "substantial question" as to whether the agreement was likely to lessen competition substantially. Dresser manufactures 16 or 17 percent of the construction equipment sold in central Illinois (defined as Illinois south of Chicago and north of the latitude of St. Louis), and Komatsu only 1 percent. Roland accounts for all these sales. The judge found that Komatsu (which has no exclusive dealerships anywhere in the midwest) could not have gotten **[**7]** into this market except by persuading a dealer for another manufacturer, such as Roland, to carry Komatsu equipment as a second line.

The first bone of contention between the parties is the proper standard for granting a preliminary injunction and for appellate review of such a grant. Each party is able to cite numerous decisions in support of its view of the proper standard, simply because the relevant case law is in disarray in both this and other circuits. Many of our cases say that to get a preliminary injunction a plaintiff must show each of four things: that he has no adequate remedy at law or will suffer irreparable harm if the injunction is denied; that this harm will be greater than the harm the defendant will suffer if the injunction is granted; that the plaintiff has a reasonable likelihood of success on the merits; and that the injunction **[*383]** will not harm the public interest. See, e.g., *Technical Publishing Co. v. Lebhar-Friedman, Inc., 729 F.2d 1136, 1138-39 (7th Cir. 1984)*; *Alexander v. Chicago Park District, 709 F.2d 463, 467 (7th Cir. 1983)*; *O'Connor v. Board of Education, 645 F.2d 578, 580 (7th Cir. 1981)*. **[**8]** Although described in the cases as a four-factor test, the test actually involves five factors, unless "no adequate remedy at law" and "irreparable injury" mean the same thing. In ordinary equity parlance they do not. See 11 Wright & Miller, Federal Practice and Procedure § 2944, at p. 401 (1973). But *Fox Valley Harvestore, Inc. v. A.O. Smith Harvestore Products, Inc., 545 F.2d 1096, 1097 n. 1 (7th Cir. 1976)*, suggests that they may mean the same thing in the preliminary-injunction setting. Further adding to the uncertainty is the fact that we usually say no adequate remedy at law *or* irreparable harm (as in *Technical Publishing, Alexander*, and *O'Connor*), but sometimes no adequate remedy at law *and* irreparable harm, as in *Fox Valley, supra, 545 F.2d at 1097*. And our recent decision in *American Can Co. v.*

Mansukhani, 742 F.2d 314, 325 (7th Cir. 1984), states that the plaintiff must establish "the threat of irreparable harm for which there is no adequate remedy at law."

Maybe there is a sixth factor. Some cases, by stating that the purpose of a preliminary injunction is to preserve the status quo, see, e.g. **[**9]** , EEOC v. City of Janesville, 630 F.2d 1254, 1259 (7th Cir. 1980), imply that this is another thing the plaintiff must prove; and it is true that if the plaintiff asks for more than a return to the status quo he is apt to be turned down on that ground. See, e.g., SCM Corp. v. Xerox Corp., 507 F.2d 358, 361 (2d Cir. 1974). But "status quo" is ambiguous. The preliminary injunction in this case maintained the status quo in one sense: it continued Roland as a Dresser dealer. But it changed the status quo in another: it made the dealership agreement no longer terminable by either party on 90 days' notice.

Some of our cases imply that although each of the four factors must be considered, the plaintiff need not prevail on all four. See, e.g., Reinders Bros. v. Rain Bird Eastern Sales Corp., 627 F.2d 44, 49 (7th Cir. 1980); Fox Valley, supra, 545 F.2d at 1098. But other cases say that "a preliminary injunction is an extraordinary remedy which is not available unless plaintiffs carry their burden of persuasion as to all of the [four] prerequisites." Shaffer v. Globe Protection, Inc., 721 F.2d 1121, 1123 (7th Cir. 1983). **[**10]** To the same effect see, e.g., Technical Publishing Co., supra, 729 F.2d at 1139; Singer Co. v. P.R. Mallory & Co., 671 F.2d 232, 234 (7th Cir. 1982) ("All of these conditions must be satisfied before the drastic remedy of an injunction will be ordered."); but cf. *Illinois* Bell Tel. Co. v. Illinois Commerce Comm'n, 740 F.2d 566, 571 (7th Cir. 1984) ("where the plaintiff seeks an injunction [preliminary or permanent] to prevent the violation of a federal statute that specifically provides for injunctive relief, it need not show irreparable harm"). Still other cases do not mention the four factors, see, e.g., Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982), or propose a different standard, see Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119, 123 (7th Cir. 1982).

With respect to the individual factors, some cases imply that the first (first two, if no adequate remedy at law and irreparable harm are meant to be separate factors) is presumptively satisfied in any dealer-termination case, presumably because the dealer's loss of profits would **[**11]** be difficult to quantify. See Menominee Rubber Co. v. Gould, Inc., 657 F.2d 164, 167 (7th Cir. 1981); Reinders Bros. v. Rain Bird Eastern Sales Corp., supra, 627 F.2d at 53. But these are alternative holdings, and the strongest statement of this position, in Milsen Co. v. Southland Corp., 454 F.2d 363, 366 (7th Cir. 1971), appears to be a dictum. *Fox Valley* can be read to require that the plaintiff go much further and show that the termination has "crippled if not destroyed [its] ability to carry on [its] antitrust case." 545 F.2d at 1098. See generally Note, *The Irreparable Harm Requirement **[*384]** for Preliminary Injunction Relief in Antitrust Distributor Termination Cases*, 61 B.U.L. Rev. 507, 516-21 (1981).

It is in the dealer-termination cases, too, that we find an alternative formulation to "reasonable likelihood of success," another of the traditional four (or five, or six) factors. *Fox Valley* alternates "reasonable likelihood of success" with "some likelihood of success," 545 F.2d at 1098, while *Milsen* just says "success on the merits," 454 F.2d at 366, **[**12]** leaving unclear just how fair a prospect of success is necessary. The Supreme Court has said, "likely to prevail on the merits." Doran v. Salem Inn, Inc., 422 U.S. 922, 931, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1975). "Some likelihood of success" seems to be an abbreviated version of the formula in Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 740 (2d Cir. 1953) (Frank, J.), that the plaintiff's contentions on the merits must be "so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." We adopted this formula in Mytinger & Casselberry, Inc. v. Numanna Laboratories Corp., 215 F.2d 382, 385 (7th Cir. 1954), but later references are more gingerly. See Milsen Co. v. Southland Corp., supra, 454 F.2d at 366 n.3; Mullis v. Arco Petroleum Corp., 502 F.2d 290, 293 (7th Cir. 1974); Fox Valley, supra, 545 F.2d at 1097-98; W.A. Mack, Inc. v. General Motors Corp., 260 F.2d 886, 890 (7th Cir. 1958); see also Benson Hotel Corp. v. Woods, 168 F.2d 694, 697 (8th Cir. 1948). **[**13]** Most of our cases continue to speak of "reasonable likelihood," but as the appearance of both "reasonable" and "some" likelihood in *Fox Valley* suggests, it is unclear how much practical difference there is between these formulations.

With respect to the scope of appellate review, the picture is especially blurred, as pointed out by Judge Friendly in a dictum in Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d 48, 59 (2d Cir. 1979), that Judge Eschbach of our court has called cogent. Shango v. Jurich, 681 F.2d 1091, 1097 (7th Cir. 1982). Most cases in this and other circuits denote the standard of review either as abuse of discretion, see, e.g., *SEC v. Suter, 732 F.2d 1294, 1301 (7th Cir. 1984)*, or as "clear" abuse of discretion. See quotation in next paragraph from *Alexander; United States Steel Corp. v. Fraternal Ass'n of Steelhaulers, 431 F.2d 1046, 1048 (3d Cir. 1970)*. The older cases, such as *Mytinger & Casselberry, supra, 215 F.2d at 384-85*, are especially emphatic about the limited scope of appellate review. Although the Supreme Court routinely employs the abuse **[**14]** of discretion formulation, see *Doran v. Salem Inn, Inc., supra, 422 U.S. at 932*; *Brown v. Chote, 411 U.S. 452, 457, 36 L. Ed. 2d 420, 93 S. Ct. 1732 (1973)*, and cases cited, it is not clear whether the standard of review was actually at issue in any of the Court's cases; the abuse of discretion standard seems to have been assumed rather than examined. One of our cases implies that there is broader appellate review of an order granting than of an order denying a preliminary injunction, *Milsen Co. v. Southland Corp., supra, 454 F.2d at 369* -- but how much broader is unclear. Several of our cases do not specify a standard of review, but imply that it is the same standard as is used to review district court judgments involving the application of a substantive rule to the facts found by the district judge. *Mullis, Valley Liquors*, and *Omega Satellite Products* are all such cases.

One case says that an order denying a preliminary injunction will not be reversed "unless there is demonstrated to be a clear abuse of the trial court's discretion or clear error in the trial court's findings." *Alexander v. Chicago Park District, supra, 709 F.2d at 467*. **[**15]** A variant of this test, found in several cases, is that a grant or denial of a preliminary injunction will not be reversed unless there has been a clear abuse of discretion, "a certain mistake of law," or clearly erroneous factfindings. E.g., *Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607, 613 (7th Cir. 1982)*. Now it might seem that if the trial judge's findings are not clearly erroneous and he has made no legal **[*385]** errors, there would be no basis for reversal and hence no place for the abuse of discretion standard -- unless the judge was not applying a standard; but we have seen that preliminary injunctions are supposed to be granted or denied in accordance with a standard, and not as a matter of judicial grace. Determinations that involve applying a legal standard to a state of facts are commonly treated as factfindings for purposes of the clearly-erroneous standard, see 9 Wright & Miller, Federal Practice and Procedure §§ 2589-2590 (1971), but in any event are not considered discretionary determinations. The reference to "certain" mistake of law adds little, for any purely legal determination made by the trial judge in **[**16]** granting or denying a preliminary injunction is subject to plenary appellate review, see, e.g., *Pratte v. NLRB, 683 F.2d 1038, 1044 (7th Cir. 1982)*; *Delaware & Hudson Ry. v. United Transport. Union, 146 App. D.C. 142, 450 F.2d 603, 620 (D.C. Cir. 1971)*, just as any purely legal determination underlying a final judgment is. Maybe, however, the formulation in *Atari* is intended to distinguish between ordinary factfindings (including findings resulting from the application of a substantive standard, such as that of negligence, to the who-did-what-to-whom facts), as to which the clearly-erroneous standard clearly applies, and the balancing of harms that is required in a preliminary-injunction decision. The striking of the balance often requires a comparison of imponderables that invites an exercise of judgment by the district judge to which the court of appeals will defer even more broadly than where the judge has applied a substantive standard such as negligence -- provided the judge has not committed a clear error of fact, or an error of law.

Several other decisions in this circuit, however, suggest that the term abuse of discretion when used **[**17]** in the context of appellate review of orders granting of denying preliminary injunctions means just that there are no errors of law and no clearly erroneous findings of fact. Support for this position in this circuit is found in *Hillhaven Corp. v. Wisconsin Dep't of Health & Social Services, 733 F.2d 1224, 1226 (7th Cir. 1984)* (per curiam) ("we can only reverse the district court's action [granting a preliminary injunction] if it is clearly erroneous or represents a mistake of law. The totality of the factors must point to a clear departure from the proper exercise of the district judge's discretion."); *Machlett Laboratories, Inc. v. Techny Industries, Inc., 665 F.2d 795, 798 (7th Cir. 1981)* ("The latter injury . . . is plainly outweighed by the certain injury to Techny of going out of business, and therefore it must be deemed an abuse of discretion to find the opposite."), and *Charles v. Carey, 627 F.2d 772, 776 (7th Cir. 1980)* ("misapplication of the law to particular facts is an abuse of discretion"). Other circuits have suggested that "abuse of discretion" means error, period: "What we mean, when we say that a court abused **[**18]** its discretion, is merely that we think that it made a mistake." *Pearson v. Dennison, 353 F.2d 24, 28 n. 6 (9th Cir. 1965)*; see also *In re Josephson, 218 F.2d 174, 182 (1st Cir. 1954)* (Magruder, J.). Although neither of these was an injunction case, *Clemons v. Board of Education, 228 F.2d 853, 857 (6th Cir. 1956)*, was, and it says that "misapplication of the law to the facts is in itself an abuse of discretion" requiring reversal. See also *Omega Importing Corp. v. Petri-Kine*

Camera Co., 451 F.2d 1190, 1197 (2d Cir. 1971) (Friendly, J.). Finally, many opinions that say "abuse of discretion" appear to review the district court's order as searchingly as they would any nondiscretionary determination. See, e.g., Godinez v. Lane, 733 F.2d 1250, 1262 (7th Cir. 1984); United Church of the Medical Center v. Medical Center Comm'n, 689 F.2d 693, 698-701 (7th Cir. 1982); Dos Santos v. Columbus-Cuneo-Cabrini Medical Center, 684 F.2d 1346, 1349-52 (7th Cir. 1982).

Our discussion of the standard for ruling on requests for preliminary injunctions, and of the standard for **[**19]** appellate review of such rulings, should have made clear that it is not possible to reconcile all the precedents, or even just all the ones in this circuit. But the apparent discord is mostly verbal. Beneath the welter of apparently **[*386]** conflicting precedents we sense agreement on the following principles:

1. ***HN2***[] In every case in which the plaintiff wants a preliminary injunction he must show that he has "no adequate remedy at law," and (unless the statute under which he is suing excuses a showing of irreparable harm, as in *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n, supra, 740 F.2d at 571*) that he will suffer "irreparable harm" if the preliminary injunction is not granted. The absence of an adequate remedy at law is a precondition to any form of equitable relief. The requirement of irreparable harm is needed to take care of the case where although the ultimate relief that the plaintiff is seeking is equitable, implying that he has no adequate remedy at law, he can easily wait till the end of trial to get that relief. (On the distinction between "no adequate **[**20]** remedy at law" and "irreparable harm" see Fiss & Rendleman, Injunctions 59 (2d ed. 1984).) Only if he will suffer irreparable harm in the interim -- that is, harm that cannot be prevented or fully rectified by the final judgment after trial -- can he get a preliminary injunction. ***HN3***[] Where the only remedy sought at trial is damages, the two requirements -- irreparable harm, and no adequate remedy at law -- merge. The question is then whether the plaintiff will be made whole if he prevails on the merits and is awarded damages.

2. In saying that the plaintiff must show that an award of damages at the end of trial will be inadequate, we do not mean wholly ineffectual; we mean seriously deficient as a remedy for the harm suffered. See Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970) (Friendly, J.); 11 Wright & Miller, *supra*, § 2944, at p. 396. A damages remedy can be inadequate for any of four reasons:

(a) The damage award may come too late to save the plaintiff's business. He may go broke while waiting, or may have to shut down his business **[**21]** but without declaring bankruptcy. Of course, even if the plaintiff declares bankruptcy, his trustee in bankruptcy can get a damage award; but probably it will not cover all the losses incident to the bankruptcy. The award may be inadequate even if the plaintiff leaves the business without becoming insolvent. As Judge Friendly noted in a case involving the termination of an automobile dealer, "the right to continue a business in which William Semmes had engaged for twenty years and into which his son had recently entered is not measurable entirely in monetary terms; the Semmes want to sell automobiles, not to live on the income from a damages award." Semmes Motors, Inc. v. Ford Motor Co., supra, 429 F.2d at 1205.

(b) The plaintiff may not be able to finance his lawsuit against the defendant without the revenues from his business that the defendant is threatening to destroy. But in an age of contingent-fee contracts this will rarely be a decisive consideration.

(c) Damages may be unobtainable from the defendant because he may become insolvent before a final judgment can be entered and collected. See discussion in Signode Corp. v. Weld-Loc Systems, Inc., 700 F.2d 1108, 1111 (7th Cir. 1983). **[**22]**

(d) The nature of the plaintiff's loss may make damages very difficult to calculate. Consider a loss, but not a crippling loss (that would be case (a)), of business profits. In principle, any profits lost by Roland as a result of being terminated for breach of an implied exclusive-dealing contract can be monetized, and awarded as damages; but in practice it may be very difficult to distinguish the effect of the termination from the effect of other things happening at the same time, and to project that effect into the distant future. On the difficulties encountered in trying to calculate damages for lost profits, see, e.g., Taylor v. Meirick, 712 F.2d 1112, 1119-22 (7th Cir. 1983); Hayes v. Solomon, 597 F.2d 958, 976-77 (5th Cir. 1979); Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 Harv. L. Rev. 1566, 1577-86 (1967).

[*387] 3. ***HN4***[] In deciding whether to grant a preliminary injunction, the court must also consider any irreparable harm that the defendant might suffer **[**23]** from the injunction -- harm that would not be either cured by the defendant's ultimately prevailing in the trial on the merits or fully compensated by the injunction bond that *Rule 65(c) of the Federal Rules of Civil Procedure*s requires the district court to make the plaintiff post. The cases do not usually speak of the defendant's *irreparable* harm, but the qualification is implicit; if the defendant will not be irreversibly injured by the injunction because a final judgment in his favor would make him whole, the injunction will not really harm him. But since the defendant may suffer irreparable harm from the entry of a preliminary injunction, the court must not only determine that the plaintiff will suffer irreparable harm if the preliminary injunction is denied -- a threshold requirement for granting a preliminary injunction -- but also weigh that harm against any irreparable harm that the defendant can show he will suffer if the injunction is granted.

4. Besides showing that he has no adequate remedy at law and that he will suffer irreparable harm unless the preliminary injunction is granted, the plaintiff has another threshold to cross: that of showing some likelihood **[**24]** of succeeding on the merits. It is not enough that the failure to get the injunction will be a disaster for him whereas the injunction would be only a minor inconvenience to the defendant. Equity jurisdiction exists only to remedy legal wrongs; without some showing of a probable right there is no basis for invoking it. But although unwilling therefore to go as far as the Ninth Circuit in *Costandi v. AAMCO Automatic Transmissions, Inc., 456 F.2d 941, 943 (9th Cir. 1972)* (per curiam), which upheld the grant of a preliminary injunction without any consideration at all of the probable outcome of the trial, we agree that the threshold is low. It is enough that "the plaintiff's chances are better than negligible. . . ." *Omega Satellite Products Co. v. City of Indianapolis, supra, 694 F.2d at 123*. See also *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 182 App. D.C. 220, 559 F.2d 841, 842 n.1, 842-44 (D.C. Cir. 1977)* ("substantial case on the merits" good enough for a stay pending appeal (analogous to a preliminary injunction), even though "ultimate success by the movant is [not] a mathematical probability," and **[**25]** the court's "own approach may be contrary to movant's view of the merits"); *West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232, 235 (4th Cir. 1971)* ("probable right," used interchangeably with "substantial issues"). And see the excellent discussion in Comment, *Probability of Ultimate Success Held Unnecessary for Grant of Interlocutory Injunction*, 71 Colum. L. Rev. 165 (1971).

5. If the plaintiff does show some likelihood of success, the court must then determine how likely that success is, because this affects the balance of relative harms (point 3 above). The more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor; the less likely he is to win, the more need it weigh in his favor. This is a most important principle, and one well supported by cases in this and other circuits, and by scholarly commentary. See *Hyatt Corp. v. Hyatt Legal Services, 736 F.2d 1153, 1159 (7th Cir. 1984)*; *Omega Satellite Products Co. v. City of Indianapolis, supra, 694 F.2d at 123*; *American Hospital Ass'n v. Harris, 625 F.2d 1328, 1331 (7th Cir. 1980)* **[**26]** ("The required showing of probability of success on the merits 'varies with the quality and quantum of harm that [the moving party] will suffer from the denial of an injunction,'" quoting *District 50, United Mine Workers of America v. International Union, United Mine Workers of America, 134 App. D.C. 34, 412 F.2d 165, 168 (D.C. Cir. 1969))*; *Dan River, Inc. v. Icahn, 701 F.2d 278, 283 (4th Cir. 1983)*, and cases cited there; *Roth v. Bank of the Commonwealth, 583 F.2d 527, 538 (6th Cir. 1978)*; *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., supra, 559 F.2d at 843-44*; *Canal Authority v. Callaway, 489 F.2d 567, 576-77 (5th Cir. 1974)*; *Virginia Petroleum* ***[*388]*** *Jobbers Ass'n v. FPC, 104 App. D.C. 106, 259 F.2d 921, 925 (D.C. Cir. 1958)* (per curiam) (stay pending appeal) ("injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits"); 11 Wright Miller, *supra*, § 2948, at pp. 453-55; Developments in the Law, *Injunctions*, 78 Harv. L. Rev. 994, 1056 (1965) **[**27]** ("Clear evidence of irreparable injury should result in a less stringent requirement of certainty of victory; greater certainty of victory should result in a less stringent requirement of proof of irreparable injury") (footnote omitted).

A variant of this "sliding scale" approach is illustrated by *Charlie's Girls, Inc. v. Revlon, Inc., 483 F.2d 953, 954 (2d Cir. 1973)* (per curiam): "One moving for a preliminary injunction assumes the burden of demonstrating either a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor." See also *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86, 88 (9th Cir. 1975)*. This approach and the "sliding scale" approach are treated as identical in *American Hospital Ass'n v. Harris, supra, 625 F.2d at 1331*.

The idea underlying these equivalent approaches is that the task for the district judge in deciding whether to grant or deny a motion for preliminary injunction is to minimize errors: the error of denying an injunction to one who will in fact (though no one can **[**28]** know this for sure) go on to win the case on the merits, and the error of granting an injunction to one who will go on to lose. The judge must try to avoid the error that is more costly in the circumstances. That cost is a function of the gravity of the error if it occurs and the probability that it will occur. The error of denying an injunction to someone whose legal rights have in fact been infringed is thus more costly the greater the magnitude of the harm that the plaintiff will incur from the denial and the greater the probability that his legal rights really have been infringed. And similarly the error of granting an injunction to someone whose legal rights will turn out not to have been infringed is more costly the greater the magnitude of the harm to the defendant from the injunction and the smaller the likelihood that the plaintiff's rights really have been infringed.

6. Sometimes an order granting or denying a preliminary injunction will have consequences beyond the immediate parties. If so, those interests -- the "public interest" if you will -- must be reckoned into the weighing process just described. See *Yakus v. United States, 321 U.S. 414, 440-41, 88 L. Ed. 834, 64 S. Ct. 660 (1944)*; **[**29]** *Delaware River Port Authority v. Transamerican Trailer Transport, Inc., 501 F.2d 917, 924 (3d Cir. 1974)*.

7. ***HN5***[] The application of the above principles requires the seasoned judgment of the district court -- what is usually called the court's "discretion," although the use of the term in the present context has been criticized. "Perhaps the most important area where parroting the discretion phrase is likely to lead to wrong decision is the review of the grant of denial of preliminary injunctions." Friendly, *Indiscretion About Discretion*, *31 Emory L.J. 747, 773 (1982)*. As so often in law the trouble comes from using the same word in different senses. When we speak of an issue as being committed to the district court's discretion, intending to imply by this that the scope of appellate review should be extremely limited, we generally have reference to one of three different (but closely related, and sometimes identical) types of issue: one not decided according to a standard; one not susceptible of uniform treatment across cases; one not decided on the basis **[**30]** of evidence reasonably accessible to the appellate court through the record of the proceedings in the trial court. See *Mosey Mfg. Co. v. NLRB, 701 F.2d 610, 615 (7th Cir. 1983)* (en banc); *United States v. McCoy, 517 F.2d 41, 44 (7th Cir. 1975)*; *United States v. Criden, 648 F.2d 814, 817-18 (3d Cir. 1981)*; *Noonan v. Cunard S.S. Co., 375 F.2d 69, 71 (2d Cir. 1967)* **[*389]** (Friendly, J.). Criminal sentences, rulings on most discovery questions, and rulings on evidentiary questions where the issue is prejudicial impact on the jury illustrate the three types of discretionary judgment. Their common characteristic is that either the need for or the feasibility of appellate review is very limited. The trial judge is supposed to tailor a criminal sentence to the particular characteristics of the defendant (including his demeanor) and may weight the various characteristics as he pleases; a proper assessment of jury prejudice requires first-hand observation of the jurors; discovery issues frequently call for managerial rather than juristic judgments. All are determinations where appellate review is limited to **[**31]** deciding whether the district judge abused his discretion -- or even, as in the review of a criminal sentence, whether he exercised discretion; if he did, and the sentence is within statutory limits, the court of appeals cannot reverse. See *United States v. Ely, 719 F.2d 902, 906-07 (7th Cir. 1983)*, and cases cited there.

Rulings on requests for preliminary injunctions, it may be argued, do not have the relevant characteristics of these examples. As in this case, usually they are made on a trial-type record. Many preliminary-injunction hearings take as long as the average federal trial, which lasts only three days. (Estimated from Tables C8 and C9 in the 1983 Annual Report of the Director of the Administrative Office of the U.S. Courts.) The hearing here lasted two and a half days. Moreover, the analytical procedure for deciding whether to grant or deny a motion for preliminary injunction, sketched earlier, constitutes a true legal standard. It does not call for a discretionary -- in the sense of standardless or intuitive -- judgment, or for a consideration of numerous factors none enjoying any particular weight, or for an evaluation of factors inaccessible **[**32]** to a reviewing court (there may of course be credibility issues, but this is no more likely than in the mine run of federal civil cases). The factors to be considered are few and definite; they are as we have said spread out on a record; and they are to be compared in a particular sequence and in accordance with a specific formula which requires first deciding whether the plaintiff has crossed specified thresholds and then weighting the parties' likely harms from the grant and denial of the preliminary injunction, respectively, by the strength of the plaintiff's case.

Although there is a sense in which equitable relief is inherently discretionary because historically, and still to a large extent, there is no absolute right to an equitable remedy, see *Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-13, 72 L. Ed. 2d 91, 102 S. Ct. 1798 (1982)*; *Yakus v. United States, supra, 321 U.S. at 440*; *Meredith v. City of Winter Haven, 320 U.S. 228, 235, 88 L. Ed. 9, 64 S. Ct. 7 (1943)*; *Wisconsin v. Weinberger, 745 F.2d 412, 425 (7th Cir. 1984)*, this is a different meaning of discretion, one that actually cuts against a highly **[**33]** deferential standard of review when as in this case the district court *grants* the preliminary injunction. "The granting of a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it." *Warner Bros. Pictures, Inc. v. Gittone, 110 F.2d 292, 293 (3d Cir. 1940)* (per curiam), quoted in *Buffalo Courier-Express v. Buffalo Evening News, supra, 601 F.2d at 59*; see also 11 Wright & Miller, *supra*, § 2942, at p. 368, and cases cited there; and the *Milsen, Shaffer*, and *Singer* cases cited earlier in this opinion. The exercise of a power so far-reaching ought to be subject to effective, and not merely perfunctory, appellate review. "Congress would scarcely have made orders granting or refusing temporary injunctions an exception to the general requirement of finality . . . if it intended appellate courts to be mere rubber-stamps save for the rare cases when a district judge has misunderstood the law or transcended the bounds of reason." *Omega Importing Corp. v. Petri-Kine Camera Co., supra, 451 F.2d at 1197*.

These considerations may explain why, as **[**34]** we pointed out earlier, many cases that recite "abuse of discretion" as the standard of review actually review the district **[*390]** judge's order granting or denying a preliminary injunction as if the standard were clear error (both for pure factfindings and for the district judge's application to those findings of the principles for granting or denying preliminary injunctions) or mere error (for pure legal determinations). In these cases, the words "abuse of discretion" are not being used literally, to refer only to cases where the ruling being reviewed is a discretionary one. It seems, therefore, that the words describe a range of standards (see, e.g., *United States v. Criden, supra, 648 F.2d at 817*), in which the amount of deference given the trial judge's rulings varies with the nature of the ruling -- a range that overlaps clear error, and even error, period. See Friendly, *supra*, at 764, 784; Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L. Rev. 635, 650-53 (1971); the cases cited in these two articles; and the *Pearson, Clemons*, and *Omega Importing* cases cited earlier in this opinion. The **[**35]** other end of the range is described in *Delno v. Market St. Ry., 124 F.2d 965, 967 (9th Cir. 1942)*: "Discretion . . . is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court." See also *Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 563 (7th Cir. 1984)*; *Harrington v. DeVito, 656 F.2d 264, 269 (7th Cir. 1981)*. This may be the appropriate formula when reviewing a determination as to whether a discovery order should have been granted, or whether an objection to a question asked a witness should have been sustained as unduly prejudicing a party in the eyes of the jury. But it does not follow that it is the appropriate formula for reviewing orders granting or denying preliminary injunctions.

Where in this range should appellate review of a decision granting (or denying) a preliminary injunction be located? We have mentioned the factors pushing review toward the upper end of the range, where abuse of discretion merges with clear error (or even mere) error. Other factors push in **[**36]** the other direction. Judge Friendly himself, in his *Omega Importing* opinion from which we quoted earlier, stated that the court of appeals in reviewing such a decision not only must accept the district court's credibility findings, and give due regard to its (other) factfindings, but also must "give proper regard to . . . its 'feel' of the case." *451 F.2d at 1197*. The processing of an application for a preliminary injunction often requires the district judge to negotiate informally but intensively with the parties over such matters as the scheduling of discovery and the scope and time of the hearing, and these negotiations may give the judge a sense for the proper disposition of the application for a preliminary injunction that the appellate court will not be able to obtain from the appeal papers. And we have already noted the presence of imponderable factors when the judge is balancing the harms to the parties from granting or denying the preliminary injunction. Although, considering the nature of the judge's determination and the stakes to the parties, we do not think the term abuse of discretion can be limited to cases where the judge can be said to have acted **[**37]** irrationally or fancifully (*Delno*), we also do not think, considering the imponderable character of the balancing process and the judge's superior feel for the issues which a cold transcript may not fully communicate to the reviewing court, that we are entitled to substitute our judgment for the district judge's. See, e.g., *Wesley-Jessen Division v. Bausch & Lomb Inc., 698 F.2d 862, 864 (7th Cir. 1983)*. ***HN6***[] The question for us is whether the judge exceeded the bounds of permissible choice in the circumstances, not what we would have done if we had been in his shoes.

We need not be any more precise than this about the meaning of "abuse of discretion" in the context of appellate review of orders granting or denying preliminary injunctions in order to decide this case. (Nor need we decide whether the denial of a preliminary injunction should be reviewed more deferentially than a grant, on the theory that all equitable relief is in some -- **[*391]** but perhaps largely historical -- sense discretionary with the trial judge; nor whether the standard of review should be different **[**38]** when the district judge grants or denies a preliminary injunction without having held an evidentiary hearing.) For as we are about to see, the district judge committed a clear factual error and a legal error that require us to set aside his conclusion on the balance of harms, and another legal error with respect to the probable success of Roland on the merits of its antitrust claim.

Applying to the present case the general approach to the analysis of preliminary-injunction cases that we have outlined, we begin by noting that Roland has satisfied the threshold requirements of proving that it has no adequate remedy at law and that it will suffer irreparable harm if preliminary injunctive relief is denied it. Of course it can if it wins at trial get a damage award that will, in principle, compensate it for any interim losses. But the nature of the losses that it fears is such as to make the calculation of these damages a difficult and not very satisfactory process -- better than nothing, but not so sure a method of rectifying the wrong to Roland (if there was a wrong) that we can be confident that none of the harm to it in the interim will be irreparable harm. But we think the district **[**39]** judge clearly erred in finding that without the preliminary injunction Roland probably would go out of business. So far as we can tell, although half of Roland's revenues are derived directly or indirectly from the sale of Dresser construction equipment only 10 percent come from sales of new equipment, which would be cut off if the dealership were cancelled. Roland's revenues from renting Dresser equipment should not be affected by the cancellation of the franchise, at least until its present stock wears out, and that should not be till after the trial is over. Roland's parts business (and therefore its maintenance business as well) will, however, be affected, by the difference between the cost of parts when bought directly from the manufacturer (as Roland now does) and the cost of parts bought from another dealer. The record indicates that the second cost is 20 percent higher than the first. Although Roland sells parts to its customers at an average mark-up of 27 or 28 percent over the cost of buying parts from Dresser, the difference between that mark-up and the 20 percent mark-up that it will have to pay to get the same parts from a dealer might well be too little to cover Roland's **[**40]** selling expenses. But Roland is selling service as well as parts, and its labor costs will not be affected by its not being able to buy parts directly from Dresser.

The greatest weakness in Roland's proof of business losses is that Roland projected its sales of Komatsu equipment to continue at the same, naturally very low, level at which it sold that equipment in the first year of its Komatsu dealership. This is unrealistic. Surely Roland expects to do better in its second and subsequent years. In sum, the loss of the Dresser distributorship will be painful, but it will not be fatal. And bear in mind that we are concerned only with the period between now and the entry of a final judgment; it is only these interim losses that are relevant in deciding whether Roland is entitled to a preliminary injunction.

Turning to the harm to Dresser from the grant of the preliminary injunction, we think the district judge was too confident of his ability to ward off that harm by requiring as a condition of the injunction that Roland maintain Dresser's market share. The judge was right that Dresser faces the prospect of a substantial loss of goodwill if, while this litigation is wending its **[**41]** way to completion, Roland curries favor with Komatsu (with whom Roland's long-range future as a dealer in construction equipment probably lies) by selling Komatsu equipment in preference to Dresser equipment. This is the danger that called forth the restriction that the judge imposed. But a federal judge, however able and experienced, is in no position to supervise a dealership in construction equipment, as the judge undertook to do by requiring that Roland maintain, within "normal economic **[*392]** fluctuations," Dresser's "approximate" market share in central Illinois. The decree may protect Dresser to some extent -- but in doing so it will harm competition between Dresser and Komatsu. And it cannot protect Dresser fully. Dresser "will be frozen into an intimate and continuous relationship with a dealer it no longer wishes to be associated with. . . . One of the reasons the contract was of so short duration and subject to such short cancellation notice may be assumed to be that one of the undoubted rights a manufacturer still has is to use its own judgment with respect to those whom it wishes to appoint as its dealers. To bear this burden for an indefinite number of years **[**42]** is a great hardship." *Jack Kahn Music Co. v. Baldwin Piano & Organ Co., 604 F.2d 755, 764 (2d Cir. 1979)*.

HN7[] Ordinarily the trial judge's balancing of the harms to the parties would be entitled to substantial deference by the reviewing court, in accordance with our earlier discussion of the scope of appellate review -- but not if the balancing is infected by a clear error of fact, or an error of law. The judge in this case made a clearly erroneous finding of fact when he found that Roland probably would go out of business if the injunction was not issued; and he committed an error of law when he failed to consider the possible impact on competition of the provision of the injunction that freezes Dresser's market share until the end of the lawsuit.

Once we set aside the erroneous aspects of the district judge's analysis of the balance of harms, rejecting his finding that Roland probably would go out of business, and his attempt to freeze Dresser's share of Roland's business, we are left with no certain sense of where the balance of harms lies. We cannot say that without the **[**43]** restriction we have disapproved, Dresser will be harmed more if the preliminary injunction is kept in force until the case is tried (no trial date has been set) and judgment entered than Roland will be harmed if the injunction is dissolved. But as there is no clear balance of hardships in favor of the injunction, Roland cannot prevail merely by showing that it has raised a substantial question regarding the legality of Dresser's action in terminating it. It must show that it is more likely than not to win. For only then would the error of denying Roland a preliminary injunction should it later win on the merits be more costly than the error of granting it the injunction should it later lose on the merits.

HN8[] In order to prevail on its section 3 claim, Roland will have to show both that there was an agreement, though not necessarily an explicit agreement (see *Tire Sales Corp. v. Cities Service Oil Co., 637 F.2d 467, 474 (7th Cir. 1980)*; *McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332, 338 (4th Cir. 1959))*, between it and Dresser that it not carry **[**44]** a line of construction equipment competitive with Dresser's, and that the agreement was likely to have a substantial though not necessarily an immediate anticompetitive effect. Regarding the first of these required showings, the record of the preliminary-injunction proceeding contains no evidence that either Roland or any other Dresser dealer agreed with Dresser not to carry a competing manufacturer's line. Nothing in the dealership agreement even hints at a requirement of exclusive dealing, and the fact that after signing the agreement with Dresser Roland applied for a Komatsu dealership is evidence that Roland itself did not think it had made an implied commitment to exclusive dealing. True, Dresser prefers exclusive dealers -- so much so as to be willing to terminate its only dealer in a large marketing area. The district judge believed that evidence of this preference, coupled with the absence of any reason for Dresser's having terminated Roland other than Roland's having taken on an additional line of construction equipment, established a prima facie case of agreement. But an agreement requires a meeting of minds, and there is no evidence that Roland ever thought itself bound **[**45]** to carry only the Dresser line. Indeed, at argument Roland disclaimed any knowledge of what it describes as the implied exclusive-dealing term in the contract; it called it a "secret" term, echoing the district **[*393]** judge's description of exclusive dealing as something "in the mind of" Dresser. One mind is not enough for a meeting of minds. The fact that Dresser was hostile to dealers who would not live and die by its product (as the district judge put it), and acted on its hostility by canceling a dealer who did the thing to which it was hostile, does not establish an agreement, but if anything the opposite: a failure to agree on a point critical to one of the parties. See Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 686 (1962); *Filco v. Amana Refrigeration, Inc., 709 F.2d 1257, 1266-67 (9th Cir. 1983)*.

Actually, it is not important whether Dresser's antipathy to nonexclusive dealing was secret. Assume that Dresser made clear to Roland and its other dealers that it wanted only exclusive dealers and would exercise its contract right to terminate, immediately **[**46]** and without cause, any dealer who took on a competing line. The mere announcement of such a policy, and the carrying out of it by canceling Roland or any other noncomplying dealer, would not establish an agreement. See, e.g., *Dillon Materials Handling, Inc. v. Albion Industries, 567 F.2d 1299, 1306 (5th Cir. 1978)*. It would be a classic example of the conduct permitted by *United States v. Colgate & Co., 250 U.S. 300, 305-06, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*, a decision whose continued vitality despite much criticism is attested to by the Supreme Court's approving reference to it in *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775 (1984)*. See also *Russell Stover Candies, Inc. v. FTC, 718 F.2d 256,* *260 (8th Cir. 1983)*. True, there is some evidence that Dresser, fearing the competition of Komatsu, made efforts to discover which of its dealers were considering dealing with Komatsu. Surveillance could in some circumstances intimidate -- could be the stick that forced dealers into a tacit understanding not to handle a competitor's goods. See *Yentsch v. Texaco, Inc., 630 F.2d 46, 54 (2d Cir. 1980)*. **[**47]** But there is no evidence that it was such here, when Roland within months after signing a dealership agreement with Dresser went and signed another one with Komatsu. The district judge did not rely on evidence of surveillance in concluding that there was an implicit exclusive-dealing agreement.

Dresser's preference for exclusive dealers, its effort to find out whether its dealers were exclusive dealers, and its terminating Roland when it found out that Roland no longer was its exclusive dealer do not support an inference "both that the distributor communicated its acquiescence or agreement" to exclusive dealing "and that this was sought by the manufacturer." *Monsanto Co. v. Spray-Rite Service Corp., supra, 104 S. Ct. at 1471 n. 9*. But even if Roland can prove at trial that there was an exclusive-dealing agreement, it will have grave difficulty -- we infer from this record -- in proving that the agreement is anticompetitive. The objection to exclusive-dealing agreements is that they deny outlets to a competitor during the term of the agreement. At one time it was thought that this effect alone would condemn exclusive-dealing agreements under section 3 of the Clayton **[**48]** Act, provided that the agreements covered a large fraction of the market. See *Standard Oil Co. v. United States, 337 U.S. 293, 314, 93 L. Ed. 1371, 69 S. Ct. 1051 (1949)* ("*Standard Stations*"). Although the Supreme Court has not decided an exclusive-dealing case in many years, ***HN9***[] it now appears most unlikely that such agreements, whether challenged under section 3 of the Clayton Act or *section 1* of the Sherman Act, will be judged by the simple and strict test of *Standard Stations*. They will be judged under the Rule of Reason, and thus condemned only if found to restrain trade unreasonably. See, e.g., *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 1575-76, 80 L. Ed. 2d 2 (1984)* (concurring opinion); *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 333-35, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961)*; *American Key Corp. v. Cumberland Associates , 579 F. Supp. 1245, 1256-57 (N.D. Ga. 1983)*.

[*394] **[**49]** ***HN10***[] The exclusion of one or even several competitors, for a short time or even a long time, is not *ipso facto* unreasonable. The welfare of a particular competitor who may be hurt as the result of some trade practice is the concern not of the federal antitrust laws, see *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 2740 n. 14, 81 L. Ed. 2d 628 (1984)*, but of state unfair competition law, see *Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 655 (7th Cir. 1984)*, which is not involved in this appeal. The competitor in question, Komatsu, is not even a party to this case.

HN11[] The exclusion of competitors is cause for antitrust concern only if it impairs the health of the competitive process itself. See *Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660, 663-65 (7th Cir. 1982)*. Hence ***HN12***[] a plaintiff must prove two things to show that an exclusive-dealing agreement is unreasonable. First he must prove **[**50]** that it is likely to keep at least one significant competitor of the defendant from doing business in a relevant market. If there is no exclusion of a significant competitor, the agreement cannot possibly harm competition. Second, he must prove that the probable (not certain) effect of the exclusion will be to raise prices above (and therefore reduce output below) the competitive level, or otherwise injure competition; he must show in other words that the anticompetitive effects (if any) of the exclusion outweigh any benefits to competition from it.

Roland has as yet made very little effort to establish either of these two things. On the present record it appears that Komatsu cannot be kept out of the central Illinois market even if every manufacturer of construction equipment prefers exclusive dealers and will cancel any dealer who switches to the Komatsu line. Komatsu is the second largest manufacturer of construction equipment in the world. Its total sales of such equipment are four times as great as Dresser's. Already it is a major factor in the U.S. construction-equipment market; in some items it outsells Dresser. The nationwide practice of exclusive dealing has not kept **[**51]** Komatsu from becoming a major factor in the U.S. market, apparently in a short period of time. The reason is evident. Since dealership agreements in this industry are terminable by either party on short notice, Komatsu, to obtain its own exclusive dealer in some area, has only to offer a better deal to some other manufacturer's dealer in the area. It need not fear being sued for interference with contract; Roland would not be breaking its contract with Dresser if it gave Dresser the heave-ho, provided it gave 90 days' notice. Maybe if Roland had known that it would be cut off by Dresser as soon as it was, it would have demanded some guarantees from Komatsu to tide it over the period of transition when Komatsu was not yet as well established a name in central Illinois as Dresser (though Dresser itself was in a sense new to the market); and probably Komatsu would have given Roland these guarantees to get a foothold in the central Illinois market. The likeliest consequence of our dissolving the preliminary injunction would be to accelerate Komatsu's efforts to promote its brand through the Roland dealership.

Admittedly this analysis may exaggerate the smoothness with which the **[**52]** competitive process operates. Knowing that it cannot move gradually into central Illinois by persuading dealers to carry its line as a second line, Komatsu may expand more slowly than it would otherwise have done, and at somewhat higher cost. And since the national market in construction equipment appears to be highly concentrated (although the record is scanty in this regard, particularly in its omission of any data on foreign sales, which may conceivably be part of the U.S. market, properly defined), any impediments to new competition may harm consumers by keeping prices at noncompetitive levels -- though whether the industry at present is or is not highly competitive must be a matter of conjecture on this record. But with all this conceded we still cannot agree that Roland has shown a substantial anticompetitive effect, actual or potential, from the alleged exclusive-dealing agreement, when we reflect on Komatsu's **[*395]** strength and on the fact that neither Dresser nor, it appears, any other manufacturer has long-term exclusive-dealing contracts. ***HN13***[] Exclusive-dealing contracts **[**53]** terminable in less than a year are presumptively lawful under section 3. See ABA Antitrust Section, ***Antitrust Law*** Developments 98 (2d ed. 1984); Sullivan, Handbook of the Law of Antitrust 485-86 (1977); cf. Marvel, *Exclusive Dealing*, 25 J. Law & Econ. 1, 6 (1982). This one was terminable in 90 days. Finally, Komatsu undoubtedly has the resources to establish its own dealership in central Illinois, if it cannot lure away someone else's dealer despite the lack of long-term contracts binding dealers to their existing suppliers.

HN14[] The calculus of competitive effect must also include some consideration of the possible competitive benefits of exclusive dealing in this industry. Competition is the allocation of resources in which economic welfare (consumer welfare, to oversimplify slightly) is maximized; it is not rivalry per se, or a particular form of rivalry, or some minimum number of competitors. See *Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos., supra, 682 F.2d at 663-65*. If, as Dresser argues, exclusive dealing leads dealers to promote **[**54]** each manufacturer's brand more vigorously than would be the case under nonexclusive dealing, the quality-adjusted price to the consumer (where quality includes the information and other services that dealers render to their customers) may be lower with exclusive dealing than without, even though a collateral effect of exclusive dealing is to slow the pace at which new brands, such as Komatsu, are introduced. Cf. *Beltone Electronics Corp.*, FTC Complaints and Orders para. 21,934 at p. 22,394 (FTC July 6, 1982). The evidence on this point is slim. But it is at least plausible that Dresser, having if we may judge from its operation in central Illinois only one dealer in a large territory, would want that dealer to devote his efforts entirely to selling Dresser's brand. A dealer who expresses his willingness to carry only one manufacturer's brand of a particular product indicates his commitment to pushing that brand; he doesn't have divided loyalties. See *Sulmeyer v. Coca-Cola Co., 515 F.2d 835, 840 n. 2 (5th Cir. 1975)*. If the dealer carries several brands, his stake in the success of each is reduced. Suppose, though there is contrary evidence in the record, **[**55]** that Roland intended to promote Dresser and Komatsu products with equal vigor. It is still the case that if Roland failed to promote Dresser vigorously, it would have Komatsu to fall back on -- but Dresser might suffer a drastic decline in the central Illinois market, all of its eggs being in the Roland basket. Exclusive dealing may also enable a manufacturer to prevent dealers from taking a free ride on his efforts (for example, efforts in the form of national advertising) to promote his brand. The dealer who carried competing brands as well might switch customers to a lower-priced substitute on which he got a higher margin, thus defeating the manufacturer's effort to recover the costs of his promotional expenditures by charging the dealer a higher price. See Marvel, *supra*, at 6-25.

Therefore, even if, in signing on with Komatsu, Roland did not intend to discontinue its sales of the Dresser line eventually and in the meantime to begin phasing Dresser out, Dresser still has a plausible argument that an exclusive dealer would promote its line more effectively than a nonexclusive dealer, and by doing so would increase competition in the market for construction equipment. The **[**56]** argument is no more than plausible; it is supported by very little evidence; it may be wrong. But when we consider how tenuous is the evidence that exclusive dealing in this market will exclude or even significantly retard Komatsu -- how tenuous even is the inference that there was an exclusive-dealing agreement -- even weak evidence of competitive gains from exclusive dealing must reinforce our conclusion that Roland has failed to show that it is more likely than not to prevail at the trial on the merits.

It should go without saying that although we have concluded that the district judge should not have granted Roland's motion for a preliminary injunction, our **[*396]** discussion of the probable merits of Roland's antitrust claim is tentative. We do not exclude the possibility that on the fuller record made in the trial on the merits Roland will succeed in establishing its claim.

REVERSED.

Dissent by: SWYGERT

Dissent

SWYGERT, Senior Circuit Judge, dissenting.

I commend the majority's effort to delineate a coherent standard for the grant of preliminary injunctions. And I support the test set forth by the court, except I firmly believe that principles of equity jurisprudence **[**57]** require the maintenance of the "abuse of discretion" standard of review which has heretofore been recognized in this and other circuits, but which the majority does not fully adopt or support. Moreover, I find the district court's decision granting Roland a preliminary injunction sustainable even under the majority's interpretation of that standard.

I

Although the majority nominally retains the abuse of discretion standard, it substitutes the common understanding that has been given that term in the grant or denial of preliminary injunctions for a new interpretation, requiring strict scrutiny by the reviewing court for isolated errors of fact or mistakes of law, thus leaving little flexibility for the district court in taking an overall view of the totality of circumstances. Apparently the majority believes that if the district court reaches a conclusion on the evidence with which the reviewing court disagrees, the district court's determination regarding the balance of harms and the overall propriety of granting or denying injunctive relief is entitled to no deference whatsoever.

The majority recognizes that the overwhelming weight of precedent has uncritically accepted the **[**58]** abuse of discretion standard. *See, e.g., Doran v. Salem Inn, Inc., 422 U.S. 922, 923, 45 L. Ed. 2d 648, 95 S. Ct. 2561 (1975)*; *Brown v. Chote, 411 U.S. 452, 457, 36 L. Ed. 2d 420, 93 S. Ct. 1732 (1973)*; *Menominee Rubber Co. v. Gould, Inc., 657 F.2d 164, 166 (7th Cir. 1981)*; *Reinders Brothers, Inc. v. Rain Bird Eastern Sales Corp., 627 F.2d 44, 49 (7th Cir. 1980)*; *Milsen Co. v. Southland Corp., 454 F.2d 363, 369 (7th Cir. 1971)*; *United States Steel Corp. v. Fraternal Ass'n of Steelhaulers, 431 F.2d 1046, 1048 (3d Cir. 1970)*; 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2962, at 633 (1973) (hereinafter "Wright & Miller") and cases cited therein. As the majority illustrates, *see ante* slip op. at 7-10, although the courts almost unanimously have paid lip service to the abuse of discretion standard, when examined closely the cases reveal several inconsistencies in this respect. *See also Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d 48, 59 (2d Cir. 1979)*. *See generally* Hammond, *Interlocutory Injunctions: Time for* **[**59]** *a New Model*?, 30 U. Toronto L.J. 240, 240-41, 259-63 (1980) (hereinafter "Hammond, *New Model*"); Luebsdorf, *The Standard for Preliminary Injunctions*, 91 Harv. L. Rev. 525, 525-27, 537-40 (1978); *Developments in the Law -- Injunctions*, 78 Harv. L. Rev. 994, 1070 (1965) (hereinafter "*Developments*"). Often the court will add other language to the standard such as "clear error" or "mistake of law." *See ante* slip op. at 4-10; 11 Wright & Miller, *supra*, § 2962, at 633-37. The few courts that have undertaken to define abuse of discretion have failed to agree on a definition. *See ante* slip op. at 7-10; Friendly, *Indiscretion About Discretion*, *31 Emory L.J. 747, 762-64 (1982)*. Most important perhaps, the actual scrutiny with which appellate courts have reviewed preliminary injunction decisions by lower courts has differed markedly irrespective of the seeming consensus on the applicable standard of review. *See ante* slip op. at 7-10. This last inconsistency, which exists in all types of cases, has given rise to the criticism that formulation of the standard of review is a purely verbal exercise because **[**60]** reviewing courts will decide a case as they see fit regardless of the standard of review. If a reviewing court wishes to sustain a decision **[*397]** of a lower court, it will claim deference to the lower court in accord with the applicable standard. If a reviewing court wishes to reverse a decision of a lower court, it will find whatever degree of error is necessary under the applicable standard.

Despite the inconsistencies and the ring of truth to the foregoing criticism, I believe that the majority's discussion of the standard of review represents a fundamental misunderstanding of the role of preliminary injunctive relief in our legal system and the role of the district courts in dispensing that relief. I endorse the four-part test set forth by the majority for determining the propriety of granting a preliminary injunction. I believe, however, that the formulation of that or any other test cannot replace the role of discretion in the decision to grant or deny a preliminary injunction. I further believe that the discretion must lie with the district court in the first instance.

The interlocutory injunction developed in England in the courts of equity. Like other equitable **[**61]** remedies, injunctions were designed to offer relief when legal remedies were unavailable or inadequate to protect the parties' rights. *See Developments, supra*, at 997-98. Thus, it has been said that equity developed to relieve the harshness of the law. Despite the merger in our federal system of equity and law courts, a preliminary injunction is still considered an extraordinary remedy that is granted not as a matter of right. *See* 11 Wright and Miller, *supra*, § 2948, at 428.

A preliminary injunction is different from a remedy at law because it is both equitable and interlocutory. Unlike a remedy at law which generally requires only that a party pay damages, an injunction requires the party enjoined to do something or to refrain from doing something. Framing an injunctive decree is completely unlike assessing damages. Balancing harms and sliding scales are unique to equitable remedies. Determining a plaintiff's likelihood of success on the merits prior to trial is unique to interlocutory relief. To fulfill its role of softening the harshness of the law and offering relief when a legal remedy is unavailable, the rules for granting preliminary injunctive relief **[**62]** must remain flexible and able to account for a myriad of situations. In sum, the decision whether to grant a preliminary injunction does not lend itself to a rigid legal formulation. *See* *Lemon v. Kurtzman, 411 U.S. 192, 201, 36 L. Ed. 2d 151, 93 S. Ct. 1463 (1973)* ("In equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests. . . ."); *Hecht & Co. v. Bowles, 321 U.S. 321, 329, 88 L. Ed. 754, 64 S. Ct. 587 (1944)* ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."); *cf.* *United States v. McCoy, 517 F.2d 41, 44* (7th Cir.), *cert. denied*, *423 U.S. 895, 46 L. Ed. 2d 127, 96 S. Ct. 195 (1975)* (trial judge is given discretion where "the factors which may properly influence his decision are so numerous, variable and subtle that the fashioning of rigid rules would be more likely to impair his ability to deal fairly with a particular problem than to lead to a **[**63]** just result").

Because the preliminary injunction is an extraordinary remedy that may impose a great burden on defendants and is granted before a full trial or a final determination of liability, the notion of leaving the decision to the unbridled discretion of judges is particularly troublesome. *See* O. Fiss & D. Rendleman, *Injunctions*, at 104-06 (2d ed. 1984); Hammond, *New Model, supra*, at 272 ("A discretionary formula, though fashionable, raises the dangers of potential judicial arbitrariness with respect to a remedy which is often dispositive of litigation and the difficulties of mounting an appeal from a discretion. These difficulties are not really solved by assuming that there will always be a succession of level-headed men called judges on the Clapham omnibus who will exercise considered judgment."). Thus, I endorse the majority formulation of a coherent test to guide both the district courts and the reviewing courts. I believe, however, that within the confines of that **[*398]** test the district court does and must exercise a large degree of discretion. Balancing the harms, determining the plaintiff's likelihood of success on the merits, and balancing **[**64]** together the harms and likelihood of success on a sliding scale all require discretionary judgments. *See* *United States Steel Corp. v. Fraternal Ass'n of Steelhaulers, supra, 431 F.2d at 1048*. Discretion also inheres in the framing of an injunctive decree appropriate to the situation and the parties. *See* *Hecht Co. v. Bowles, supra, 321 U.S. at 329*; *Duran v. Elrod, 713 F.2d 292, 297 (7th Cir. 1983)*, *cert. denied*, *465 U.S. 1108, 104 S. Ct. 1615, 80 L. Ed. 2d 143 (1984)*. There are as many possible decrees in any given case as there are judges. Although the test set forth by the majority will help guide the discretion of the courts, it cannot replace that discretion.

The discretion that inheres in the decision whether to grant a preliminary injunction cannot rest with the reviewing court but must lie in the district court. First, it must be remembered that the district court has the responsibility for making a final determination on the merits of the case. The lower court should also be entrusted to determine whether a preliminary injunction is necessary to preserve a state of affairs such that the court will **[**65]** be able to grant meaningful relief upon conclusion of a full trial. Second, given the flexibility of the standard for preliminary injunctive relief and the necessity for discretionary judgments, two courts could easily arrive at different though equally viable conclusions. Refusal to defer to the decision of the lower court in the first instance frequently will result in a substitution of the judgment of the reviewing court for that of the district court. This is a poor use of judicial resources. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 778-80 (1957). Finally, and most importantly, if discretionary judgments must be made (as I believe they must) in deciding to grant or deny preliminary injunctive relief, the trial court with its greater knowledge of the case and the parties and "superior opportunity to get 'the feel of the case'" is in a better position than a reviewing court to make those judgments. *Noonan v. Cunard Steamship Co., 375 F.2d 69, 71 (2d Cir. 1967)* (quoting *Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 216, 91 L. Ed. 849, 67 S. Ct. 752 (1947))*; *see* Rosenberg, *Judicial* **[**66]** *Discretion of the Trial Court, Viewed from Above*, 22 Syracuse L. Rev. 635, 662-63 (1971); Wright, *The Doubtful Omniscience of Appellate Courts, supra*, 41 Minn. L. Rev. at 781-82.

The majority lists three types of matters that are generally referred to the district court's discretion: a matter not decided according to a standard; a matter not susceptible of uniform treatment; and a matter not decided on the basis of evidence reasonably accessible to the appellate court through the record of the proceedings in the trial court. *See ante* slip op. at 15-16. The majority lists illustrations of these three types of discretionary judgment: criminal sentences; rulings on most discovery questions; and rulings on evidentiary questions where the issue is prejudicial impact on the jury. Deciding whether to grant a preliminary injunction has similarities with all three types of discretionary matters listed by the majority.

The test delineated today by the majority is unquestionably a standard, but so is a criminal sentencing statute. The key in both situations is that the standard contains a vast amount of flexibility so that the court can take into **[**67]** account the infinite variety of situations that may arise. *See A.L.K. Corp. v. Columbia Pictures Industries, Inc., 440 F.2d 761, 763 (3d Cir. 1971)*. Like formulation of a criminal sentence, the formulation of an injunctive decree is often tailored to the individual circumstances of the case and the parties, and the inherent "rightness" that the situation demands. *See, e.g., Inland Steel Co. v. United States, 306 U.S. 153, 157-58, 83 L. Ed. 557, 59 S. Ct. 415 (1939)*; Wright & Miller, *supra*, § 2947, at 424-26 and cases cited therein; *Developments, supra*, at 1063-64.

[*399] Deciding that a matter is susceptible of uniform treatment assumes the answer to the question posed by the majority's discretionary judgment analysis. If uniform treatment is sought, then a rigid legal formula is developed and discretion is dispensed with. If, on the other hand, discretion is deemed to be an element of a decision, uniformity is not expected. In my view, uniform treatment historically has not been and should not be a goal in preliminary injunction decisions, without, of course, condoning arbitrary decisionmaking. The decision to grant or deny **[**68]** a preliminary injunction should depend on the unique circumstances of and the parties in each case. I do not believe that uniform treatment is even possible under the test adopted today. The test is flexible, at least in theory. The sliding scale approach by its nature is antithetical to uniformity. Unique facts are certain to exist in each case which must be factored into the test. The decision to grant or deny preliminary injunctive relief simply defies mechanical treatment.

Finally, despite the majority's contention that a preliminary injunction hearing produces a record similar to a trial record, a reviewing court does not have the same access to evidence that the district court has or that the reviewing court has after trial. The district court's greater knowledge of the case and the parties and its ability to engage in extensive dialogue with the parties is particularly important in an abbreviated proceeding such as a preliminary injunction hearing. In that kind of hearing the parties do not have the same opportunity to develop their arguments and create their record that is essential to a meaningful review by an appellate court which has no prior acquaintance with the **[**69]** case and little if any opportunity to question the parties. In addition, a reviewing court may not have the same access to findings by the district court before trial as after trial. A trial judge may well be hesitant before trial and before presentation of all of the evidence to make explicit or final findings on witness credibility and other matters which the judge is in a unique position to make for fear that the findings will constrain or prejudice the final resolution of the case. Accordingly, the judge's decision to grant or deny a preliminary injunction may be influenced by unstated and preliminary findings. We should encourage trial judges to refrain from making absolute findings that may impede a fair final resolution on the merits and at the same time to determine the appropriateness of preliminary injunctive relief on the basis of all of the evidence then available to them. I fear that the majority's refusal to defer to the judgments of the trial judge will encourage the opposite; judges will be forced either to make their conclusions explicit and absolute or disregard them. It is worth noting that to the extent a decision by a reviewing court is not based on deference **[**70]** to the trial judge, the decision will have the inevitable and baneful effect of constraining and prejudicing the judge's final resolution of the case.

Because the decision to grant or deny preliminary injunctive relief ought to lie within the discretion of the district court in the first instance, our review of that decision ought to be bound by the abuse of discretion standard. The district court's decision involves some nondiscretionary judgments, such as preliminary factual findings and application of both the proper test for injunctive relief and, where necessary, the correct substantive law. Because the district judge is in a superior position to make preliminary judgments based on incomplete evidence, even these judgments should be reviewed with greater than usual deference. And, even assuming that the district court has committed an isolated error of fact or an isolated mistake of law, the court's ultimate decision to grant or deny preliminary injunctive relief should be reversed only if it constitutes an abuse of discretion under the totality of the circumstances. *See* *Menominee Rubber Co. v. Gould, Inc., supra, 657 F.2d at 166*; *Reinders Brothers, Inc. v. Rain Bird Eastern Sales Corp., supra, 627 F.2d at 49*. **[**71]** The majority rejects this view by focusing exclusively on individual aspects of the case, **[*400]** at the expense of taking an overall view of the issue before the district court.

This circuit has adopted a definition of abuse of discretion that offers expansive protection to the decision of the district court. An abuse of discretion occurs only when no reasonable person could take the view adopted by the trial court. *American Medical Ass'n v. Weinberger, 522 F.2d 921, 924 (7th Cir. 1975)*. *See also* *Duran v. Elrod, supra, 713 F.2d at 297*; *Harrington v. DeVito, 656 F.2d 264, 269 (7th Cir. 1981)*, *cert. denied*, *455 U.S. 993, 71 L. Ed. 2d 854, 102 S. Ct. 1621 (1982)*; *Particle Data Laboratories, Inc. v. Coulter Electronics, Inc. , 420 F.2d 1174, 1178 (7th Cir. 1969)*. It can be argued that such an extreme limitation on the scope of appellate review is inappropriate in preliminary injunction cases in which there is a delineated standard (however flexible) and a large body of case law on the subject. *See generally* *United States v. Criden, 648 F.2d 814, 817-18 (3d Cir. 1981)*; Friendly, **[**72]** *Indiscretion About Discretion, supra*, 31 Emory L.J. at 762-73. At a minimum, however, the abuse of discretion standard of review of preliminary injunction decisions means that the appellate court should not second guess the balances struck by the district court if there is reasonable support in the record for those balances; doubts should be resolved in favor of the district court's decision. At a minimum, abuse of discretion means much greater deference than the majority gives today to the decision of the court below.

II

Turning to the facts of the instant case, I conclude that the district court's decision granting Roland a preliminary injunction was not an abuse of discretion even if the majority's interpretation of that standard of review is employed. That is, even assuming that isolated errors of fact or mistakes of law all but erase any discretion that the district court might otherwise have, I can find no such errors in this case.

The majority concedes that Roland satisfied the threshold requirements of proving that it has no adequate remedy at law and that it will suffer irreparable injury if injunctive relief is denied. *Ante* slip op. at 20. Based upon its **[**73]** *de novo* review of the evidence, the majority decides that the district court has committed errors of fact and, as a result, the district court's judgment as to the balance of harms is entitled to no deference. The majority then itself concludes that the balance of harms between Roland and Dresser is approximately equal and thus that Roland must show a substantial likelihood of success on the merits. Finding that Roland has failed sufficiently to show an exclusive dealing agreement with anticompetitive effect, the majority concludes that preliminary injunctive relief is unwarranted.

There are several holes in the majority's conclusion that the district court clearly erred in finding tha Roland would probably go out of business if its Dresser distributorship is terminated. The majority concedes that the purchase of

Dresser parts from other dealers at a twenty percent markup could render the sales of parts unprofitable but concludes that Roland could still derive profits on the sale of service in connection with the parts business. There is no evidence and no guarantee, however, that the profits derived from the sale of service are sufficient to render the parts business ultimately **[**74]** profitable. The majority also finds that Roland's revenues from the rental of Dresser equipment "should not be affected by the cancellation of the franchise, at least until its present stock wears out, and that should not be till after the trial is over." *Ante* at 391. In the absence of knowing the size and condition of Roland's present stock of rental equipment, the lifespan of such equipment, or when the trial will be over, the majority's finding is untenable. The majority also finds that Roland's projected future earnings from sales of Komatsu equipment is unrealistically low. The majority, however, offers no more realistic projection. Purely speculative earnings should not be the basis for denying preliminary injunctive relief. The court can take **[*401]** appropriate action if and when those earnings come to pass. If Roland's earnings from the sales of Komatsu equipment increase to the point that the injunction is no longer necessary to protect Roland's status as an ongoing business, the court can always dissolve or modify the injunction. *See* *United States v. Swift & Co., 286 U.S. 106, 119, 76 L. Ed. 999, 52 S. Ct. 460 (1932)*; *Developments, supra* **[**75]** , at 1080-86. Finally, the majority completely ignores the loss of goodwill, business reputation, and credit rating that Roland will suffer if its Dresser distributorship is terminated. *Roland Machinery Co. v. Dresser Industries, Inc.*, No. 84-3038, Order of March 27, 1984, at 8 (C.D. Ill.) (hereinafter "Order"). *See* *Menominee Rubber Co. v. Gould, Inc., supra, 657 F.2d at 167*; *Reinders Brothers, Inc. v. Rain Bird Eastern Sales Corp., supra, 627 F.2d at 53*. *See generally* Comment, *The Irreparable Harm Requirement for Preliminary Injunctive Relief in Antitrust Distributor Termination Cases*, 61 B.U.L. Rev. 507, 516-21 (1981).

At a minimum, Roland will lose twenty-four percent of its annual gross profits if Dresser terminates Roland's distributorship. *See* Operating Statement of Roland from Nov. 1, 1982-Oct. 31, 1983, Plaintiff's Exhibit No. 11A at 2. This assumes that Roland will be able to continue its sales of Dresser parts at a twenty percent markup and that Roland will lose no revenues on its rental of Dresser equipment. This figure does not take into account the loss of profits on service rendered in connection with **[**76]** the sale of new Dresser equipment or the loss of revenues as a result of Roland's loss of goodwill, business reputation, and credit rating. This figure is sufficient in my mind to support the testimony of Roland's treasurer and comptroller who concluded, after reviewing Roland's financial records, that Roland could not survive as an ongoing business past 1985 if Dresser were allowed to terminate Roland's distributorship. See Preliminary Hearing Transcript, vol. 1, at 81. In sum, the evidence supports and nothing the majority has stated indicates any error in the district court's conclusion that Roland would probably disappear as a business entity if Dresser did not continue to supply Roland with new machines and parts. See Order at 8.

Even if there is only a small likelihood that Roland will go out of business if its Dresser distributorship is terminated, that possibility must be considered because the harm to Roland, if its business is destroyed, is so great. A small business enterprise is endowed with a "soul" identified with its owner who has created and nurtured the enterprise into a useful and successful business. As the majority recognizes, *see ante* slip op. at 11, **[**77]** the harm to the owner from the loss of a business enterprise is not compensable. Earl Roland "want[s] to sell [construction equipment machinery], not to live on the income from a damages award." *Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970)*. *See also* *Milsen Co. v. Southland Corp., supra, 454 F.2d at 366*; *Bateman v. Ford Motor Co., 302 F.2d 63, 66 (3d Cir. 1962)*.

Even assuming that Roland would not be forced out of business if Dresser terminated the distributorship, Roland will still suffer substantial harm in terms of loss of profits and loss of goodwill and business reputation. This harm is given little weight by the majority. The majority merely finds that Roland will be able to continue in business if its Dresser distributorship is terminated and concludes that the harm to Roland if the injunction is not granted is equivalent to the harm to Dresser if the injunction is granted. *See ante* slip op. at 21-23.

In assessing the harm to Dresser that the injunction will cause, the majority dismisses as unworkable the district court's conditional decree that requires Roland to maintain Dresser's **[**78]** market share within normal economic fluctuations. *Ante* slip op. at 21-22. The majority merely substitutes its judgment for that of the district court. The majority ignores the condition of the decree which permits Dresser to obtain additional distributors in Roland's territory. See Order at 15. The majority also ignores the district court's finding that **[*402]** there was no evidence to support Dresser's contention that Roland would cease or had ceased vigorously to market Dresser products. See Order at 8-9. Drafting a conditional decree so as to protect the interests of all of the parties is entirely appropriate. *See* Inland Steel Co. v. United States, supra, 306 U.S. at 156-58; Milsen Co. v. Southland Corp., supra, 454 F.2d at 369. I see no reason to doubt the district court's competence to enforce the decree in this instance. I would commend the district court for its sensitivity to the interests of both parties.

The mistake of law the majority identifies is the district court's failure "to consider the possible impact on competition of the provision of the injunction that freezes Dresser's market share until the end of the lawsuit. **[**79]** " *Ante* at 392. In my view, the majority's so-called legal error is irrelevant in determining if the district court properly granted a preliminary injunction. Whether a particular term of the preliminary injunction has anticompetitive effects goes only to the question of the proper scope of the decree, not to the question of whether, on balance, the plaintiff or the defendant would suffer more by the imposition of some form of injunctive relief.

I agree with the majority that the injunctive decree, even as conditioned by the district court, cannot fully protect Dresser. Nevertheless, I believe the majority has not come close to showing that the balance struck by the district court was clear error, let alone an abuse of discretion. *Cf.* Menominee Rubber Co. v. Gould, Inc., supra, 657 F.2d at 167 ("The imbalance between the hardship [the distributor] would suffer if terminated [including the loss of good will and disruption of business] versus the hardship [the defendant] would suffer if the status quo were maintained is . . . apparent . . ."); Reinders Brothers, Inc. v. Rain Bird Eastern Sales Corp., supra, 627 F.2d at 53 (balance of harms **[**80]** found in favor of plaintiff where termination of distributorship would damage plaintiff's goodwill, plaintiff continued to use defendant's product, and defendant was free to set up competing distributors in plaintiff's territory); Milsen Co. v. Southland Corp., supra, 454 F.2d at 366 ("Courts which have entered injunctions against [franchise] terminations have weighed the equities and found the plaintiff's side more substantial . . .").

Concluding that the balance of hardships is even, the majority holds that Roland must show that it was more likely than not that Roland would prevail on the merits of its claim that Dresser engaged in an exclusive dealing policy in violation of section 3 of the Clayton Act, 15 U.S.C. § 14 (1982). The district court concluded that Roland raised a "substantial question" whether there existed an implied exclusive dealing arrangement between Roland and Dresser which tended to substantially lessen competition in the relevant market. Order at 14. Even without the benefit of the newly-clarified test announced today, the district court applied the correct standard for determining Roland's likelihood of success **[**81]** on the merits given the court's finding that the balance of harms tipped decidedly in favor of Roland. Therefore, the district court's entire analysis is sustainable even under the majority's interpretation of the abuse of discretion standard.

In addition, I believe that the evidence supports the conclusion that Roland is more likely than not to prevail on its section 3 claim. I am not as confident as the majority that *Colgate, see* United States v. Colgate & Co., 250 U.S. 300, 306-07, 63 L. Ed. 992, 39 S. Ct. 465 (1919), retains much validity with respect to exclusive dealing claims which arguably are subject to the rule of reason rather than a per se rule. *See* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 1470, 79 L. Ed. 2d 775 (1984) ("It is of considerable importance that . . . concerted action on non-price 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."). **[**82]** **[*403]** Nevertheless, there is sufficient evidence in the record that Dresser did more than merely independently maintain an exclusive dealing policy.

Dresser engaged in extensive surveillance of Roland and other distributors which Dresser believed had or might sign agreements to deal with Komatsu. Dresser's Senior Vice-President of Operations and Acting President of the Construction Equipment Group requested reports on Dresser distributors dealing with Komatsu and such reports were prepared. *See* Plaintiff's Exhibits 34, 35, 52, 53, & 67, at 110-17. Dresser's President of Construction Equipment International instructed a Regional Manager to monitor Roland at the time Roland was preparing to sign an agreement with Komatsu. *See* Plaintiff's Exhibit 67, at 125. A Dresser Territorial Sales Manager obtained notes from another distributor of a purported conversation with Roland concerning the Komatsu contract. *See* Hearing Transcript, vol. 2, at 204-05; Plaintiff's Exhibit 63, at 52-55. There is also evidence suggesting that Dresser offered one distributor an additional incentive, *i.e.*, an additional territory, to induce the distributor not to sign an agreement **[**83]** with Komatsu. *See* Plaintiff's Exhibit 58, at 59-60. This evidence is sufficient at this stage to show that Dresser's conduct more likely than not exceeded the type of conduct permitted under *Colgate, supra.* *Cf. Albrecht v. Herald Co., 390 U.S. 145, 149-50, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)* (combination found to exist where manufacturer hired second distributor to compete with first distributor who was not following suggested price); *United States v. Parke, Davis & Co., 362 U.S. 29, 45-47, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)* (agreement found to exist where acquiescence of retailers in suggested prices was secured by threats of termination); *FTC v. Beech-Nut Packing Co., 257 U.S. 441, 454-55, 66 L. Ed. 307, 42 S. Ct. 150 (1922)* (institution of policing system to detect price-cutters and refusing to sell to price-cutters until they agreed to conform to suggested prices found to exceed the conduct permitted under *Colgate*); *Greene v. General Foods Corp., 517 F.2d 635, 658 (5th Cir. 1975)*, *cert. denied*, *424 U.S. 942, 47 L. Ed. 2d 348, 96 S. Ct. 1409 (1976)* (institution **[**84]** of "device for policing the conduct of distributors" and "monitoring of [distributor's] pricing to his . . . customers" found to go "far beyond the simple announcement of terms and refusal to deal with a noncomplying independent distributor that is still permissible under *Colgate*"). *See generally* L. Sullivan, *Handbook of the Law of Antitrust* § 139, at 393-95 (1977). As the district court found, *see* Order at 10-11, Dresser offered no persuasive evidence of its reason for terminating Roland's distributorship other than an implied exclusive dealing condition. While this evidence may not be sufficient to ultimately prove the existence of an agreement, it is sufficient at this early stage of the litigation to meet the majority's greater than not likelihood test.

Finally, in concluding that Roland failed to establish any anticompetitive effect resulting from Dresser's conduct, the majority completely ignores the evidence before and the findings of the district court. Roland argued before the district court that the relevant geographic market included those counties that Roland contracted to service for Dresser. Dresser offered no evidence concerning the relevant **[**85]** geographic market. The district court therefore defined the relevant geographic market as that part of Central Illinois in which Roland normally receives requests and supplies bids from construction equipment consumers. *See* Order at 11-12. The majority does not dispute this finding, but discusses Komatsu's standing in both the world and national markets for construction equipment. *See ante* slip op. at 26-27. The majority finds that "the nationwide practice of exclusive dealing has not kept Komatsu from becoming a major factor in the U.S. market" and concludes that the practice will not do so in Central Illinois. *Id.* This conclusion ignores (but does not refute) the district court's findings that Komatsu had tried but failed to infiltrate the Central Illinois market through the use of exclusive dealers and that the Central Illinois market **[*404]** is unique because it is "the backyard" of Caterpillar, "the world's number one producer and seller of construction equipment." Order at 12-13. The majority suggests that its decision will actually help Komatsu's entry into the market because "the likeliest consequence of our dissolving the preliminary injunction would **[**86]** be to accelerate Komatsu's efforts to promote its brand through the Roland distributorship." *Ante* at 394. In fact, the evidence shows that exclusive Komatsu distributorships shave failed to survive in Central Illinois and Roland itself has been unable to produce sufficient profits from the sale of Komatsu products to survive. Of course, when the distributor fails, Komatsu's attempt to infiltrate the market also fails. On the basis of this evidence, the district court concluded: "Removal of the Dresser distributorship would probably [*i.e.*, more likely than not] doom Roland to the same end that all other Komatsu distributors have fallen [and] effectively prevent Komatsu from entry into the Central Illinois market." Order at 13. The district court's conclusion is based on the evidence presented to the court and is not clearly erroneous.

Finally, although the district court does not mention this finding in its discussion on the merits of Roland's section 3 claim, the court earlier in the opinion notes:

Only recently has the construction equipment machinery market engaged in significant price competition, having previously operated under the pricing "umbrella" of the **[**87]** dominating market leader Caterpillar. Apparently non-price factors dictated the decisions of most construction machinery purchasers in the past, a trend Dresser apparently anticipates in the future. . . .

Order, at 9 n.3. Roland apparently quoted lower prices on Komatsu equipment when submitting price quotations to customers on competing Dresser and Komatsu machinery. *Id.* This suggests that the entry of foreign competitors such as Komatsu into the United States market has triggered some price competition in the industry. At least it suggests that Komatsu may be offering consumers a lower-priced alternative. If this is so, the consumer value, as the majority calls it, is clearly promoted by Komatsu's entry into the construction equipment market.

The majority's analysis of the instant case is precisely the type of substitution of judgment about which I warned in the first part of this dissent. I find the district court's decision well-reasoned, based on the evidence, and without either errors of fact or mistakes of law. Notwithstanding its rhetorical reaffirmation of the abuse of discretion standard, the majority applies that standard in a way that allows it to reverse **[**88]** the judgment below when, in its view, the district court has committed any isolated "clear" error of fact or "mere" error of law. Indeed, the majority undertakes a sweeping *de novo* review of the evidence and reaches a conclusion contrary to that of the district court. Such *de novo* review usurps the authority of the district court to decide whether a preliminary injunction is necessary to protect the interests of the parties pending trial and the court's ability to render final relief after trial. Moreover, the decision by the majority, despite its disclaimer, will necessarily prejudice the district court's ultimate decision after a full trial. I would affirm the district court's grant of a preliminary injunction.

Terre Du Lac Asso. v. Terre Du Lac, Inc.

United States District Court for the Eastern District of Missouri, Eastern Division

August 31, 1984

No. 83-2577C(3)

Reporter
601 F. Supp. 257 *; 1984 U.S. Dist. LEXIS 23939 **; 1985-1 Trade Cas. (CCH) P66,574

TERRE DU LAC ASSOCIATION, INC., Plaintiff, v. TERRE DU LAC, INC., et al., Defendants

Core Terms

counts, motion to dismiss, sale of land, defendants', purchaser, lawsuit, golf, individual member, requested relief, memberships, subdivision, antitrust, predicate

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Judges: Hungate, District Judge.

Opinion by: HUNGATE

Opinion

[*258] MEMORANDUM

HUNGATE, District Judge.

Numerous pretrial motions are pending in this action, including four motions to dismiss as to which the Court heard oral argument on August 9, 1984. The action is premised upon a sixteen-count complaint arising out of defendants' actions with regard to the sale of land in a particular subdivision.

Initially, and apart from the merits of the pending motions, the Court declines to exercise pendent jurisdiction over counts seven through fourteen. With the Court having, as it does, some 360 pending lawsuits, justice and the effective administration of courts are best served by permitting plaintiff's **[**2]** eight pendent counts to be dealt with in the state court. [1] As noted by Congressman Neal Smith, Chairman of the House Appropriation Committee's Subcommittee on Commerce, Justice, State and Judiciary, in an interview published in *The Third Branch*, vol. 16, no. 8 (Aug. 1984), the judiciary can alter its own workload to some extent for the purpose of dealing with increasing caseloads. The courts may some day have to cease looking elsewhere for help and examine their own operations

[1] Anyone who disagrees with this proposition should attempt the formulation of suitable, comprehensible jury instructions for a case with nine parties, eight federal counts, and eight state counts.

and rulings in situations where alternative remedies are available and are adequate to compensate for any injuries sustained.

The court cannot be governed by, but must not be oblivious to, the docket impact of its rulings. For example, district courts face an incipient epidemic of civil RICO treble damage cases. If the present litigation **[**3]** blizzard continues unabated, simply adding judges will not remedy the problems **[*259]** of justice delayed being justice denied. Accordingly, plaintiff's state law claims will be dismissed without prejudice.

Defendants, in their four separate motions to dismiss plaintiff's amended complaint, urge dismissal of each of the remaining eight counts. Counts one through six are based on the Interstate Land Sales Full Disclosure Act, *15 U.S.C. § 1701 et seq.* (Land Sales Act); count fifteen is based on the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C. § 1961 et seq.*; and count sixteen is based on the Sherman Antitrust Act, *15 U.S.C. § 1 et seq.* (Sherman Act).

Plaintiff association purports to sue both on its own behalf and for its members as purchasers in the Terre du Lac subdivision. Essentially, plaintiff's complaint seeks redress for injuries allegedly sustained as a result of unfulfilled promises as to numerous aspects of living in the subdivision. Specifically, plaintiff complains of unfinished roads, water and sewage systems, failure to transfer ownership of various amenities to the association, utility service charges, and use of the country club facilities.

[4]** As noted above, counts one through six allege violations of the Land Sales Act, which provides that "[a] purchaser or lessee may bring an action at law or in equity against a developer or agent if the sale or lease was made in violation of section 1703(a) of this title." § 1709(a). Clearly, the plaintiff association does not have standing to sue on its own behalf as to these counts, since it does not allege any purchase or lease from defendants. Plaintiff asserts, however, that it has associational standing to represent the claims of its members under these counts. Defendants vigorously contest this assertion.

In *Warth v. Seldin, 422 U.S. 490, 511, 95 S. Ct. 2197, 2211, 45 L. Ed. 2d 343 (1975)*, the Court found that an association could have representative standing, even without injury to itself, so long as any one member satisfies the requirement of justiciability and "so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensible to proper resolution of the cause. . . ." The requirements for associational standing were further clarified in *Hunt v. Washington Apple Advertising Commission, 432 **[**5]** U.S. 333, 343, 97 S. Ct. 2434, 2441, 53 L. Ed. 2d 383 (1977)*:

> Thus we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

In *Hunt, id.*, a Washington state agency sought to challenge the constitutionality of a North Carolina statute requiring that all apples sold or shipped into North Carolina in closed containers be identified by only the applicable federal grade or a designation that the apples were not graded. The Supreme Court held that the state agency did have associational standing, noting that "neither the interstate commerce claim nor the request for declaratory and injunctive relief requires individualized proof and both are thus properly resolved in a group context." *Id. at 344, 97 S. Ct. at 2442*.

Assuming, *arguendo*, that plaintiff fulfills the first two *Hunt* requirements for associational standing, the Court finds that plaintiff **[**6]** fails to satisfy the third requirement that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." Counts one, two, four, and the portions of count six which incorporate the first three counts, are based on defendants' alleged fraudulent representations and course of business as to plaintiff's members. That being the case, it is clear that each injured party must participate in the lawsuit in order to divulge the extent of the misrepresentation to which the purchaser was exposed.

Plaintiff argues that it can establish the existence and breach of promises **[*260]** without the need of *each* individual member, Memorandum in Opposition to Defendants' Motions to Dismiss Plaintiff's First Amended Complaint at 14, and that so long as this is established as to a sufficient number of members to justify specific performance, there is no need for individual participation. However, the Court does not agree with plaintiff's apparent contention that the third *Hunt* requirement precludes associational standing only when the nature of the relief sought requires individual participation by each member. Rather, both the relief **[**7]** and the claim must be able to proceed without participation of individual members. Although plaintiff's associational requests for relief do not require such participation, their claims of fraud, upon which the requests for relief are predicated, must each be supported with testimony as to particular fraudulent misrepresentations. This, in turn, requires individual participation by individual members alleging injury. *See, i.e.,* *Harris v. McRae, 448 U.S. 297, 321, 100 S. Ct. 2671, 2690, 65 L. Ed. 2d 784 (1980)* (women's group lacked standing to raise free exercise challenge to Hyde Amendment, since free exercise case necessitates showing of coercive effect of enactment as it operates against individual in practice of religion).

This reasoning does not apply to count three or to the portion of count six which charges aiding and abetting as to count three. Count three alleges injury resulting from the issuance of false property reports. To establish defendants' liability for false property reports under the Land Sales Act, "a plaintiff is not required to prove that each purchaser relied in some way on the omission or misrepresentation but only that a material misrepresentation or **[**8]** omission existed in the statement of record at the time the property was sold." *Bryan v. Amrep Corp., 429 F. Supp. 313, 317 (S.D.N.Y.1977)*. Neither the nature of the claim asserted nor the relief requested requires individual participation.

Nonetheless, the Court finds that plaintiff also lacks standing as to these claims under the reasoning set forth in *Associated General Contractors of North Dakota v. Otter Tail Power Co., 611 F.2d 684 (8th Cir.1979)*. [2] In that case, a nonprofit association, with both union and nonunion general contractors as members, alleged that an agreement between defendant corporations and numerous labor unions violated antitrust and state labor laws. The Eighth Circuit held that "the association is clearly not in a position to speak for its members. . . . Their status and interests are too diverse and the possibilities of conflict too obvious to make the association an appropriate vehicle to litigate the claims of its members." *Id. at 691*. The Court stated in support:

> Some members are not qualified and others are not willing to work on the project; some stand to benefit from working on the project under the Agreement and still others **[**9]** will be hurt by not being able to do so.

Id. Significantly, the Court's finding of potential conflict was made despite the fact that the association had voted unanimously to bring the lawsuit, observing that it is the Court's responsibility to determine whether members' interests required individual representation. *Id*.

Here, the Court need not search extensively in order to find potential conflict. Some members, as argued by defendants, may believe that the value of their property is diminished by the very fact of this lawsuit, or may find that it is not in their best interests to have their mandatory dues expended in this fashion. One defendant is also a board member of the plaintiff association.

As noted in *Minnesota Public Interest Research Group v. Selective Service System, 557 F. Supp. 925, 935 (D.Minn.1983)*, the Eighth Circuit "appears fairly ready to find that a diversity of view necessitates **[**10]** individualized participation, preventing representational standing." In light of the Eighth Circuit's holding, the Court must reject plaintiff's argument for the more **[*261]** liberal approach taken by the Tenth Circuit in *National Collegiate Athletic Association v. Califano, 622 F.2d 1382 (10th Cir.1980)*. Accordingly, all of plaintiff's claims under the Land Sales Act must be dismissed without prejudice to the right of any individual members to seek relief on their own behalf.

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[2] This reasoning is equally applicable to the Land Sales Act counts disposed of *supra*.

Plaintiff's lack of associational standing, as set forth above in regard to its members' claims under the Land Sale Act, also mandates dismissal of its members' claims in counts fifteen and sixteen. In these latter two counts, however, under RICO and the Sherman Act, plaintiff has asserted standing on its own behalf in addition to alleging associational standing. The Court, therefore, addresses plaintiff's claims under these counts separately.

As to plaintiff's RICO count, the Court will sustain defendants' motions to dismiss for the reason that none of the named defendants have been criminally convicted of any of the predicate acts listed in RICO. [3] The "pattern of racketeering activity" alleged **[**11]** by plaintiff consists of mail fraud, in that defendants are charged with mailing false property reports, and false representations to potential purchasers, and receiving checks from purchasers through the mail. However, as conceded orally by counsel for plaintiff, none of these defendants have been convicted of any of the alleged predicate acts of mail fraud.

In a recent and well-reasoned decision, the Second Circuit has determined that criminal conviction of a predicate act must precede a private civil suit under RICO. *Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir.1984)*. In *Sedima*, the distinguished Second Circuit examined the statute itself, its legislative history, and previous case law; all of which, it concluded, suggest the necessity of restricting the availability of **[**12]** RICO's civil penalties to those persons whose potential (defendants) have been found criminally guilty of committing a predicate act. Otherwise, RICO would "permit defendants in every 'garden-variety' fraud or securities violation case to be stigmatized as 'racketeers', on the basis of a preponderance of the evidence. . . ." *Id., at 503*.

To find otherwise would also allow treble damages to be awarded on only a preponderance of the evidence, and would further have a severe effect on the court's dockets.

The Court also finds plaintiff's antitrust claim on its own behalf to be without merit. In count sixteen, plaintiff alleges that defendants are violating ***antitrust law*** by way of an illegal tie-in arrangement between golf memberships in the Terre du Lac Golf and Country Club and lots offered for sale by defendants in the subdivision. Plaintiff complains of defendants' practice of waiving the membership initiation fee for persons whose lot is purchased from defendants, whereas those persons who purchase lots from anyone else and desire to obtain a golf membership must pay a substantial initiation fee. Plaintiff alleges that this practice precludes sellers from obtaining the fair **[**13]** market value of their lots.

In arguing the merits of defendants' motions to dismiss, all parties rely on the recently decided case of *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*. As noted therein, "the essential characteristic of an invalid tying arrangements lies in the seller's exploitation of its control over the typing 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 1558*.

The Court agrees with defendants that no such tying is alleged by plaintiff's complaint, and that plaintiff has failed to state **[*262]** a claim for which relief could be granted under the antitrust laws. Purchasers are not required to buy golf club memberships in order to buy land in the subdivision, nor are they required to buy land from the defendants in order to purchase golf club memberships. Accordingly, the Court finds that count sixteen must be dismissed.

Also pending in this action is a motion to intervene as defendant by the Missouri Public Service Commission and a motion to vacate the Court's August **[**14]** 9, 1984, protective order. Because this order dismisses plaintiff's complaint in its entirety, those motions are moot.

ORDER

A memorandum dated this day is hereby incorporated into and made a part of this order.

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[3] The determination whether a prior criminal conviction is a prerequisite to a civil RICO recovery was left open in the recent case of *Alexander Grant and Company v. Tiffany Industries, Inc., 742 F.2d 408 (8th Cir.1984)*.

IT IS HEREBY ORDERED that the Court declines to exercise pendent jurisdiction as to Counts VII through XIV, and those counts are dismissed without prejudice.

IT IS HEREBY FURTHER ORDERED that the motion to dismiss filed by defendants Terre du Lac, Inc., and James O. Kwon be and the same is granted.

IT IS HEREBY FURTHER ORDERED that the motion to dismiss filed by defendant CIT Corporation be and the same is granted.

IT IS HEREBY FURTHER ORDERED that the motion to dismiss filed by defendants Terre du Lac Golf and Country Club, Inc., Terre du Lac Country Club Associates, Sensibar Enterprises, Inc., and Moill, Ltd., be and the same is granted.

IT IS HEREBY FURTHER ORDERED that the motion to intervene filed by the Missouri Public Service Commission be and the same is denied as moot.

IT IS HEREBY FURTHER ORDERED that the motion to vacate the protective order entered August 9, 1984, be and the same is denied as moot.

In re Folding Carton Antitrust Litigation

United States Court of Appeals for the Seventh Circuit

January 13, 1984, Argued ; September 5, 1984, Decided

Nos. 83-1467, 83-1468, 83-1506, 83-1507, 83-1673

Reporter
744 F.2d 1252 *; 1984 U.S. App. LEXIS 18896 **; 1984-2 Trade Cas. (CCH) P66,189

IN RE FOLDING CARTON ANTITRUST LITIGATION; APPEALS OF FEDERAL PAPER BOARD COMPANY, INC., CUMBERLAND FARM DAIRIES, PANTRY PRIDE ENTERPRISES, INC., THE MEAD CORPORATION, BEATRICE FOODS CO., LAND O'LAKES, INC., G. HEILEMAN BREWING CO., INC., and GRIST MILL CO.

Prior History: [1]** Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. MDL 250 -- Edwin A. Robson and Hubert L. Will, Judges.

Disposition: Affirmed in Part.

Core Terms

escheat, class member, district court, reserve fund, deposited, funds, settlement, claimants, nonclaiming, unclaimed, late claim, anti trust law, antitrust, unclaimed property, five year, appeals

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Judges: Cummings Chief Judge, Eschbach and Flaum, Circuit Judges. Flaum, Circuit Judge, concurring in part and dissenting in in part.

Opinion by: CUMMINGS

Opinion

[*1253] CUMMINGS, Chief Judge:

These five appeals have been consolidated and grow out of antitrust litigation involving an alleged nationwide price-fixing conspiracy among manufacturers of folding cartons in violation of the Sherman Act (*15 U.S.C. § 1*). The appeals have been filed by two former defendants and six former class-member plaintiffs and relate chiefly to the district court's disposition of an approximately $6,000,000 reserve fund established to pay late claims and to meet various expenses **[**2]** and contingencies connected with the distribution of the $200,000,000 settlement fund. The litigation is fully described in the joint memorandum opinion of District Judges Robson and Will reported in *557 F. Supp. 1091 (N.D. Ill. 1983)*.

On September 19, 1979, the district court entered a final judgment approving the settlement agreement providing for payment by the 25 defendants of $200,000,000 into a fund for distribution to the plaintiff class. Six days thereafter the court appointed the Folding Carton Administration Committee ("Administration Committee") which is also involved in these appeals. The settlement agreement provided for a cut-off date of September 6, 1979, for claims but later claims were honored with judicial assent.

On March 6, 1980, the district court approved distribution of 97% of the fund, which by then had grown to approximately $206,000,000, and decided that the balance be held in reserve for potential late claims and errors in distribution. All timely claims were paid by the Administration Committee by the end of April 1980. Some late claims were subsequently paid with court approval. Others still pend.

On September 3, 1982, the Administration **[**3]** Committee (composed of two counsel for the plaintiff class, one who had represented a defendant and an independent fourth) recommended that the $6,000,000 in the reserve fund plus future interest be used to establish a private "Antitrust Development and Research Foundation" to promote the study of complex litigation and various substantive and procedural aspects of ***antitrust law***. Thereafter six former **[*1254]** plaintiff class members [1] and two former defendants [2] filed motions in the district court, which had retained jurisdiction of the case, seeking distribution of the remainder of the settlement fund to plaintiff class members or otherwise *pro rata* to the settling defendants. Two of the class members [3] also requested return to class-member plaintiffs of fees and costs that had been awarded to counsel for the Administration Committee, or in the alternative that they be audited, with excessive fees and costs returned to them, and that the expenses paid to the Administration Committee's accounting firm be subjected to an independent accounting. We granted a temporary stay in April 1983 and granted a stay pending appeal on May 3, 1983, so that no more late claims have been **[**4]** paid [4] nor has the suggested Foundation been organized. At the same time we postponed any action on the Administration Committee's motion to dismiss the appeals.

We now hold that we have jurisdiction over this matter pursuant to the collateral order doctrine for the reasons given in *In re General Motors Corporation Engine Interchange Litigation, 594 F.2d 1106, 1117-1121 (7th Cir. 1979)*. Therefore the motion to dismiss is denied.

As to the district court's February 17, 1983, distinguished opinion, we agree that neither the plaintiff class nor the settling defendants have any right to the reserve fund. We also agree **[**5]** that under these circumstances, it was appropriate for the district court to consider the *cy pres* doctrine or Fluid Class Recovery to achieve an equitable disposition of the reserve fund. We discussed the "fluid recovery" concept in *Simer v. Rios, 661 F.2d 655, 675-677 (7th Cir. 1981)*, but refused to utilize it. As in *Simer*, the $200,000,000 paid by these defendants surely counsels deterrence, has disgorged illegally obtained profits and has satisfied the compensatory factor of the Sherman Act, so that fluid recovery is not needed. [5] Consequently it was inappropriate for the district court to utilize the reserve fund to establish a tax-exempt Foundation for research on complex antitrust litigation and on various substantive aspects of the antitrust laws, as suggested by the Administration Committee.

[6]** The district court directed that the funding of the Foundation should not commence until February 17, 1984, one year from the date of its opinion. That period was provided to the Administration Committee for the payment of additional late claims. *557 F. Supp. at 1110*. Because of our temporary stay order of February 17, 1983, and our May 3, 1983, stay pending appeal, that beneficial one-year extension was of no effect. Therefore, the Administration Committee should hold the reserve fund available for one year from the date of this opinion to cover

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[1] Land O'Lakes, Inc., G. Heileman Brewing Co., Inc., Grist Mill Co., Beatrice Foods Co., Cumberland Farm Dairies, Inc. and Pantry Pride Enterprises, Inc.

[2] The Mead Corporation and Federal Paper Board Company, Inc.

[3] Cumberland Farm Dairies, Inc. and Pantry Pride Enterprises, Inc.

[4] The last distribution to late claimants was apparently on May 27, 1982.

[5] For a comprehensive discussion of this subject, see Developments in the Law -- Class Actions, 89 Harv. L. Rev. 1318, 1516-1536 (1976); for refusal to utilize the analogous concept of creative sentencing in the criminal field, see *United States v. Wright Contracting Co., 728 F.2d 648, 650-653 (4th Cir. 1984)*, where the court of appeals overturned district court orders requiring defendants to contribute substantial sums to private charitable organizations.

the cost of locating absent class members and making appropriate payments to them from the principal and accrued interest of the reserve fund.

After careful consideration, we conclude that the establishment of the proposed Foundation would be carrying coals to Newcastle. There has already been voluminous research with respect to multidistrict antitrust litigation and the substantive and procedural aspects of the antitrust **[*1255]** laws by judges, lawyer specialists, law schools, bar associations, Congressional committees, the Department of Justice and the Federal Trade Commission, and it is a continuing project of **[**7]** all those concerned. In our view, establishing an unneeded Foundation for these purposes from the reserve fund would be a miscarriage of justice and an abuse of discretion. Instead, after the passage of a year hence for making appropriate payments to absent or tardy class members and for absorbing appropriate expenses, we direct that the remainder of the reserve fund escheat to the United States. The reason given by the district court for not ordering escheat to the United States government was that the federal statutory terms established in *28 U.S.C. §§ 2041* and *2042* for escheat do not apply. However, the spirit of those statutes is certainly satisfied and indeed the technical Congressional requirements present no real obstacles.

Thus *28 U.S.C. § 2041* is now entitled "Deposit of monies in pending or adjudicated cases," and the text applies to "All monies paid into any court of the United States or received by the officers thereof, in any case pending or adjudicated in such court * * *." Here the $200,000,000 fund was paid into the district court or its officers, namely, the Administration Committee, thus satisfying that portion **[**8]** of the escheat statute. The immediately succeeding Section initially refers to "money deposited under *section 2041*" and provides that money so deposited and unclaimed for five years shall be deposited in the federal Treasury "in the name and to the credit of the United States." The district court stated that it could not approve escheat to the United States because five years had not then elapsed since the deposit of the fund and the right to the money had not been adjudicated. *557 F. Supp. at 1103*. But almost five years have now elapsed, and we are permitting unpaid class members to claim until a year from this opinion, which will be well beyond the unclaimed five years specified in *Section 2042*. Moreover, the right to the money among the parties hereto was adjudicated in the February 17, 1983, district court opinion and in 1979 when it approved the settlement agreement. In view of the generous time period afforded by the district court and us, it is doubtful that any claimants will come along thereafter. Nevertheless, the open-ended closing sentence of *28 U.S.C. § 2042* will allow "Any claimant entitled" thereto to recover from the United States **[**9]** after the escheat. *Hodgson v. Wheaton Glass Co., 446 F.2d 527 (3d Cir. 1971)*. Accordingly, the statutory terms for federal escheat have been sufficiently satisfied.

As noted, *28 U.S.C. § 2042* permits an entitled claimant to recover from the United States. To that extent, the escheat is impermanent [6] and also raises no unconstitutional taking. Since any legitimate claimant has been afforded an adequate remedy against the United States, there is no bar to interim governmental use of the escheated money "deposited in the Treasury and to the credit of the United States." [7] Because the settlement stemmed from defendants' alleged violations of *Section 1* of the Sherman Act (*15 U.S.C. § 1*), it is much more appropriate to have the escheat benefit the United States rather than to adopt the labyrinthine methodology employed by the dissent to justify escheat to the states.

[10]** **[*1256]** Five *amici curiae* non-claimant members of plaintiff class [8] favor the district court's order of February 17, 1983, insofar as it gives such persons an additional year to present claims. Our resolution grants a

[6] Some of the cases cited in the dissent are thus accurate in stating that the escheat to the United States is not permanent.

[7] The Supreme Court decision addressing state escheat cited by the dissent, *Texas v. New Jersey, 379 U.S. 674, 13 L. Ed. 2d 596, 85 S. Ct. 626 (1965)* did not involve property in dispute under federal law and therefore the role of the United States as a depositary under *28 U.S.C. § 2042* was not implicated. That case does not inject state *parens patriae* principles into matters solely within federal jurisdiction. Here the fund arose out of defendants' alleged violations of the federal antitrust laws. None of the cases relied upon in the dissent involves a situation comparable to the present one, so that this opinion is not in conflict with other cases involving *28 U.S.C. §§ 2041* and *2042*.

[8] Avery International Corp., Handschy Chemicals, Inc., John C. Gilmore, Textor Corporation and Zachary Confections, Inc.

similar grace period but of course provides for escheat thereafter instead of for the Foundation championed by *amici*.

The order of February 17, 1983, and the order of March 3, 1983, approving fees and costs are affirmed except with respect to the establishment of the Foundation. As to the reserve fund, we hold that any portion (including interest) remaining a year herefrom after the payment of meritorious claims and expenses by the Administration Committee shall escheat to the United States subject to the conditions expressed in 28 U.S.C. §§ 2041 and 2042. Motion to dismiss appeals denied; costs to be borne by the respective parties. **[**11]** [9]

Concur by: FLAUM (In Part)

Dissent by: FLAUM (In Part)

Dissent

FLAUM, Circuit Judge, concurring in part and dissenting in part.

I agree that the district court abused its discretion in holding that the unclaimed portion of the settlement fund would be used to create an Antitrust Research Foundation. To the extent that the majority opinion holds that the unclaimed fund shall "escheat" and, in effect, remain permanently available in the United States Treasury to pay late claims pursuant to 28 U.S.C. § 2042, I dissent. The federal government cannot escheat unclaimed property. [1] The majority avoids this by saying that the federal government may have "interim" use of the funds until claimants present themselves, while recognizing that the claimants will never present themselves. As a practical **[**12]** matter, the majority is allowing an escheat, and indeed, the majority refers to its result as an escheat.

[13]** I agree that nonclaiming class members should be allowed an additional year in which to file claims. During that year, any late claimants who can show good cause may, in the discretion of the district court, be paid their share of the settlement fund. After the cut-off date, any remaining funds should be deposited with the United States Treasury. I would hold that at that time, any state that can establish a right to escheat under its law may petition to escheat its share of the fund.

A.

Where a district court's order is a product of a choice among a number of options and reflects a weighing of the equities and an appellate court holds that the district court abused its discretion in making the particular choice that it made, the appropriate course is for the appellate court to remand the case. *See, e.g.,* Ketchum v. Byrne, 740 F.2d 1398, slip op. at 27-28 (7th Cir. 1984) (as amended). Here, the district court was faced with a number of possible choices, and after weighing the equities, held that the fund should be used to establish an antitrust foundation. The majority and I agree that this use was an abuse of discretion. I join in the majority's decision **[**14]**

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[9] All arguments presented by the litigants have been fully considered. Most of them were properly rejected in the opinion below. Those not covered there or in this opinion do not merit discussion.

[1] It may be that the United States may forfeit funds deposited into the Treasury under section 2042 where a statute gives the government a right to assert a beneficial interest or ownership of the funds. *See* United States v. Iovenelli, 403 F.2d 468 (7th Cir. 1968) (government may have right to money used to bribe federal agent, pursuant to 18 U.S.C. § 3612); In re Escheat of Monies Deposited, 187 F.2d 131 (3d Cir. 1951) (same). *See also* United States v. Farrell, 196 U.S. App. D.C. 434, 606 F.2d 1341, 1344-45 & n.7 (D.C. Cir. 1979) (summary of statutory forfeiture). The United States may also assert a reversionary interest in unclaimed funds where such reversion is permitted by statute. *See* 38 U.S.C. § 3202(e) (any funds of deceased veteran derived from federal veterans' benefits paid to decedent that would escheat to state shall escheat to United States). One court has noted that although § 3202(e) uses the term "escheat," the statute actually permits reversion, not escheat. In re Estate of Novotny, 446 F. Supp. 1027, 1031-35 (S.D.N.Y. 1978). Here, there is no statute allowing the federal government to assert a beneficial interest in damages in a private antitrust action.

[*1257] not to remand this case to allow the district court to dispose of the funds only because, in reaching its result, the district court clearly held that nonclaiming class members had the superior equitable right to the funds. *In re Folding Carton Antitrust Litigation, 557 F. Supp. 1091, 1107 (N.D. Ill. 1983)*. The district court thus chose among its options. I do not hold, and I do not understand the majority to hold, that this holding was an abuse of discretion. Thus, I do not preclude, and I do not understand the majority to preclude, a district court in another case from dividing unclaimed funds among claiming class members or allowing the funds to revert to the defendants.

B.

Section 2042 provides in pertinent part:

> In every case in which the right to withdraw money deposited in court . . . has been adjudicated or is not in dispute and such money has remained so deposited for at least five years unclaimed by the person entitled thereto, such court shall cause such money to be deposited in the Treasury in the name and to the credit of the United States. Any claimant entitled to any such money may, on petition to the court and upon notice **[**15]** to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.

The majority holds that under *section 2042*, the money will "escheat" to the United States and remain available to pay late claimants who file. The majority notes that, as a practical matter, the class members who have not yet filed claims probably will never file. Thus, the question becomes what should happen to the money.

The United States government cannot obtain title to the money. *Section 2042* operates only to change the depositary of unclaimed funds; it is not a federal escheat statute. 7 Pt. 2 Moore's Federal Practice para. 67.04 (1984). It does not operate to change the ownership of the funds; even though the money is deposited "in the name and to the credit of" the United States, the United States obtains no beneficial interest in the funds but merely holds the money as trustee for the rightful owners. *See* *United States v. Klein, 303 U.S. 276, 279-80, 82 L. Ed. 840, 58 S. Ct. 536 (1983)*; *Stapleton v. $2,438,110, 454 F.2d 1210, 1214-15* (3d Cir.), *cert. denied*, *409 U.S. 894, 34 L. Ed. 2d 151, 93 S. Ct. 111 (1972)*; **[**16]** *In re Moneys Deposited, 243 F.2d 443, 445 (3d Cir. 1957)*; *United States v. Cochrane, 87 F.2d 3, 4 (5th Cir. 1936)*. Thus, there can be no permanent escheat to the United States. *United States v. Seventeen Thousand, Four Hundred Dollars in Currency, 524 F.2d 1105, 1109 (10th Cir. 1975)* (Doyle, J., dissenting) (deposit under *section 2042* does not act as escheat); *Hodgson v. Wheaton Glass Co., 446 F.2d 527, 535 (3d Cir. 1971)*; *United States v. Iovenelli, 403 F.2d 468, 469 (7th Cir. 1968)*; *see* *Hansen v. United States, 340 F.2d 142 (8th Cir. 1965)*. Moreover, allowing the United States to take title to the money may well be unconstitutional as depriving claimants of property without due process of law. *See* *American Loan & Trust Co. v. Grand Rivers Co., 159 F. 775 (C.C. Ky. 1908)*. [2] Thus, the unclaimed funds at issue here do not, and cannot, become the property of the United States. The remaining funds merely will sit in the United States Treasury. It may be, as the majority states, that an escheat to the federal government would be "appropriate." Regardless of **[**17]** whether such a result is appropriate, it is not authorized by law.

Because some nonclaiming class members will never come forward, and because **[*1258]** they have the superior equitable right to the funds, the task becomes to compensate them as nearly as possible. [3] Nonclaiming class members "are at least the equitable owners of their respective shares in the recovery." *Boeing Co. v. Van Gemert, 444 U.S. 472, 482, 62 L. Ed. 2d 676, 100 S. Ct. 745 (1980)*.

[18]** Traditionally, unclaimed property escheats to the states. *See* *Hodgson v. Wheaton Glass Co., 446 F.2d at 535*. A number of courts have recognized that money deposited under *section 2042* may escheat to the states. *See*

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[2] Prior to the decision in *American Loan & Trust Co.*, the statute did not permit claimants to petition for return of their money. Following the decision, the statute was amended to its present form. *See* Act of March 3, 1911, c. 224, 96 Stat. 1083. Thus, the issue of the constitutionality of a permanent escheat to the United States has not arisen since the 1911 amendment. *See* *In re Moneys Deposited, 243 F.2d 443 (3d Cir. 1957)*.

[3] This is the purpose behind both the fluid recovery and *cy pres* theories. *See* Newberg, Class Actions § 7570 (1977).

id.; see also United States v. Klein, 303 U.S. 276, 58 S. Ct. 536, 82 L. Ed. 840 (1938); Stapleton v. $2,438,110, 454 F.2d at 1214. This is true even where, as here, the unclaimed property is created under federal law. *See* Hodgson v. Wheaton Glass Co., 446 F.2d at 535; In re Moneys Deposited, 243 F.2d 443 at __. I would not preclude the states here from petitioning to escheat the fund. Unlike the federal government, a state government may escheat unclaimed property on behalf of its citizens because the state stands as *parens patriae* as to its citizens. [4] *See* Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. Chi. L. Rev. 448, 453-58 (1972). The state acts to represent those of its citizens who do not collect their unclaimed property.

[19]** The theory of allowing an escheat to the states is that nonclaiming class members will benefit indirectly to the extent that the state uses the fund to benefit all of its citizens. Obviously, this results in an imperfect fit between the class harmed -- the nonclaiming class members -- and the class benefitted -- all citizens. However, awarding the fund to either the defendants or the claiming class members results in an even less perfect fit because it ensures that nonclaiming members will receive no benefit.

Allowing escheat to the states serves the purpose of the ***antitrust law***, class action settlements, and the purpose of the reserve fund at issue here. First, to the extent that ***antitrust law*** serves a deterrence purpose, it is served through any plan not resulting in return of the fund to the defendants. This purpose is not as applicable where, as here, the damages are created pursuant to a settlement agreement in which the defendant admits to no wrongdoing. To the extent that the ***antitrust law*** has a compensatory rationale, escheat serves it by allowing each member of the class some degree of recovery, even if indirect. Second, this court has noted that "the class action **[**20]** . . . is primarily a device to vindicate the rights of individual class members." *In re General Motors Corporation Engine Interchange Litigation, 594 F.2d 1106, 1128 n.33 (7th Cir. 1979)*, *cert. denied*, *444 U.S. 870, 62 L. Ed. 2d 95, 100 S. Ct. 146 (1980)*. Escheat allows the rights of every class member to be vindicated in some sense. Finally, the district court stated that "the reserve fund itself was established for the express purpose of benefitting those class members who might appear and file late claims." *In re Folding Carton Antitrust Litigation, 557 F. Supp. at 1107*. Again, escheat is the best way to ensuring that the reserve fund will be put to an approximation of its intended use. *See generally* Comment, *Damage Distribution, supra* at 453-58.

In this case, the non-claiming class members are citizens of different states. Thus, under a *parens patriae* theory, no one state may escheat the entire fund. I would hold that each state may escheat a portion **[*1259]** according to the rule announced in *Texas v. New Jersey, 379 U.S. 674, 13 L. Ed. 2d 596, 85 S. Ct. 626 (1965)*. In that case, several **[**21]** states invoked the original jurisdiction of the Supreme Court to determine which state was entitled to escheat money belonging to creditors, living in different states, of a corporation. The Court held that the state of each creditor's last-known address should be entitled to escheat the creditor's share. To the extent that a creditor's last-known address is in a state that does not provide for escheat of that property, the state of corporate domicile would be permitted to escheat that portion, subject to the right of the state of the last known address to recover if its law later permitted escheat. *Id. at 680-82*. The Court based its result not on "statutory or constitutional provisions or . . . past decisions nor . . . logic . . . [but rather] ease of administration and of equity. . . . We believe that the rule we adopt is the fairest, is easy to apply, and in the long run will be the most generally acceptable to all the States." *Id. at 683*.

Applying the rule to the facts of this case, and guided by the principles of "ease of administration and of equity" behind the rule, I would allow each state to escheat that portion of the fund that represents **[**22]** its share of the number of nonclaiming class members whose last address is within its state as compared to the total number of nonfiling claimants. A list of all such addresses was compiled when the notices of the settlement were sent out to all

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[4] The theory of the state as *parens patriae* is used in the antitrust class action context in three distinct senses. First, it refers to the traditional power of the state to protect those of its citizens who cannot protect themselves, by collecting their unclaimed property. Second, it refers to attempts by states to extend their traditional power and sue on behalf of their citizens allegedly injured. Third, it refers to attempts by states to sue for alleged injury to the general economy of the state itself. In this case, I refer to *parens patriae* only in its first sense.

class members. To the extent that a state's law does not permit escheat of the property, the money will remain in the Treasury, subject to escheat should the state change its law. [5]

[5] Some states have a provision in their escheat statute permitting the owner of the property to reclaim the property after escheat. *See* Uniform Disposition of Unclaimed Property Act § 19; *see, e.g.*, Ill. Rev. Stat. ch. 141, § 119.

Summers v. Federal Deposit Ins. Corp.

United States District Court for the Western District of Oklahoma

September 5, 1984

No. CIV-83-1524-E

Reporter

592 F. Supp. 1240 *; 1984 U.S. Dist. LEXIS 23880 **

Thomas E. SUMMERS, Jr., Plaintiff, v. FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver of Penn Square Bank, N.A., Richland Resources Corporation, Don D. Tapper, The Chase Manhattan Bank, N.A., Commerce Bank, an Oklahoma banking corporation, and Continental Illinois National Bank and Trust Company of Chicago, Defendants

Core Terms

treble damages, anti trust law, receiver, damages, statutory construction, Clayton Act, deceased's estate, punitive damages, double damages, injured person, state law, disproportionate, compensatory, provisions, Racketeer, survive, courts, cases

LexisNexis® Headnotes

Banking Law > Regulators > US Federal Deposit Insurance Corporation > Enforcement Powers

Civil Procedure > Remedies > Damages > Punitive Damages

Banking Law > ... > National Banks > Insolvencies, Liquidations & Rehabilitations > General Overview

HN1[] **US Federal Deposit Insurance Corporation, Enforcement Powers**

Punitive damages, permissible under state law, cannot be assessed against the Federal Deposit Insurance Corporation as receiver of a failed bank.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

HN2[] **Remedies, Damages**

Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO), codified at *18 U.S.C.S. § 1964(c)* provides in pertinent part that: any person injured in his business or property by reason of a violation of *§ 1962* of Rico shall recover threefold the damages he sustains. *18 U.S.C.S. § 1964(c)*.

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

HN3[] **Remedies, Damages**

Treble damages under § 4 of the Clayton Act, codified at *15 U.S.C.S. § 15* are penal in character and should not be assessed against the estate of a deceased malefactor.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

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

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

HN4[] **Remedies, Damages**

The test of whether treble damages are penal has three parts: one, whether the purpose of the statute is to redress individual or public wrongs; two, whether recovery under the statute runs to the injured individual, or to the public; and three, whether the authorized recovery is wholly disproportionate to the harm suffered. In promulgating the Racketeer Influenced and Corrupt Organizations Act (RICO), Congress expressly finds that the problem of racketeering is primarily public, not private, including draining resources from the economy, subverting the democratic process, and undermining the general welfare. Second, a treble damage award under RICO runs to a person injured in his business or property by reason of a violation of *§ 1962* of RICO, codified at *18 U.S.C. § 1962*. Third, treble damages under RICO are wholly disproportionate to the injury, just as in the Clayton Act.

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Judges: Eubanks, Chief Judge.

Opinion by: EUBANKS

Opinion

[*1241] OPINION AND ORDER

EUBANKS, Chief Judge.

Before the Court is the motion of the defendant Federal Deposit Insurance Corporation ["FDIC"], as receiver of the defunct Penn Square Bank, N.A., to strike the plaintiff's claim for treble damages under the Racketeer Influenced and Corrupt Organizations Act ["RICO"], *18 U.S.C. § 1964(c) (1982)*. Pursuant to the Court's order of July 9, 1984, the parties **[**2]** have submitted supplemental briefs and the motion is now at issue. For the reasons stated below, the motion is granted.

This Court has previously ruled that ***HN1***[] punitive damages, permissible under state law, cannot be assessed against the FDIC as receiver of a failed bank. *E.g., Professional Asset Management, Inc. v. Penn Square Bank, N.A., 566 F. Supp. 134 (W.D. Okla.1983)*. However, the allowability of treble damages under RICO against the FDIC is a question of first impression.

This is, fundamentally, a question of statutory construction. The resolution of that question must begin with the statute itself. *E.g., United States v. Turkette, 452 U.S. 576, 580, 101 S. Ct. 2524, 2527, 69 L. Ed. 2d 246 (1981)*. ***HN2***[] *Section 1964(c)* of RICO provides: "Any person injured in his business or property by reason of a violation of *section 1962* of this chapter . . . shall recover threefold the damages he sustains . . ." *18 U.S.C. § 1964(c)*.

[*1242] Although Congress used the verb "shall" in *Section 1964(c)*, it is not necessarily mandatory. *See* 2A C. Sands, *Sutherland on Statutory Construction* § 57.03 (1973). The treble damages provision of *Section 1964(c)* is drawn from federal ***antitrust* [**3] *law***, [1] specifically Section 4 of the Clayton Act, *15 U.S.C. § 15 (1982)*. [2] *See, e.g.*, 115 Cong.Rec. 9567 (1969) (statement of Sen. McClellan). Early cases construing the nearly identical language in the Clayton Act implied that a treble damages action survived the death of a defendant-violator, but did not so hold. *Barnes Coal Corp. v. Retail Coal Merchants Ass'n, 128 F.2d 645, 649 (4th Cir.1942)*; *Hicks v. Bekins Moving & Storage Co., 87 F.2d 583, 585 (9th Cir.1937)*; *Moore v. Backus, 78 F.2d 571, 575-76 (7th Cir.1935)*, *cert. denied*, *296 U.S. 640, 56 S. Ct. 173, 80 L. Ed. 455 (1935)*. *See* American Bar Association Section of ***Antitrust Law***, *Antitrust Developments 1955-1968* 305 & n. 37 (1968); A. Stickells, *Federal Control of Business -- Antitrust Laws* § 188 at 712 (1972). However, courts that have confronted the issue directly have held that such actions survive only for actual, not treble, damages. *Rogers v. Douglas Tobacco Board of Trade, 244 F.2d 471, 483 (5th Cir.1957)*; *RSE, Inc. v. H & M, Inc., 90 F.R.D. 185 (M.D.Pa.1981)*; *Shires v. Magnavox Co., 432 F. Supp. 231, 235 (E.D.Tenn.1976)*; *Vandervelde v. Put & Call Brokers & Dealers Ass'n* ***[**4]*** *, 344 F. Supp. 118, 156-57 (S.D.N.Y. 1972)*; *Haskell v. Perkins, 28 F.2d 222, 224 (D.N.J.1928)*, *rev'd on other grounds*, *31 F.2d 53 (3d Cir.1929)*, *cert. denied*, *279 U.S. 872, 49 S. Ct. 513, 73 L. Ed. 1007 (1929)*. *See* American Bar Association Section of ***Antitrust Law***, ***Antitrust Law*** *Developments (Second)* 483 (1984). The rationale on which these decisions are based is that ***HN3***[] treble damages under Section 4 are penal in character and should not be assessed against the estate of a deceased malefactor. *E.g., Rogers, supra, 244 F.2d at 483*.

[5]** This rationale is compelling and applies with equal or greater force to RICO treble damages against the FDIC as receiver. ***HN4***[] The test of whether treble damages are penal has three parts: one, whether the purpose of the statute is to redress individual or public wrongs; two, whether recovery under the statute runs to the injured individual, or to the public; and three, whether the authorized recovery is wholly disproportionate to the harm suffered. *Murphy v. Household Finance Corp., 560 F.2d 206, 209 (6th Cir.1977)* (stating the test and collecting the cases). First, in promulgating RICO, Congress expressly found that the problem of racketeering was primarily public, not private, including draining resources from the economy, subverting the democratic process, and

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[1] It does not follow from this that Congress intended to import all of the peculiar rules of ***antitrust law*** into RICO, *see, e.g., In re Longhorn Securities Litigation, 573 F. Supp. 255, 270 (W.D. Okla.1983)*. Indeed, RICO's legislative history makes this quite clear. *E.g.*, 115 Cong.Rec. 9567 (1969) (statement of Sen. McClellan).

[2] Section 4 provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained . . ." *15 U.S.C. § 15*.

undermining the general welfare. 84 Stat. 922-23 (1970) (findings and purpose of the Organized Crime Control Act of 1979, title IX of which is RICO). Second, a treble damage award under RICO runs to a "person injured in his business or property by reason of a violation of Section 1962 . . ." 18 U.S.C. § 1964(c). Third, treble damages under RICO are wholly disproportionate to the injury, just as in the Clayton Act. *See* **[**6]** 3 C. Sands, *Sutherland on Statutory Construction* § 59.02 at 4 (1974). *Cf.* Rogers, supra, 244 F.2d at 483-84. *But cf.* United States v. Bornstein, 423 U.S. 303, 313-17, 96 S. Ct. 523, 529-32, 46 L. Ed. 2d 514 (1976) (False Claim Act's double damages provision is compensatory, to make the government whole for "costs delays, and inconveniences occasioned by fraudulent claims"); Murphy, supra, 560 F.2d at 209-11 (Truth in Lending Act's double damages provision is compensatory; doubling merely provides for liquidated damages).

[*1243] Though one of the three elements of the test indicates that treble damages RICO are remedial, it appears on balance that they are in fact penal. It would be plainly unjust to permit such an award against the receiver, for innocent depositors and creditors alone would be punished, not the putative wrongdoer, the bank. *Cf.* Bowles v. Farmers National Bank of Lebanon, Kentucky, 147 F.2d 425, 428-30 (6th Cir.1945) (treble damages under the Emergency Price Control Act of 1942); Professional Asset Management, supra, 566 F. Supp. at 137 (punitive damages under state law).

There is one, rather analogous case to the contrary, but the **[**7]** court declines to follow it in the case at bar. State Farm Fire and Casualty Co. v Estate of Caton, 540 F. Supp. 673 (N.D.Ind.1982). In *Caton*, the court held as a matter of law that treble damages under RICO could be assessed against the estate of a deceased individual. Initially, because the case involved an individual, and not a national bank, it is inapposite. [3] Secondly, as a decision of another district court, it is not binding.

Finally, *Caton* is not even very persuasive. Although the court employed the proper test of whether treble damages under RICO are penal or remedial, id. at 681, its analysis is unsound. Congress did not explicitly denominate RICO's treble damages as remedial. It did provide that RICO as a whole "shall be liberally construed to effectuate its remedial purposes." 84 Stat. 947; 18 U.S.C. § 1961 note (liberal **[**8]** construction of provisions). But this does not necessarily imply that the statute is wholly remedial; rather, it simply directs the courts not to apply the traditional rule of strict construction in penal statutes. *See* 3 C. Sands, *supra*, § 59.07.

Furthermore, the *Caton* court's reliance on United States v. Cappetto, 502 F.2d 1351 (7th Cir.1974), *cert. denied*, *420 U.S. 925, 95 S. Ct. 1121, 43 L. Ed. 2d 395 (1975)*, is misplaced as the premise from which to conclude that treble damages under Section 1964(c) are remedial. In *Cappetto*, the Seventh Circuit was considering a governmental injunction action under Section 1964(a) and (b), not a private action for treble damages under 1964(c). 502 F.2d at 1354-55. RICO cannot fairly be characterized *in toto* as either penal or remedial; instead, it must be analyzed *seriatim*. Certain provisions of RICO are clearly penal, 18 U.S.C. §§ 1963(a), (c), and others are remedial, 18 U.S.C. § 1964(a), (b). Its treble damages provision is not so plain, but the Court here concludes that it is essentially penal.

Accordingly, the FDIC's motion to strike the plaintiff's prayer for treble damages on his RICO claim should be **[**9]** and hereby is granted. If the plaintiff prevails on that claim against the FDIC, then he is legally entitled only to actual damages.

End of Document

[3] There is a strong argument that supports the court's decision in *Caton*, based on the facts. *See* id. at 682. However, it simply does not apply here.

D & R Distributing Co. v. Chambers Corp.

United States District Court for the Eastern District of California

September 6, 1984

No. CV F 80-297-EDP

Reporter

608 F. Supp. 1290 *; 1984 U.S. Dist. LEXIS 23808 **; 1984-2 Trade Cas. (CCH) P66,194

D & R DISTRIBUTING CO., INC., Plaintiff, v. CHAMBERS CORPORATION, AMANA REFRIGERATION, INC., R & K DISTRIBUTORS, INC., RANGAIRE CORPORATION, Defendants

Core Terms

distributor, products, manufacturer, Sherman Act, prices, summary judgment motion, appliances, alleges, summary judgment, antitrust, group boycott, conspiracy, brand, competitors, termination, ovens, price fixing, recommendations, damages, anti trust law, anticompetitive, Wholesale, household, cooking, relevant market, differentials, antitrust violation, amended complaint, rule of reason, distributorship

LexisNexis® Headnotes

Torts > ... > Prospective Advantage > Intentional Interference > Defenses

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

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

HN1[] **Intentional Interference, Defenses**

The tort of interference with prospective advantage consists of intentional and improper methods of diverting or taking business from another which are not within the privilege of fair competition. There are five essential components to the tort: an economic relationship containing the probability of future economic benefits accruing to the plaintiffs, defendant's knowledge of the existence of that relationship, defendant's intentional commission of acts designed to disrupt the relationship, actual disruption thereof and damages proximately caused thereby.

Contracts Law > Breach > General Overview

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

Torts > ... > Commercial Interference > Contracts > General Overview

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

Torts > ... > Prospective Advantage > Intentional Interference > Defenses

HN2[] Contracts Law, Breach

In the case of interference with a contract, it is well established that a person is not justified in inducing a breach of contract simply because he is in competition with one of the parties to the contract and seeks to further his own economic advantage at the expense of the other. On the other hand, with the tort of prospective advantage (where inducing a breach of contract is not involved) the law recognizes a more extensive privilege to interfere for the sake of competition.

Civil Procedure > Judgments > Summary Judgment > Evidentiary Considerations

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

HN3[] Summary Judgment, Evidentiary Considerations

It is clear that a movant for summary judgment may discharge its burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for the plaintiff.

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

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

A unilateral refusal to deal may violate the Sherman Act, *15 U.S.C.S. § 1 et seq.*, if it is accompanied by anti-competitive acts or purpose. Such a refusal may constitute an unreasonable restraint of trade even if it is justified by legitimate business reasons.

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

HN5[] Monopolies & Monopolization, Attempts to Monopolize

The elements required to establish a claim of attempt to monopolize in the Ninth Circuit have been variously stated, but generally plaintiff must show: specific intent to destroy competition, predatory conduct directed to accomplishing that purpose, and dangerous probability of success.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Covenants not to Compete

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

HN6[] **Distributorships & Franchises, Antitrust Issues**

It has been consistently held in the Ninth Circuit that it is not a violation of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, for a manufacturer to conspire with others to simply switch distributors at one of its exclusive franchises and to cease doing business with the former dealer. That the termination of dealings may affect the entity refused is immaterial when the refusal is for business reasons which are sufficient to the manufacturer in the absence of any arrangement restraining trade.

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

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

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN7[] **Sherman Act, Claims**

There are three necessary elements of an attempt to monopolize claim. The first is the presence of a specific intent to destroy competition or build a monopoly. Such an intent may be shown or inferred by the commission of a Sherman Act *§1* violation, *15 U.S.C.S. § 1*. Alternately, such intent may be shown through proof of the specific intent to set prices or exclude competition in a portion of the market without legitimate business purpose. Second, the specific intent must be accompanied by either predatory or anticompetitive conduct or a substantial claim of restraint of trade directed to accomplishing the unlawful purpose, or sufficient market power to accomplish the unlawful purpose. Third, there must be causal antitrust injury. Unilateral refusals to deal, in conjunction with these requisite elements, have been held to constitute an attempt to monopolize in violation of *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*.

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

Evidence > Burdens of Proof > Ultimate Burden of Persuasion

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

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

HN8[] **Summary Judgment, Opposing Materials**

On a motion for summary judgment by a defendant on the ground that plaintiff has no valid claim, the defendant, as the moving party, has the burden of producing evidence, of the necessary certitude, which negatives the opposing party's claim, regardless of where the ultimate burden of proof would lie at trial.

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 > Remedies > General Overview

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

HN9[] **Robinson-Patman Act, Claims**

A private treble damage plaintiff must make some showing of actual injury attributable to a violation of the Robinson-Patman Act.

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

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

HN10[] **Private Actions, Standing**

Standing is a question of law to be decided by the court.

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

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

HN11[] **Private Actions, Standing**

The Ninth Circuit has established the "target area" formula for determining standing. Under this doctrine, one who is only incidentally injured by a violation of the antitrust laws, "the bystander who was hit but not aimed at," cannot recover against the violator.

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

HN12[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A group boycott is a restraint which generally is the means used for effectuating a concerted refusal to deal. An essential element to a group boycott claim is concerted action.

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

Antitrust & Trade Law > Sherman Act > General Overview

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

Generally, the mere compilation and dissemination of pricing information among competitors does not constitute a per se violation of the Sherman Act, *15 U.S.C.S. § 1 et seq.* However, an exchange of price information coupled with a restriction of output or otherwise specific actions designed to achieve a uniformity of prices among competitors would constitute a per se violation of the Sherman Act, *15 U.S.C.S. § 1 et seq.*

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

HN14[] **Regulated Practices, Price Fixing & Restraints of Trade**

Where illegal price fixing results in an artificially high price, those who pay the fixed price may recover the difference between the fixed price and the price which would otherwise have prevailed absent the illegal price fixing. And, although determining what the price would have been absent a conspiracy may require some speculation, a wrongdoer should not be permitted to invoke the uncertainty created by his own wrong and use it to preclude a plaintiff's recovery.

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

Torts > Business Torts > General Overview

HN15[] **Private Actions, Remedies**

Recovery of lost profits is measured in any of three ways: The "before and after" method, the "yardstick method," or the "sales projection" method. The "before and after" method compares two periods of time in the antitrust claimant's business -- the period during which his business suffered from the antitrust violations, and a previous or subsequent period free from the effect of the antitrust violations. Specifically, the claimant is awarded the difference between, his net profits during a period either before the antitrust violations began or after they had ceased and their effects had ended, and his net profits during the period of the antitrust violations. The period used for comparison with the damage period must be a fair measure of the claimant's profits. The Ninth Circuit has held that the before and after method of measuring damages may be used only where there has been some showing that the market conditions in the two periods were similar but for the impact of the violation.

Counsel: [1]** James Duryea, Jr., Esq., San Francisco, California, for Plaintiff.

For the Defendants Chambers Corp. and Rangaire Corp., James K. Barnum, Esq., Stammer, McKnight, Barnum & Bailey, Fresno, California, Max L. Gillam, Latham & Watkins, Los Angeles, California, Robert W. Jordan, Baker & Botts, Dallas, Texas, for the Defendant R & K Distributors, Inc.

Severson, Werson, Berke & Melchoir, San Francisco, California, Rain, Harrell, Emery, Young, Doake, Dallas, Texas, for Defendants.

Judges: Price, District Judge

Opinion by: PRICE

Opinion

[*1293] MEMORANDUM DECISION AND ORDER

The parties to this action filed multiple motions before the Magistrate, as follows:

1. The motion of defendant R & K Distributors for summary judgment. Timely objections to the Magistrate's recommendation were filed. The Court reviews this motion *de novo*.

2. Plaintiff's motion for summary judgment on its price fixing claim. The Magistrate's recommendation was objected to; hence, the Court reviews *de novo*.

3. Defendant Chambers' motion for summary judgment on plaintiff's antitrust claims. Timely objections were filed to the Magistrate's recommendations; hence, the Court reviews the matter *de novo*.

4. **[**2]** Defendant Amana's motion for summary judgment on plaintiff's antitrust claim. Timely objections to the Magistrate's recommendations were filed. The Court reviews the matter *de novo*.

5. Defendant Chambers' motion for summary judgment on plaintiff's pendent state causes of action. Neither the plaintiff nor the defendants filed timely objections to the Magistrate's recommendations. The Court reviews the Magistrate's recommendations under the clearly erroneous standard. [1]

The Magistrate, although hearing the motions at different times, filed the majority of his recommendations simultaneously. Each motion was addressed separately, although there is a demonstrable relationship among the motions.

I

PLAINTIFF'S COMPLAINT

Plaintiff's complaint alleges the following facts which do not appear to be contested:

D & R Distributing (hereinafter D & R) is a California corporation engaged in the wholesale distribution of major kitchen household appliances. **[**3]** It also owns and operates retail appliance stores in Modesto and Fresno. From an unspecified date in 1954, and continuing until October 1, 1980, **[*1294]** Chambers Corporation (hereinafter Chambers) a Delaware corporation, and a wholly owned subsidiary of Rangaire Corporation (hereinafter Rangeaire) sold Chambers brand household cooking appliances pursuant to an agreement that was at least partially in writing, and contained a standard form "Franchise Agreement." The complete terms of this agreement are the subject of one of the pending motions.

Prior to the 1973 agreement, D & R had been Chambers' exclusive distributor for Stanislaus, Merced, Fresno, Madera, Kern, Kings and Tulare Counties (the San Joaquin Valley). The 1973 agreement expanded D & R to the whole of Northern California.

The 1973 agreement was terminated October 1, 1980, by Chambers.

Amana Refrigeration (hereinafter Amana), an Iowa corporation, sells Amana brand household and refrigeration appliances nationwide.

R & K Distributors (hereinafter R & K), is a California corporation, which distributes, on a wholesale level, built-in appliance products of various manufacture, including those of Chambers, Rangaire Corporation **[**4]** (hereinafter

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[1] See *Gonzales v. Harris, 514 F. Supp. 991 (E.D. Cal. 1981)*.

Rangeaire), a Texas corporation. Rangaire is a building contractor, produces and sells limestone and lime products, and owns all of Chambers' stock. It is not clear from the First Amended Complaint whether Rangaire manufactures and sells appliances independent of its ownership of Chambers.

We turn to the motions.

II

THE MOTIONS OF R & K FOR SUMMARY JUDGMENT [2]

The motions of R & K can be properly considered independently of the other motions before the Court.

As pointed out above, the distributorship arrangement between D & R and Chambers was terminated by Chambers on October 1, 1980. R & K is accused by D & R with legal responsibility for this event.

Plaintiff now seeks damage from R & K **[**5]** on account of this termination on the grounds of antitrust violations and a pendent state tort claim.

First, plaintiff claims that its distributorship was terminated by Chambers in violation of the Sherman Antitrust Act "pursuant to and in furtherance of a combination and conspiracy between defendant Chambers Corporation and defendant R & K to unreasonably restrain and unlawfully tie the sale of Chambers brand products with complimentary dominant cooking appliance products, including Jenn-Air and KitchenAid, and pursuant to a combination and scheme to engage in a discriminatory pricing system."

As to the pendent state claim, plaintiff claims that R & K interfered with plaintiff's "prospective economic advantages" under its distributorship agreement with Chambers Corporation by making misrepresentation about the capabilities and intentions of R & K as a prospective distributor of Chambers' products, which induced Chambers Corporation to terminate plaintiff's distributorship.

R & K's presentation has refuted plaintiff's allegations and all reasonable inferences that might be drawn therefrom. When pressed, at deposition or through other discovery devices, for the production of evidence **[**6]** to support these allegations, plaintiff's officers and witnesses have conceded that none exist, save and except an in-house memoranda developed by defendant Chambers' personnel, and distributed only among Chambers' personnel. Presumably, this memorandum was the principal source of information relied upon by the Chambers' executives to choose R & K as the successor distributor to plaintiff. Assuming, without deciding, that such document **[*1295]** would be admissible against R & K under one of the many exceptions to the hearsay rule, we analyze that document to determine its probative effect on the issues tendered by R & K's motion.

Advantages Of Having R & K As Chambers Distributor:

1. Strong position as true distributor of premium priced products -- KitchenAid and Jenn-Air.
2. Excellent financial position requiring no factory assistance in warehousing inventory.
3. Strong professional sales force, 11 field salesmen and 50 demonstrators. Experienced management.
4. Over 300 established dealers, long term and loyal.
5. Nationally recognized prestigious distributor who would influence other desirable distributors we would like, such as:

    REMCO-Federated - Chicago **[**7]** and Davenport
    W. D. Alexander - Atlanta
    Dean Distributor - Portland
    Domestic Supply - Seattle

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[2] R & K's original motion was entitled "Motion to Dismiss Amended Complaint." It is based on *Fed.R. Civ. P. 12(b)(2)*, *(6)*. It should be noted that R & K was named in the First Amended Complaint for the first time. R & K's original motion was denied. R & K then filed the instant motion for summary judgment.

Elm Distributors - Denver
Jack Riggs is committed to using his considerable influence to help Chambers secure powerful distributors throughout USA.
6. R & K is committed to opening branch operations in Sacramento and Fresno.
7. R & K is largest Jenn-Air distributor in country and is on record as being committed to Chambers regardless of future moves by Jenn-Air.
8. Experience in selling premium priced cooking equipment, having been large Corning distributor before merger with Amana.
9. Highly professional in their relationship with dealers as shown in exhibits, i.e., franchise agreements, etc.
10. Very promotional with in-house capability. This proposal represents the very best opportunity to improve our market position to date. We suggest a meeting with the R & K organization in San Francisco between our top management and R & K, at the earliest possible date. R & K is prepared to begin as a full operating distributor on October 1, 1980."

Plaintiff first argues that this document supports the inference that R & K made false and fraudulent misrepresentations to Chambers' officials. **[**8]** He points to paragraph 3 concerning the available R & K personnel. As previously indicated, the record indicates clearly that the contents of paragraph 3, as well as other reference R & K's capabilities, represents the interpretation of the Chambers' employees who prepared the memorandum rather than reflecting statements by R & K officers and other employees.

However, for this analysis, even if we assumed that plaintiff's arguments are correct, and further that R & K officers and employees made such statements, would this create a triable issue of fact which would entitle the plaintiff to go to trial?

It is the Court's view that the antitrust elements of this case are controlled by *A. H. Cox & Co. v. Star Machinery Co., 653 F.2d 1302 (9th Cir. 1981)*. There, as here, plaintiff Cox was displaced by defendant distributor Star as the exclusive distributor for truck cranes in the Seattle area which were manufactured by the defendant R & K Products. There, as here, plaintiff sued the replacement distributor as well as the manufacturer, who had replaced plaintiff, on antitrust grounds.

In affirming defendant's motion for summary judgment, the circuit court stated:

> . . . The **[**9]** economic impact resulting from a change in distributors is not altered merely because the dealer initiated contact or actively sought the change, provided the manufacturer ultimately makes the decision based on its independent business judgement. Appellant has advanced no evidence of dealer coercion here, and therefore the attempt to cast this arrangement in horizontal terms must fail.
>
> **[*1296]** Under the foregoing principles, appellant cannot prevail because it has failed to adduce any evidence of anticompetitive effect or intent which would distinguish this dealer substitution case from the myriad of decisions upholding changes in distributors. That one distributor will be hurt when another succeeds in taking its line will be axiomatic in some markets, as it was here, but the intent to cause that result is not itself prohibited by the antitrust laws. The intent proscribed by the antitrust laws lies in the purpose to harm competition in the relevant market, not to harm a particular competitor.

A.H. Cox & Co. v. Star Machinery Co., supra, at 1307.

To the Court's mind, these principles are determinative of the instant case. Accordingly, it is the decision of the Court **[**10]** to follow the Magistrate's recommendation and to grant R & K's motion for summary judgment on the antitrust theory.

The Magistrate, in his recommendation, did not address the plaintiff's alternate state theory of tortious interference with a prospective economic advantage. Accordingly, the Court considers this theory of recovery *de novo*, reviewing the mass of supporting and opposing material proffered by the parties.

HN1[] The tort of interference with prospective advantage consists of intentional and improper methods of diverting or taking business from another which are not within the privilege of fair competition. 4 Witkin, Summary of California Law (8th Ed. 1974) § 392 at p. 2643. There are five essential components to the tort: (1) an economic relationship containing the probability of future economic benefits accruing to the plaintiffs, (2) defendant's knowledge of the existence of that relationship, (3) defendant's intentional commission of acts designed to disrupt the relationship, (4) actual disruption thereof and (5) damages proximately caused thereby. *Olivet v. Frischling (1980) 104 Cal. App. 3d 831, 837, 164 Cal. Rptr. 87*.

The critical issue in this tort is whether **[**11]** the interference was justified. In determining this question we must observe an important distinction between interference with a contract and interference with relationships which can be disturbed without a breach of contract. *HN2*[] In the case of interference with a contract, it is well established that a person is not justified in inducing a breach of contract simply because he is in competition with one of the parties to the contract and seeks to further his own economic advantage at the expense of the other. *See Olivet v. Frischling, id*., n.1. On the other hand, with the tort of prospective advantage (where inducing a breach of contract is not involved) the law recognizes a more extensive privilege to interfere for the sake of competition. *Shida v. Japan Food Corp. (1967) 251 Cal. App. 2d 864, 866, 60 Cal. Rptr. 43*.

Plaintiff and defendant agree that liability in this case turns on whether or not the defendant R & K engaged in "improper means" to persuade Chambers to switch to R & K as the distributor. *See Shida v. Japan Food Corp., id*. The use of improper means of persuasion, *i.e*., fraudulent misrepresentations, would obviate any privilege of fair competition.

In **[**12]** support of its summary judgment motion, defendant introduced deposition testimony that the Chambers Marketing Plan for Northern California was prepared by Mr. Adams and Mr. Pruitt of Chambers, and more importantly, testimony of these two gentlemen that the representations alleged to have been made by defendant R & K were in fact never made. Mr. Adams and Mr. Pruitt testified that the statements which form the basis of plaintiff's allegations against R & K were due to a poor choice of words on the part of Chambers and the statements contained in them, attributable to R & K, were, in fact, never made.

Defendant R & K also submitted deposition testimony of Mr. J. Riggs that he never made any statement to Chambers regarding using his influence to help Chambers secure powerful distributors. **[*1297]** (Depo. J. Riggs, Vol. II, 164:24-28.) However, as to the other representations, Mr. Riggs testified that he does not recall whether or not he made such representations to Chambers. (Depo. of J. Riggs, Vol. II 163:15-16, 25.)

Plaintiff contends that defendant has not met its summary judgment burden in that it has not submitted any evidence of its motive or purpose in wooing Chambers. However, *HN3*[] **[**13]** it is clear that the movant may discharge its burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for the plaintiff, *Doff v. Brunswick Corp., 372 F.2d 801, 805 (9th Cir. 1967)*.

The critical deficiency in plaintiff's case on the pendent state cause of action is its lack of any evidence that the defendants committed any acts which were not justified under the general principles of competition. On the basis of the facts developed by the respective parties in support and in opposition to R & K's motion for summary judgment, the case is similar to *Shida v. Japan Food Corp, supra.* There, as here, an exclusive distributorship for a food item was granted to the plaintiff by the manufacturer, said distributorship specifically to be renewable on an annual basis. During the seven successive renewals, plaintiff increased its production by approximately 400 percent. At the behest of defendant, plaintiff's manufacturer did not renew its contract with the plaintiff. In reversing the bench judgment for the plaintiff, the appellate court stated:

> In the case at bench it appears from the findings of the trial court that the award **[**14]** of damages rests exclusively upon the assumption that it was an actionable wrong to induce Waimanalo Ko-Ko Company not to renew its agreement with plaintiff. There is no finding that defendant used any improper means to persuade Waimanalo, or that any illegal restraint of competition was created, or that defendant had any purpose beyond the obvious objective of advancing its own interest as a competitor.

Shida v. Japan Food Corp., supra, at 867.

It should be noted that the instant motions for summary judgment are before the Court only after extensive discovery has been undertaken. This is not a case wherein the plaintiff has not had ample opportunity to probe all of the hidden recesses of its corporate opponents in order to discover evidence from which inferences favorable to its position might be drawn. It is not been able to develop even a scintilla of such evidence. [3]

[15]** With the antitrust claims against R & K removed from the action, an alternate ground for granting R & K judgment on the pendent state claims is lack of jurisdiction in this Court, once the federal claims are gone. We have two California corporations proceeding against each other on a state cause of action which is not so interwoven with the remaining issues to cause the Court to retain its discretionary jurisdiction.

III

CHAMBERS AND RANGAIRE'S MOTION FOR SUMMARY JUDGMENT

A. *Plaintiff's Claims Based Upon Defendants' "Refusal to Deal*" [4]

Paragraphs 22 and 22A are the basis of plaintiff's allegations in this regard. They read:

> "In August, 1980, defendant Chambers Corporation refused to deal and terminated plaintiff as the exclusive direct purchaser and primary distributor of Chambers brand products in Northern California and Western Nevada pursuant to and in furtherance of a combination and conspiracy between defendant Chambers Corporation **[**16]** and defendant R & K Distributors, Inc. to unreasonably restrain and unlawfully tie the sale of Chambers brand products with complimentary dominant cooking appliance products, including **[*1298]** Jenn-Air and Kitchen Aid, and pursuant to a combination and scheme to engage in a discriminatory pricing system. Said combination and conspiracy violates Section 1 and 2 of the Sherman Act, 15 U.S.C. 1,2." (Paragraph 22)
>
> "On or about August 15, 1981, defendant Chambers Corporation refused to deal with, and terminated plaintiff as the exclusive factory distributor in Northern California and Western Nevada for Chambers brand products. Said refusal to deal and termination was accompanied by anticompetitive intent. Said refusal to deal and termination produced anticompetitive effects. Said refusal to deal violates Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2." (Paragraph 22A)

The moving defendants invite us to assume the truth of these allegations and to grant their motion as a matter of law.

The defendant then cites the usual compilation of distributorship cases to buttress its position. The plaintiff, on the other hand, cites cases that have at their nexus strong evidence **[**17]** of price fixing [Lessig v. Tidewater Oil Co. 327 F.2d 459 (9th Cir. 1964)], refusal to deal as formerly after acquisition of a competitor [California Steel and Tube v. Kaiser Steel Corp., 650 F.2d 1001 (9th Cir. 1981)], where the evidence established an anti-competitive effect or purpose [Fount-Wip, Inc. v. Reddi-Wip, 568 F.2d 1296 (9th Cir. 1978), and Program Engineering v. Triangle Publication, 634 F.2d 1188 (9th Cir. 1981)]. Thus, the plaintiff does not meet defendants' legal contentions that Chambers' unilateral refusal to deal with D & R, without more, does not state a claim under the Sherman Act. [5]

B. *Plaintiff's Allegation That Chambers' Refusal to Deal was Accompanied by "Anti-Competitive Intent" and Produced "Anti-Competitive Effects*." (Paragraph 22A, Plaintiff's Amended Complaint.

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[3] See the Court's comments concerning the Chambers in-house memorandum, *supra*, which analysis is equally relevant here.

[4] The Court adopts a "compartmentalized" approach to this motion.

[5] We have already dealt with the claim of conspiracy between Chambers and R & K. (See part I, *supra*.)

Sierra Wine and Liquor v. Heublein, Inc., 626 F.2d 129, 133 (9th Cir. 1981), states **[**18]** the rule to be:

> "Nor is United liable for violation of Sherman § 1. A manufacturer which switches distributorships violates antitrust laws only if 'the refusal to deal, manifested by a combination or conspiracy, is so anticompetitive, in purpose or effect, or both, as to be an unreasonable restraint of trade.' *Alpha Distrib. Co. of Cal., Inc. v. Jack Daniels Distillery*, 454 F.2d at 452. *See* Mutual Fund Investors v. Putnam Management Co., 553 F.2d 620 (9th Cir. 1977); *Joseph E.* Seagram & Co., Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 77-78 (9th Cir. 1969), *cert. denied*, *396 U. S. 1062, 90 S. Ct. 752, 24 L.Ed2d 755 (1970)*. Again, 'combination or conspiracy ' is a necessary condition of liability, and the district court was correct in finding, on the facts before it, that there was neither."

On the other hand, California Steel and Tube v. Kaiser Steel Corp., supra, at 1003-1004, teaches that:

> **HN4**[] "A unilateral refusal to deal may violate the Sherman Act if it is accompanied by anti-competitive acts or purpose. Times-Picayune v. United States, 345 U.S. 594, 625, 73 S. Ct. 872, 889, 97 L. Ed. 1277 (1953). Such a refusal may constitute an **[**19]** unreasonable restraint of trade even if it is justified by legitimate business reasons. Program Engineering, Inc. v. Triangle Publications, Inc., 634 F.2d 1188, 1195 (9th Cir. 1980)."

And again:

> **HN5**[] "The elements required to establish a claim of attempt to monopolize in this circuit have been variously stated, but generally plaintiff must show: (1) specific intent to destroy competition, (2) predatory conduct directed to accomplishing that purpose, and (3) dangerous probability of success. Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 853 (9th Cir. 1977), *cert. denied*, *439 U.S. 829, 99 S. Ct. 103, 58 L. Ed. 2d 122 (1978)*; **[*1299]** Hallmark Industry v. Reynolds Metals Co., 489 U.S. 8 (9th Cir. 1973), *cert. denied*, *417 U.S. 932, 94 S. Ct. 2643, 41 L. Ed. 2d 235 (1974)*. These elements need not be established independently.

The Court agrees with the defendants' statement of the law. It is clearly the law of the Circuit that:

> **HN6**[] " 'It has been consistently held in this circuit that it is not a violation of the Sherman Act for a manufacturer to conspire with others to simply switch distributors at one of its exclusive franchises and to cease **[**20]** doing business with the former dealer. ' *Golden Gate Acceptance Corp. v. General Motors Corp*., 597 F.2d at 678; Marquis v. Chrysler Corp., 577 F.2d 624 (9th Cir. 1978); Dreibus v. Wilson, 529 F.2d 170, 172-74 (9th Cir. 1975); Bushie v. Stenocord Corp., 460 F.2d 116, 120 (9th Cir. 1972); *Alpha Distrib. Co. of* Cal., Inc. v. Jack Daniel Distillery, 454 F.2d 442, 452 (9th Cir. 1972); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd, 416 F.2d 71, 78 (9th Cir. 1969), *cert. denied*, *396 U.S. 1062, 90 S. Ct. 752, 90 S. Ct. 752, 24 L. Ed. 2d 755 (1970)*. That the termination of dealings may affect the entity refused is immaterial when the refusal is 'for business reasons which are sufficient to the manufacturer in the absence of any arrangement restraining trade. ' Bushie v. Stenocord Corp., 460 F.2d at 119.

Chandler Supply Co. v. GAF Corp., 650 F.2d 983, 989 (9th Cir. 1980).

Were this a case where the prior relationship had not been that of a distributor-supplier, D & R's allegations in Paragraphs 22 and 22A may have been sufficient as a matter of law. Since we have already resolved the only conspiracy issue raised by the pleadings in **[**21]** D & R's Sherman Act § 1 claims, the Court finds Chambers and Rangaire are entitled to summary judgment thereon.

C. *D & R's Sherman Act § 2 Claims*.

At the outset, we note that defendants point to the Magistrate's failure to address their motion as to D & R's § 2 claims. Since we review the Magistrate's recommendations *de novo*, this omission, if it did occur, is not material to our consideration.

Section 2 of the Sherman Act is violated when a refusal to deal is used as leverage to maintain or extend the trader's monopoly power, or in an attempt to monopolize some part of the market place. 1 Von Kalinowski, Antitrust Laws and Trade Regulation para. 2.03(2)(a) at p. 2-31. D & R designates this claim as an attempt to monopolize.

The phrase "attempt to monopolize" means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it. Although the completed offense of monopolization under Section 2 only requires a general intent to do the acts leading to a monopoly, a specific intent to destroy competition or build monopoly is essential **[**22]** to liability. *Knutson v. Daily Review, Inc., 548 F.2d 795, 813 (9th Cir. 1976)*.

HN7[] There are three necessary elements of an attempt to monopolize claim. The first is the presence of a specific intent to destroy competition or build a monopoly. Such an intent may be shown or inferred by the commission of a Section 1 violation (e.g., in *Lessig v. Tidewater Oil Co., id*., the court found Section 1 violation consisting of defendant's resale price fixing and exclusive dealing). Alternately, such intent may be shown through proof of the specific intent to set prices or exclude competition in a portion of the market without legitimate business purpose. *Hallmark Indus. v. Reynolds, 489 F.2d 8, 12 (9th Cir. 1973)*. Second, the specific intent must be accompanied by either (1) predatory or anticompetitive conduct or a substantial claim of restraint of trade directed to accomplishing the unlawful purpose, or (2) sufficient market power to accomplish the unlawful purpose. Kintner, Federal ***Antitrust Law***, § 13.4 at p. 425 and see *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919 (9th Cir. 1980)*. Third, there must be **[*1300]** causal antitrust injury. *Cal. Computer Products* ***[**23]*** *v. Intern Business Machines, 613 F.2d 727, 738 (9th Cir. 1979)*.

Unilateral refusals to deal, in conjunction with these requisite elements, have been held to constitute an attempt to monopolize in violation of § 2 of the Sherman Act. *See* Kintner, Federal ***Antitrust Law***, Vol. II § 10.25 at p. 148. D & R alleges all three in its amended complaint.

HN8[] On a motion for summary judgment by a defendant on the ground that plaintiff has no valid claim, the defendant, as the moving party, has the burden of producing evidence, of the necessary certitude, which negatives the opposing party's claim, regardless of where the ultimate burden of proof would lie at trial. *National Industries v. Republic Nat. Life Ins. Co., 677 F.2d 1258, 1265 (9th Cir. 1982)* and generally, 6 Moore's Federal Practice para. 56.15(3) at p. 56-480.

However, Chambers-Rangaire assert that they accept for purposes of the summary judgment motion that all of D & R's factual assertions are true; that despite the truth of all the facts asserted by plaintiff, summary judgment should be granted, essentially, because plaintiff has failed, under any reasonable construction of the undisputed facts, to support a claim under **[**24]** Section 2 of the Sherman Act as a matter of law.

D & R's Answer is predictable; it is the burden of the moving party to demonstrate the absence of a genuine issue as to any material fact, and since Chambers-Rangaire offer no evidence, D & R is entitled to the Court's judgment on this point. This analysis overlooks the fact that Chambers-Rangaire rest not on what they can prove, but rather, on the basis that the facts marshalled by D & R on this issue are not sufficient, *as a matter of law*, to go to the jury.

The Court concurs with Chambers-Rangaire and grants their motion for summary judgment as to plaintiff's claims based on § 2 of the Sherman Act.

IV

PRICE DISCRIMINATION CLAIMS

Plaintiff's Robinson-Patman Act claim, 15 U.S.C. § 13 reads as follows:

> "Beginning sometime in 1975, or earlier, the exact date being presently unknown to plaintiff, defendant sold built-in household cooking appliances of its own manufacture, which products were of like grade and quality to Chambers brand built-in household cooking appliances to Amana Corporation; Sears, Roebuck & Co.; and Roper Corporation, among others, at different and lower prices than the prices at which defendant sold **[**25]** the same products under the Chambers brand name to plaintiff. Said unlawful price discrimination violates *Section 2(a)* of the Robinson-Patman Act, *15 U.S.C. § 13*."

After reviewing the Magistrate's recommendation and the evidence presented by the parties, it appears to this Court that the Magistrate was correct in determining that there is a genuine issue of fact regarding the question of "like grade and quality" which must go to the jury. However, this determination does not end the Court's inquiry.

The defendant argues that even if the private label ovens sold to Amana were of "like grade and quality" as the Chambers-brand ovens, it is still entitled to summary judgment because the price differentials between the two types of ovens were not discriminatory. Alternately, defendants assert that even if the price differentials were discriminatory, they did not substantially injure, destroy or prevent competition. Finally, they contend that even if the price differentials were discriminatory and did substantially injure, destroy or prevent competition, they did not cause compensable injury to plaintiff and thus defendant is entitled to summary judgment on the price discrimination **[**26]** claim.

The defendants buttress their position by contending that had plaintiff requested the manufacture of the private label ovens it **[*1301]** would have received them at the same price Amana did.

The resolution of this issue however turns on the resolution of the question of "like grade and quality" and since there is a factual issue remaining as to like grade and quality, the question of the price differentials being nondiscriminatory cannot be resolved at this stage of the proceedings. If for example the products are in fact of like grade and quality, then the private label arrangement is merely a facade behind which defendant hides so that it might charge different prices to different customers. The fact that plaintiff could have also benefitted from such a facade does not demonstrate that such an arrangement is not discriminatory as a matter of law.

Plaintiff must demonstrate at trial that the alleged price differential tended, substantially, to lessen or injure competition. Defendant argues that plaintiff's answer to interrogatories in which plaintiff was asked what facts it relied on to establish that the price differentials substantially injured or lessened competition, **[**27]** is insufficient to prove injury to competition and thus defendant is entitled to summary judgment.

Plaintiff's evidence shows that Mr. Watters, a research analyst of Chambers, testified both: 1) that he felt Chambers distributors were at a competitive disadvantage against Amana (Depo. 14:18-22), and 2) that they *weren't* at a competitive disadvantage. (Depo. 13:11-18).

If the question of substantial injury of competition alone were the critical issue, summary judgment would be denied in light of the dispute as to whether or not such injury existed. However, the critical question in a third line injury case such as plaintiff alleges here is whether or not the favored purchaser (Amana Refrigeration) actually passed on part of the discount given it by Chambers to Amana West Coast. *See* Von Kalinowski, *id*., § 5.07[2].

Defendant argues that plaintiff "has simply adduced no evidence to support its conclusion that . . . any lower price offered by Amana [Refrigeration] was the result of the price differentials upon which plaintiff bases its claim." However, defendant does not point to any interrogatory or deposition in which such information was sought and not given by plaintiff.

[28]** Finally, defendant argues that even if the discriminatory price differentials substantially injured competition, it is entitled to summary judgment because such price discrimination did not cause compensable injury to plaintiff. ***HN9***[] A private treble damage plaintiff "must make some showing of actual injury attributable to a violation of the Robinson-Patman Act. *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)*.

However, plaintiff's answer to Chambers interrogatories indicates that plaintiff lost sales to its retail dealer customers including nine specified customers due to the discriminatory price differentials allowed by defendant. If such loss of sales is true, plaintiff will have sufficiently met its damage requirements for a *§ 2(a)* violation. See *Allen Pen Co. v. Springfield Photo Mount Co., 653 F.2d 17, 22 (1981)*.

Consequently, defendant's motion for summary judgment as to plaintiff's Robinson-Patman Act claim is denied.

V

PLAINTIFF'S MOTION BASED ON DEFENDANT CHAMBERS-RANGAIRE EXCLUSIVE DEALING ARRANGEMENT

Paragraph 19 of plaintiff's amended complaint alleges:

> "Beginning sometime in 1977 and continuing until **[**29]** August 15, 1980, defendant Chambers Corporation coerced plaintiff into contracts, combinations and conspiracies to prevent competition in the manufacture, distribution and sale of products manufactured and sold by actual and/or potential competitors of defendant Chambers Corporation and/or defendant Rangaire Corporation. By said unlawful contracts, combinations and conspiracies, **[*1302]** plaintiff was coerced, on threat of termination and refusal to deal, to refrain from purchase of household cooking appliances other than Chambers brand products for wholesale distribution by plaintiff. Said contracts, combinations and conspiracies violate *Section 1* and *Section 2* of the Sherman Act, *15 U.S.C. 1*, *2*."

Paragraph 20 of plaintiff's amended complaint alleges:

> "Beginning sometime in 1973 and continuing up to October 1, 1980, defendant made sales of Chambers brand household cooking appliances to plaintiff on the condition, agreement and understanding that D&R Distributing would commit itself not to purchase or deal at wholesale in household cooking appliances of any manufacturers of kitchen appliances or any other actual or perceived competitor of Chambers Corporation and/or **[**30]** defendant Rangaire Corporation. Defendant thereafter policed the exclusive dealings arrangement by requiring and inducing plaintiff to refuse to distribute at wholesale any household cooking or other appliances other than Chambers brand products, and further, by extracting commitments that plaintiff would forbear from becoming the exclusive distributor for household appliance products other than Chambers brand products. Said unlawful contreact [sic] violates *Section 1* of the Sherman Act, *15 U.S.C. 1*, and *Section 3* of the Clayton Act, *15 U.S.C. 14*."

Plaintiff asserts that paragraphs 19 and 20 allege alternative substantive antitrust rules: #19 alleges a group boycott by plaintiff and defendants against competitors of defendants; #20 alleges an exclusive dealings arrangement between itself and defendant whereby plaintiff would refrain from distributing products of defendant's competitors.

In support of its contention that paragraph 19 alleges a traditional group boycott, per se violation of the antitrust laws, plaintiff directs the court's attention to its response to defendant's interrogatory no. 3(g), wherein plaintiff explains its per se allegations to the defendant:

> "The **[**31]** violation set forth in paragraph 19 constitutes a per se violation of the Sherman Act. The enlistment by Chambers Corporation, through coercive threats, of a third party, here the plaintiff, in an agreement not to trade with a manufacturer who competes with Chambers Corporation comprises a boycott, condemned under the Sherman Act. [citations] Traders may not exclude or inhibit a competitor trying to enter or compete in a market by coercing or inducing a customer not to deal with the competitor. [citations] Under the facts recited above, and incorporated herein by this reference, Chambers Corporation enlisted and induced plaintiff, an independent entity, on threat of termination, not to trade with competitors of Chambers Corporation, namely, Kelvinator Company, Gray and Dudley, and Roper Corporation."

It is evident from plaintiff's papers in opposition to the summary judgment motion and plaintiff's responses to interrogatories that paragraph 19 is aimed at two injuries: (1) a group boycott against defendant's manufacture-competitors and (2) loss of business from competing manufacturers.

Defendant's challenge to the first type of injury, viz., the group boycott involving plaintiff **[**32]** and defendant raises a question of standing. ***HN10***[] Standing is a question of law to be decided by the court. *John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495 (9th Cir. 1977)*.

HN11[] The Ninth Circuit has established the "target area" formula for determining standing. Under this doctrine, one who is only incidentally injured by a violation of the antitrust laws, "the bystander who was hit but not aimed at," cannot recover against the violator. *Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 (9th Cir. 1955)*.

It appears clear to this court that D&R Distributing does not have standing to assert **[*1303]** the injuries of defendant's competing manufacturers.

The second injury plaintiff complains of in para. 19 is its own loss of business from competing manufacturers, specifically, Kelvinator Company, Gray and Dudley and Roper Corporation, allegedly caused by defendant's exclusive dealing arrangement. However, this injury is more appropriately and clearly encompassed in para. 20.

Accordingly, the Court orders summary judgment for Chambers-Rangaire as to Paragraph 19 of plaintiff's amended complaint.

Paragraph 20 of plaintiff's amended complaint alleges an exclusive dealing **[**33]** arrangement between itself and defendant 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*. Plaintiff has withdrawn its assertion of a violation of the Clayton Act. It now proceeds only on its alleged *§ 1* of the Sherman Act violation.

In order to succeed with its *§ 1* claim at trial, plaintiff must demonstrate that an exclusive dealing arrangement exists, and that the performance of such an arrangement or contract will foreclose competition in a substantial share of the relevant product and geographic markets. Antitrust Adviser, 2d Ed. § 2.3 at p. 85 and *see Twin City Sportserv., Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1274-1275 (9th Cir. 1975)* (although Court addresses *§ 3* of Clayton Act, it is equally applicable to *§ 1* of the Sherman Act).

Essentially, defendant's argument is as follows: 1) plaintiff has failed to establish the existence of an exclusive dealing arrangement; 2) even if plaintiff has established an exclusive dealing arrangement, it has failed to adequately define the relevant market; but, 3) even if plaintiff has established the exclusive dealing arrangement and has adequately defined **[**34]** the relevant markets, it has failed to "adduce any evidence that the alleged exclusive dealings arrangement or any other alleged restraint of trade had an adverse effect upon a substantial portion of the relevant market.

Initially, the Court notes that the defendants have failed to introduce any evidence regarding the existence or nonexistence of an exclusive dealing arrangement for the time period involved in this lawsuit. Defendant's evidence to the effect that defendant thought that plaintiff would be unable to handle its large distribution area if it took on other manufacturers' products or the fact that in the past plaintiff did in fact distribute products for other manufacturers adds nothing to the question of the existence or abuse of an exclusive dealing arrangement. The defendants have failed to demonstrate that there is no genuine issue as to the existence or nonexistence of this critical fact.

Next, defendant argues that plaintiff has failed to adequately define the relevant markets. However, plaintiff's answers to interrogatories indicate that the relevant geographic market is Northern California and the relevant product markets are 1) electric built-in ovens, 2) electric **[**35]** built-in cooktops, and 3) 42-inch gas built-in cooktop surface units. Defendant may believe that to classify the product markets in the way in which plaintiff has done is "absurd", but that is insufficient support for its summary judgment motion.

Finally, defendant is correct that *at trial* plaintiff must prove that the exclusive dealing arrangement foreclosed competition in a substantial share of the relevant markets. The court recognizes that the defendant could sustain its summary judgment burden by conclusively showing that all the material facts are in evidence and that under no interpretation of such facts could the plaintiff demonstrate the foreclosure of competition in a substantial share of the relevant markets. *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)*. Before defendant would be entitled to summary judgment, however, it must demonstrate that all the evidence is in and with it, plaintiff cannot prove that competition in the relevant markets was foreclosed as a result of the alleged exclusive **[*1304]** dealing arrangement. Defendant has not done this.

Accordingly, defendant's motion for summary judgment **[**36]** as to plaintiff's exclusive dealings claim as alleged in Paragraph 20 is denied.

VI

PLAINTIFF'S GROUP BOYCOTT CLAIMS

Paragraph 23 of plaintiff's complaint states:

> "Beginning sometime in November 1980, or eaerlier [sic], the exact date being unknown to plaintiff, defendant entered into and carried out contracts, combinations and conspiracies to restrain interstate trade and commerce in the relevant market by effectuation of group boycotts depriving plaintiff of Chambers brand products from interstate sources of supply including Acropolis Wholesale Lumber of Salt Lake City, Utah; Designer Kitchens of Pohoenix, [sic] Arizona; Shreiber Engineering of Los Angeles, California; and ADD Distributors of Omaha, Nebraska. Said contracts, combinations and conspiracies violate *Sections 1* and *2* of the Sherman Act, *15 U.S.C. 1*, *2*."

HN12[] A group boycott is a restraint which generally is the means used for effectuating a concerted refusal to deal. Horsley, Per se Illegality and Concerted Refusals to Deal, 13 B.C. Indus. & Com. L.Rev. 484 (1972), found at n. 500 in Kintner, § 10.28 p. 155. An essential element to a group boycott claim is concerted action. Kintner: Federal ***Antitrust*** **[**37]** ***Law***, Vol. II, at §§ 10.27-10.38.

The concerted action alleged by plaintiff was between C&R and each participant listed in paragraph 23 of plaintiff's complaint, viz., Acropolis Wholesale Lumber of Salt Lake City, Designer Kitchens of Phoenix, Shreiber Engineering of Los Angeles, and ADD Distributors of Omaha.

Initially, defendants C&R argue that all the alleged participants to the group boycott claim, in their respective depositions, have stated that they chose not to do business with plaintiff because of business reasons, i.e., insufficient profit, and not due to any group boycott intentions or actions on the part of defendants C&R. Defendants' position is that since there is no concerted action and more importantly, no genuine issue of fact as to the existence of any concerted action, plaintiff's group boycott claim must fail and the court should grant summary judgment.

However, plaintiff has introduced evidence demonstrating that a factual question regarding the existence of concerted action among Chambers and at least one of the participants designated in paragraph 23 of his complaint exists.

Gary Bateman, the employee of the owner of Acropolis Wholesale Lumber and the one **[**38]** who is responsible for its purchasing, testified in his deposition that the vice-president of Chambers Corp. called and asked if a particular shipment ordered by Acropolis was intended for delivery to California and if so, Chambers Corp. wanted Bateman to know that two prior attempts to place such an order had already been made, and, although Chambers could not prevent Acropolis from making any such sale and delivery, it would prefer that Acropolis not make the particular shipment. (Deposition of Gary Bateman, 78:5-88.) On the other hand, Gary Bateman also testified that Dick Paras, the manager of Acropolis Wholesale Lumber, decided not to make the sale because, in addition to freight charges and the hassle with Chambers, no money would really be made on the sale. (Deposition of Gary Bateman, 111:9-13.)

The Court concludes that plaintiff has demonstrated a genuine issue of material fact, sufficient to withstand the motion for summary judgment, as to whether Acropolis Wholesale Lumber of Salt Lake City, Utah, was involved in "concerted action" with defendant or made a legitimate business decision.

Defendant next posits that the per se rule of unreasonableness is not applicable in **[**39]** the instant case because the alleged **[*1305]** group boycott is pursuant to a vertical restraint which would be governed by the Rule of Reason analysis.

Defendant argues that since plaintiff declared that it was proceeding with a per se case and not a rule of reason, once it is determined that a per se analysis is not applicable, plaintiff cannot choose to proceed with a rule of reason analysis. Defendants cite no authority for this proposition. There are cases where the court of appeals declined to proceed with a rule of reason analysis based on a *stipulation* to such effect between the parties and not any established rule of law. Plaintiffs would not be precluded from proceeding with their claim under a rule of reason analysis were the per se rule deemed to be inapplicable.

The law regarding concerted refusals to deal, or group-boycotts, is currently unsettled. One court discussing group boycotts noted "to state that the law concerning group boycotts and Section 1 of the Sherman Act lacks consistency would be to understate the truth by a wide margin." *Cullum Electric and Mechanical Inc. v. Mechanical Contractors Assn., 436 F. Supp. 418 (1976)*, *aff'd* *569 F.2d 821 (4th* ***[**40]*** *Cir. 1978)*. Conduct identified as a group boycott is no longer automatically considered as per se illegal, at least by the lower courts. Kintner, *id*. § 10.31 at p. 169. Some courts will examine whether the parties involved in the concerted refusal to deal are horizontally or vertically integrated, applying the rule of per se illegality to the former and the rule of reason to the latter. See cases cited in *Ron Tonkin Gran Turismo v. Fiat Distributors, 637 F.2d 1376, 1381-1388 (9th Cir. 1981)*.

The classification of agreements as between horizontally integrated businesses, i.e., agreements between competitors at the same level of market structure such as among manufacturers, or among distributors), and agreements between vertically integrated businesses i.e., agreements between persons at different levels of the market structure such as manufacturers and distributors, is however not always sufficiently informative or conclusive. See, e.g., *Cernuto Inc. v. United Cabinet Corp., 595 F.2d 164 (3rd Cir. 1979)* [agreement typically vertical, i.e. between a manufacturer and its distributor, judged by per se rule of illegality because, where agreement initiated by distributor **[**41]** the restraint was primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier and for purpose of controlling prices.]

Commentators in the field of ***antitrust law*** suggest that courts analyze the reasons underlying the concerted refusals to deal to determine whether they are exclusionary or anticompetitive and whether the particular practice in question is at least potentially reasonably ancillary to joint, efficiency-creating economic activities. Antitrust Advisor, 2d Ed., Supp. § 1.32 at pp. 36-46 and cases cited therein. The basic inquiry should be whether there is some plausible likelihood that the arrangement at hand has an efficiency-creating potential. If it does, it should be analyzed under the rule of reason. If not, per se illegality is appropriate. Antitrust Adviser, id., Supp. at p. 47.

After reviewing the papers in support of and in opposition to defendant's motion for summary judgment, this Court concludes that the defendants have failed to submit sufficient evidence from which a determination as to whether the per se rule of illegality or the rule of reason should be applied to the instant case **[**42]** can be made. Accordingly, defendant's motion for summary judgment on that issue is denied.

VII

PLAINTIFF'S PRICE FIXING CLAIM AGAINST DEFENDANTS CHAMBERS AND AMANA REFRIGERATION

Paragraph 18 of plaintiff's First Amended Complaint alleges:

> Beginning on January 5, 1977 and continuing at least to the time this complaint was filed, Chambers Corp. and Amana **[*1306]** Refrigeration entered into and carried out a contract, combination and conspiracy to fix, stabilize, peg, control and regulate prices on sales of self-cleaning pyrolytic electric built-in wall ovens and

other built-in kitchen appliance products sold under Amana and Chambers brand names. Said contract, combination and conspiracy unreasonably restrained interstate trade and commerce in California and in the U.S. in violation of *Section 1* and *Section 2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*.

Plaintiff's theory is that defendants Chambers Corporation and Amana agreed to an exchange of distributor price lists with the intent of fixing prices.

HN13[] Generally, the mere compilation and dissemination of pricing information among competitors does not constitute a per se violation of the Sherman Act. *United States v. United* ***[**43]*** *States Gypsum Co., 438 U.S. 422, 441, 57 L. Ed. 2d 854, 872, 98 S. Ct. 2864, n.16 (1978)*, *United States v. Container Corp., 393 U.S. 333, 21 L. Ed. 2d 526, 89 S. Ct. 510(1969)* (Fortas concurring) , *Krehl v. Baskin Robbins Ice Cream Co., 664 F.2d 1348, 1357 (9th Cir. 1982)*, *Rutledge v. Electric Hose & Rubber Co., 327 F. Supp. 1267, 1272 (C.D.Cal. 1971)*, and *see* discussion in Kintner, *Federal* ***Antitrust Law***, Vol. II, §§ 10.2-10.14. However, an exchange of price information coupled with a restriction of output or otherwise specific actions designed to achieve a uniformity of prices among competitors would constitute a per se violation of the Sherman Act. *United States v. American Linseed Oil Co., 262 U.S. 371, 67 L. Ed. 1035, 43 S. Ct. 607 (1923)*, *Krehl, id*., and *Morton Salt Co. v. United States, 235 F.2d 573, 576-577 (10th Cir. 1956)*, and *United States v. Citizens National Bank, 422 U.S. 86, 113, 45 L. Ed. 2d 41, 62, 95 S. Ct. 2099 (1975)*.

Defendants correctly point out that mere price similarity, when faced with identical or similar products involving similar costs necessarily requiring somewhat similar prices, standing alone, would be too insubstantial **[**44]** a foundation to support an inference of an unlawful price fixing conspiracy. *See* *Krehl, supra, at p. 1357, n.22*. This clearly falls short of the type of conduct accompanying price information exchange which courts have found to be per se illegal. *See, e.g.,* *United States v. American Linseed Oil Co., supra.* However, the ultimate test is not only what the actual effect is on prices, but whether such agreements interfere with "the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Plymouth Dealers' Ass'n. of No. Cal. v. United States, 279 F.2d 128, 132 (4th Cir. 1960)*.

Plaintiff relies on its evidence of an agreement between Chambers/Rangaire and Amana to exchange prices as the sole justification for concluding that defendants committed a per se violation of the Sherman Act. This is clearly not the law and plaintiff fails, as a matter of law, in its attempt at summary judgment. The Court concludes that the Magistrate was correct in denying plaintiff's cross-motion for summary judgment.

VIII

DEFENDANT CHAMBERS MOTION RE PRICE FIXING

However, the court notes that defendants, in support of their motion for summary judgment **[**45]** on plaintiff's price fixing claim, introduce evidence that one of Amana's executives responsible for setting the price of its ovens never examined or perused Chambers' price list, but, rather, fixed the price of its ovens by determining the cost of production and then adding a percentage profit figure to this amount. (Affidavit of George Tolbert). However, Mr. Tolbert's superiors to whom he sent his final prices for approval have not declared that they never saw the Chambers' price list or used it in finally determining Amana's price structure. Although defendant's counsel argues in its brief that Chambers' executives and departments responsible for price setting used the same procedure and did not examine Amana's price list, there is **[*1307]** no evidence of this presented to the Court for its consideration.

Rather, Mr. O. E. Pritchard, the Cost Manager for Chambers and the person who was responsible "for determining the standard cost of production of ovens sold by Chambers to its regional distributors under the Chambers brand states that, "I was periodically requested by my superiors at Chambers to determine the standard cost of [the ovens in question] for use in determining **[**46]** the price to be charged by Chambers for such ovens." Then, in his affidavit, Mr. Newton of Chambers testified that Mr. Hill or Mr. Grimes of Chambers determined what percentage of profit Chambers wanted to receive on its ovens. Nowhere does Chambers introduce evidence that the price list of Amana was not used or considered in effecting Chambers' own prices.

All inferences to be drawn in a summary judgment motion must be drawn in favor of the non-moving party. The movant must make a showing that makes it quite clear what the facts are as established by the evidence, and that excludes any real doubt as to the existence of any genuine issue of material fact. 6 *Moore's*, para. 56-15[3], at pp. 56-466 - 56-473. If the executives at Chambers who are responsible for establishing and finalizing the price to its distributors, in fact, examined and considered Amana's price lists in determining their own prices, the jury would be entitled to decide that an agreement to regulate, stabilize or otherwise fix prices did in fact exist. Such an inference by the fact finder would entitle plaintiff to a "per se" finding of antitrust liability.

Defendants argue, alternately, that even if the plaintiff **[**47]** prevails on the issue of liability, plaintiff has presented no evidence of injury in fact, or, alternately, any evidence from which plaintiff's damage might be computed.

The antitrust plaintiff may recover three types of damages: (1) Its increased costs, (2) lost past profits, and (3) reduction in the value of his business. Antitrust-Treble Damages -- Injury, 16 A.L.R. Fed 14, 19. Of course, double recovery is not allowed, *id*. In the instant case, it appears that plaintiff seeks to recover its increased costs in the form of overcharges for the fixed-price items, or, alternately, its lost net profits measured by the "before and after" method.

Defendant posits that there is only one proper type of recovery -- that of increased costs measured by the amount of overcharge for the fixed item. Although this is generally considered the most simple method of fixing damages, (Antitrust Adviser, 2d Ed., § 12.50 at p. 899) it is not the exclusive remedy. *See Washington State Bowling Prop. Ass'n. v. Pacific Lanes, Inc., 356 F.2d 371, 379 (9th Cir. 1966)*, *cert. denied 384 U.S. 963, 16 L. Ed. 2d 674, 86 S. Ct. 1590*, and 16 A.L.R.Fed. at p. 19.

Commonly, the increased cost damages **[**48]** involve a price overcharge. ***HN14***[] Where illegal price fixing results in an artificially high price, those who pay the fixed price may recover the difference between the fixed price and the price which would otherwise have prevailed absent the illegal price fixing. 16 A.L.R.Fed. 19; *Chattanooga Foundry and Pipe Works v. Atlanta, 203 U.S. 390, 396, 51 L. Ed. 241, 27 S. Ct. 65 (1906)*; and *Thomsen v. Cayser, 243 U.S. 66, 88, 61 L. Ed. 597, 37 S. Ct. 353 (1917)*. And, although determining what the price would have been absent a conspiracy may require some speculation. A wrongdoer should not be permitted to invoke the uncertainty created by his own wrong and use it to preclude a plaintiff's recovery. *National Constructors v. National Elec. Contractors, 498 F. Supp. 510, 518, 538 (D.Md. 1980)*.

HN15[] Recovery of lost profits is measured in any of three ways: The "before and after" method, the "yardstick method," or the "sales projection" method. 16 A.L.R. Fed 20. Plaintiff states that it has chosen the "before and after" method.

The "before and after" method compares two periods of time in the antitrust claimant's business -- the period during which his business suffered from the antitrust **[**49]** violations, and a previous or subsequent period **[*1308]** free from the effect of the antitrust violations. Specifically, the claimant is awarded the difference between, (1) his net profits during a period either before the antitrust violations began or after they had ceased and their effects had ended, and (2) his net profits during the period of the antitrust violations. *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 90 L. Ed. 652, 66 S. Ct. 574 (1946)*, and 16 A.L.R.Fed. 21. The period used for comparison with the damage period must be a fair measure of the claimant's profits. 16 A.L.R.Fed., *id*. The Ninth Circuit has held that the before and after method of measuring damages may be used only where there has been some showing that the market conditions in the two periods were similar but for the impact of the violation. *Pac. Coast Agri. Export Ass'n. v. Sunkist Growers, Inc., 526 F.2d 1196, 1206-1207 (9th Cir. 1975)*.

Plaintiff asserts that the "starting point for computing the overcharge extracted from plaintiff and other direct purchasers during the period of the price fix" is the 41.5% profit margin of Chambers and the 26% profit margin of Amana. Plaintiff **[**50]** then correctly points out the relevant inquiry: "The issue then is to determine what the price in a free and open market would have been but for the artificial price-fix imposed on the market by Chambers and Amana."

First, the margin of profit received by defendants, while relevant, is not determinative. Plaintiff would need to demonstrate that, at a minimum, the margin of profit was appreciably different during the period of antitrust violation than during the periods of no antitrust violation. Plaintiff says nothing more than is mentioned above. Nor, in its answers to interrogatories, does plaintiff do more than to mention what the range of profit margin of defendants was -- without indicating any specific time period for purposes of comparison.

More importantly, the difference between the price charged to plaintiff and defendants' marginal cost of production, without more, is not necessarily relevant nor necessarily indicative of what the "overcharge" was. Granted, in a free, ideally competitive market, often prices will not be much greater than the marginal cost of production. And true, in some monopoly cases, the fact that prices are much greater than the marginal cost of production **[**51]** is some indication of control over prices. However, it is necessary to know more than defendants' mere marginal cost of production. One can be competitive and still be able to charge more than the marginal cost of production -- assuming the market will bear it.

In summary, defendants' position is that all of plaintiff's evidence, as demonstrated by its answers to interrogatories, fails to present evidence of damages.

Implicit from the facts given in plaintiff's answers regarding the issue of damages is that the "free market, non-fixed price" during the antitrust violation period is evidenced by the price Chambers sold the relevant products to Amana, which price is less than it sold the same products to D & R.

Granted, plaintiff could have given more complete answers to defendants' interrogatories, but for purposes of this summary judgment motion, in view of the fact that all inferences must be drawn in plaintiff's favor, plaintiff has some evidence of injury and some evidence from which the jury could calculate the amount of damages.

Plaintiff does not mention its use of the "before and after" method of calculating damages in its answers to interrogatories.

Accordingly, it is **[**52]** ordered that:

1. Plaintiff's Motion for Summary Judgment on the Sherman Act claims is denied, and

2. Defendant Chambers' and Amana's Motions for Summary Judgment on the plaintiff's price fixing claims are likewise denied.

Counsel for the moving defendants are to prepare and lodge with the Court *separate* judgments consistent with this Memorandum Decision and Order and lodge the same within twenty (20) days of the date of this Order. Counsel for the plaintiff shall **[*1309]** have twenty (20) days to object to the *form* of such judgments.

End of Document

United States v. Waste Management, Inc.

United States Court of Appeals for the Second Circuit

June 12, 1984, Argued ; September 6, 1984, Decided

Nos. 83-6365, 84-6001

Reporter
743 F.2d 976 *; 1984 U.S. App. LEXIS 18843 **; 1984-2 Trade Cas. (CCH) P66,190

UNITED STATES OF AMERICA, Plaintiff-Appellee-Cross-Appellant, v. WASTE MANAGEMENT, INC. and EMW VENTURES INCORPORATED, Defendants-Appellants-Cross-Appellees

Prior History: [1]** Appeal from a final judgment of the United States District Court for the Southern District of New York (Thomas P. Griesa, Judge), following a court trial, holding that Waste Management, Inc.'s acquisition of EMW Ventures Incorporated violated § 7 of the Clayton Act, as amended, and ordering Waste Management to divest a former EMW subsidiary.

Disposition: Reversed.

Core Terms

customers, haulers, market share, containerized, industrial, competitors, merger, firms, collection, prices, trucks, ease, district court, municipalities, residential, geographic, entrants, trash collection, trash, prima facie, appraising, containers, disposal, acquire, compete, market power, non-containerized, subsidiary, constrain, increases

LexisNexis® Headnotes

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

Mergers & Acquisitions Law > Antitrust > Market Definition

HN1[] **Regulated Practices, Market Definition**

Although potential competition resulting from easy entry can as logically be appraised as part of market definition, the court utilizes the traditional analysis of defining the market in terms of existing competitors.

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

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

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Horizontal Mergers

Mergers & Acquisitions Law > Mergers > Rights of Dissenting Shareholders

HN2[] **Antitrust, Antitrust Statutes**

A post-merger market share of 48.8 percent is sufficient to establish prima facie illegality. Large market shares are a convenient proxy for appraising the danger of monopoly power resulting from a horizontal merger. A merger resulting in a large market share is presumptively illegal, rebuttable only by a demonstration that the merger will not have anticompetitive effects.

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

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

Mergers & Acquisitions Law > Antitrust > General Overview

HN3[] **Financial Institutions, Bank Mergers**

Appraisal of the impact of a proposed merger upon competition must take into account potential competition from firms not presently active in the relevant product and geographic markets.

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

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

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

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

A substantial existing market share is insufficient to void a merger where that share is misleading as to actual future competitive effect. Long-term contracts and declining reserves negate the inference of market power drawn from the existing market share. A market definition artificially restricted to existing firms competing at one moment may yield market share statistics that are not an accurate proxy for market power when substantial potential competition able to respond quickly to price increases exists.

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

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

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Market Definition

HN5[] **Antitrust Statutes, Clayton Act**

Where entry is so easy that existing competitors could not succeed in raising prices for any significant period of time, the government has announced that it will usually not challenge a merger.

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Merger Guidelines

HN6[] **Mergers & Acquisitions Law, Antitrust**

Entry by potential competitors may be considered in appraising whether a merger will substantially lessen competition.

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

Antitrust & Trade Law > Clayton Act > General Overview

HN7[] **Actual Monopolization, Anticompetitive & Predatory Practices**

See *15 U.S.C.S. § 18*.

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Andrea Limmer, Washington, District of Columbia, (J. Paul McGrath, Assistant Attorney General, Charles F. Rule, Barry Grossman, John F. Greaney, Department of Justice), for Plaintiff-Appellee-Cross-Appellant United States of America.

Judges: Van Graafeiland, Winter and Pratt, Circuit Judges.

Opinion by: WINTER

Opinion

[*977] WINTER, Circuit Judge:

Appellants Waste Management, Inc. ("WMI") and EMW Ventures **[**2]** Incorporated ("EMW") appeal from Judge Griesa's decision, *588 F. Supp. 498 (1983)*, after a bench trial, that WMI's acquisition of EMW violated section 7 of the Clayton Act, as amended, *15 U.S.C. § 18*, and from the resultant order that WMI divest Texas Industrial Disposal, Inc. ("TIDI"), a former EMW subsidiary.

We reverse.

BACKGROUND

This government antitrust action challenges WMI's acquisition of EMW's common stock. After the district court denied the government's motion for a temporary restraining order, the acquisition was consummated, and the case proceeded to trial before Judge Griesa sitting without a jury.

We summarize those facts that are not in dispute. WMI is in the solid waste disposal business. It provides services in twenty-seven **[*978]** states and had revenues of approximately $ 442 million in 1980. At the time of the acquisition, EMW was a diversified holding company that owned a subsidiary by the name of Waste Resources, which was in the waste disposal business in ten states and had revenues of $ 54 million in 1980.

WMI and Waste Resources each had subsidiaries that operated in or near Dallas. [1] WMI has one subsidiary, **[**3]** American Container Service ("ACS") in Dallas, and another, Texas Waste Management, in the Dallas suburb of Lewisville. Waste Resources had a Dallas subsidiary called Texas Industrial Disposal, Inc. ("TIDI"). WMI now operates TIDI as a WMI sub.

Waste collection involves several different types of equipment and serves the needs of various types of customers. For present purposes, it is important to distinguish between "non-containerized" and "containerized" equipment. "Non-containerized" refers to trucks with compactors into which trash cans and bags are loaded by hand. "Containerized" equipment consists of two types of receptacles, "dumpsters" and "roll off," each emptied by different kinds of trucks. Dumpsters typically have a volume **[**4]** of one to eight cubic yards and are emptied by "front-load" trucks that pick the dumpsters up with clamps and empty them into a hopper. Roll-off containers range up to 50 cubic yards in volume and are carried to a dump, emptied and then returned. Trucks that transport roll-off containers are known, not surprisingly, as roll-off trucks. If the customer desires containerized service, the waste hauler provides the dumpster or roll-off container.

There are various relevant classes of customers: (i) single or multiple dwelling residential customers; (ii) apartment complexes of varying size, (iii) "business" customers -- stores, restaurants, etc., and (iv) "industrial" customers -- construction sites, factories, etc. Customers choose among the kinds of services according to their individual needs, the quantity of trash produced being a critical factor.

The parties strenuously disagree over the proper definition of the relevant product and geographic markets. The government contended in the district court that the product market should be defined in terms of equipment type and that front-load and roll-off waste collection service each constitutes a separate product market. WMI argued **[**5]** that the market includes all forms of waste collection. The district court adopted a definition of the relevant product market that differed from the positions of both parties. Judge Griesa concluded that the product market included all trash collection, except for collection at single-family or at multiple family residences or small apartment complexes. Rejecting WMI's contentions as to the relevant geographic market, the district court excluded Tarrant County, which includes Fort Worth, thus limiting the market to Dallas County plus a small fringe area.

Based on revenue data, Judge Griesa found that the combined market share of TIDI and ACS was 48.8%. [2] He viewed that market share as *prima facie* illegal under *United States v. Philadelphia National Bank, 374 U.S. 321, 364-66, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*. Agreeing with appellants that entry into the product market is easy -- indeed, individuals operating out of their homes can compete successfully "with any other company" -- Judge Griesa nevertheless held that proof of ease of entry did not rebut the *prima facie* showing of illegality. The district **[*979]** court therefore ordered WMI to **[**6]** divest itself of TIDI. Because we conclude that potential entry into the

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[1] The government's challenge to the merger also involved WMI and Waste Resources' subsidiaries in Houston. Judge Griesa upheld the merger so far as the Houston companies were concerned, and no appeal was taken. We thus address only the legality of the acquisition of TIDI.

[2] As mentioned *supra*, WMI had a second subsidiary, Texas Waste Management, in the Dallas geographic market. The government offered no market share data for Texas Waste Management, and the district court did not consider it in its determination of market share. Since the government failed to carry its burden on this issue, we also decline to consider Texas Waste Management's share.

relevant Dallas market by new firms or by firms now operating in Fort Worth is so easy as to constrain the prices charged by WMI's subs, we reverse on the grounds that the merged firm does not substantially lessen competition.

DISCUSSION

WMI raises the following claims which we treat *seriatim*: (1) the district court's definition of the relevant geographic and product markets and its determination of WMI's post-merger market share are erroneous; and (2) the district court erred in rejecting WMI's rebuttal of the *prima facie* case.

A. **[**7]** *Market Definition and Determination of Market Share*

In determining the relevant product and geographic market, Judge Griesa considered only firms that presently collect waste in competition with WMI's subs TIDI and ACS. He thus did not consider the effect of potential competition by new entrants upon the market power of the merged firm but rather treated this as part of the rebuttal to the *prima facie* case. ***HN1***[] Although potential competition resulting from easy entry can as logically be appraised as part of market definition, *see* R. Posner, ***Antitrust Law*** 132-33 (1976), we will utilize the traditional analysis of defining the market in terms of existing competitors.

We thus begin by determining which firms presently collect waste in actual competition with WMI (a term we use henceforth to include TIDI and ACS). WMI provides waste disposal services to business and industrial customers as do a number of other private haulers. Neither WMI nor these other haulers provides substantial services to residential customers since residential waste is generally collected by private or municipal **[**8]** haulers who provide only limited services to business/industrial customers. Residential and business/industrial customers are thus served largely by different firms.

One reason for the distinction between residential and business/industrial collection is found in customer preferences for collection by particular equipment at existing prices. Thus, residential customers largely prefer non-containerized service while business/industrial customers usually opt for containerized hauling. There is of course overlap, and the district court therefore did not define the market solely in terms of equipment distinctions. Some large apartment complexes prefer containerized service (and were included by Judge Griesa as customers in the relevant market), and some businesses make do with hand collection (also included as customers in the relevant market).

Another reason for the distinction (as modified by the overlaps) between residential and business/industrial collection is that most private haulers provide only containerized service and most municipalities provide only non-containerized service. The largest municipality, the City of Dallas, provides no containerized service. Moreover, **[**9]** the few municipalities that do provide containerized service to business/industrial customers were included as sellers in the relevant product market.

At bottom, however, the distinction between residential and business/industrial service rests on two facts, one economic and the other political. First, customers with large amounts of trash have a greater need for containerized service than do customers with smaller quantities; the former tend to be business/industrial and the latter residential. Second, the latter customers are, for political reasons, served by hand collection provided at low prices by municipalities. At the fringe, of course, some business/industrial customers have sufficiently little trash to be able to choose hand collection at existing prices while some residential customers, such as large apartment complexes, prefer containerized service. Some business/industrial customers haul their trash themselves, although **[*980]** the record indicates that is not a feasible alternative for many at existing prices.

Customer preferences for service, therefore, turn largely on the quantity of trash produced, and different kinds of equipment are most useful for different **[**10]** quantities of trash. It might be that in a market without municipal haulers the larger private haulers would offer a full line of services, and the relevant product market would be all trash collection. However, the decision of the City of Dallas and other municipalities to provide non-containerized service has narrowed the market available to private haulers. The fact that only a small fringe of customers have a meaningful choice at existing prices between hand collection, containerized service, or self-hauling demonstrates that the bulk of business/industrial customers will view the alternatives as economically feasible only when confronted with substantial increases in the cost of containerized service. We regard this as legally sufficient to support Judge Griesa's view of which existing firms presently compete with WMI. [3]

[11]** Nor is there support for WMI's claim that the power of Dallas or other municipalities to provide containerized service is a constraint on the prices charged by private firms serving the market so defined. Such an expansion of services would be essentially political since the City of Dallas is not a profit-seeking entrepreneur, and there is no evidence that such a decision is likely absent very substantial price increases by private haulers.

Indeed, for all of the smoke blown by WMI over Judge Griesa's market definition, internal TIDI documents fully support his findings. In October, 1980, TIDI completed a "Budget Questionnaire" that had been sent by Waste Resources. This required TIDI to list its major competitors by name, percentage of market, and kinds of equipment. TIDI listed only private haulers as competitors, and these provided almost exclusively containerized service. The major competitors included therein were five private firms with 83 trucks suitable for containerized service and two trucks suitable for hand collection. This questionnaire amply documents Judge Griesa's conclusions as to the product market as defined in terms of existing competitors.

The district **[**12]** court found the relevant geographic market to be Dallas County, plus a small fringe, but not Tarrant County, of which the city of Fort Worth is part. WMI argued below, and continues to argue here, that the relevant geographic market consists of the entire Dallas-Fort Worth metropolitan area. We disagree. Dallas and Fort Worth constitute a Single Standard Metropolitan Statistical Area based on the Office of Management and Budget's judgments regarding economic and social integration. Nevertheless, the bulk of existing Dallas and Fort Worth haulers presently operate exclusively in their respective cities. Only a few, situated near the border between Dallas and Tarrant Counties, do business in both. The area between the two cities is not heavily urbanized and some of the towns between them have granted long term exclusive franchises to waste collectors. Since the travel times between the more heavily populated cities is 45 to 50 minutes, daily service between both areas by the same trucks would be costly. Existing firms that presently compete with WMI are thus found for the most part only in Dallas County, a finding consistent with the TIDI Budget Questionnaire.

The district **[**13]** court found that TIDI's and ACS's combined share of the market so **[*981]** defined was 48.8%. This finding was based on a comparison of revenues of the various haulers within this market, and it is to that evidence that we now turn.

In the pre-acquisition Budget Questionnaire filled out by TIDI, it listed its major competitors and gave their approximate market shares. TIDI's responses and Judge Griesa's findings are compared as follows:

Name	TIDI's Estimate of Approximate % of Market	Judge Griesa's Finding of % of Market
ACS	26	22.5
Moore Ind.	15	11.1
BFI	10	7.2
AIDS	5	3.4
S.C.A.	4	2.5

[3] We reject WMI's contention that the district court violated its due process rights by defining a market against which it had no opportunity to defend. Since appellant argued at trial that *every* waste hauler should be included in the market definition, it plainly responded to all less inclusive alternatives. To the minor extent that the district court deviated from an analysis of equipment-based distinctions as debated by the parties, that deviation was to appellant's advantage. By including in the market all business/industrial customers, even those that use non-containerized equipment, the court diluted appellant's market share by counting the revenues that Dallas and other municipalities receive from business establishments.

TIDI calculated its own market share as 40-45%, as compared with the 26.3% found by Judge Griesa. The difference between the TIDI estimates and Judge Griesa's findings are accounted for by Judge Griesa's inclusion of municipal revenues from business/industrial waste disposal.

WMI's principal challenge to these findings focuses upon the admission into evidence of two revenue surveys of various firms prepared respectively by an expert retained by the government and by paralegal employees of the Justice Department. However, so far as the **[**14]** surveys relate to the revenues of the largest private haulers, they are fully corroborated by other testimony or exhibits, and we find no contrary evidence in the record. To the extent the surveys relate to the revenues of smaller private haulers or of municipalities serving business/industrial customers, their exclusion would not significantly affect Judge Griesa's findings as to market share. Accordingly, if error was committed, it was harmless. We have reviewed other evidentiary issues raised by WMI but have concluded that they too are, at best, harmless error.

B. *WMI's Rebuttal*

HN2[] A post-merger market share of 48.8% is sufficient to establish *prima facie* illegality under *United States v. Philadelphia National Bank, 374 U.S. 321, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963)*, and its progeny. That decision held that large market shares are a convenient proxy for appraising the danger of monopoly power resulting from a horizontal merger. *Id. at 362-63*. Under its rationale, a merger resulting in a large market share is presumptively illegal, rebuttable **[**15]** only by a demonstration that the merger will not have anticompetitive effects. *Id. at 363*. Thus in *United States v. General Dynamics Corp., 415 U.S. 486, 39 L. Ed. 2d 530, 94 S. Ct. 1186 (1974)*, the Court upheld a merger of two leading coal producers because substantially all of the production of one firm was tied up in long-term contracts and its reserves were insubstantial. Since that firm's future ability to compete was negligible, the Court reasoned that its disappearance as an independent competitor could not affect the market.

WMI does not claim that 48.8% is too small a share to trigger the *Philadelphia National Bank* presumption. Rather, it argues that the presumption is rebutted by the fact that competitors can enter the Dallas waste hauling market with such ease that the finding of a 48.8% market share does not accurately reflect market power. WMI argues that it is unable to raise prices over the competitive level because new firms would quickly enter the market and undercut them.

In discussing ease of entry, Judge Griesa stated:

> Defendants in the present case urge that even if the Government has made a prima facie **[**16]** showing on the basis of market share statistics, there are circumstances which undermine the significance of these statistics. Among the arguments in this regard are:
>
> > (1) It is so easy to enter the trash collection market that the relative competitive strength of a company cannot properly be measured solely with respect to the existing companies in the market, but must take into account potential new entrants.
> >
> > **[*982]** (2) Over the past several years there has been a trend toward deconcentration, involving steady entry into the market by new companies.
> >
> > * * *
>
> The Court agrees that entry into the trash collection business is relatively easy, and the barriers to entry not great. A person wanting to start in the trash collection business can acquire a truck, a few containers, drive the truck himself, and operate out of his home. A great deal depends on the individual's personal initiative, and whether he has the desire and energy to perform a high quality of service. If he measures up well by these standards, he can compete successfully with any other company for a portion of the trade, even though a small portion. If he does not measure up, he is less successful **[**17]** or fails.
>
> Over the last 10 years or so a number of companies have started in the commercial trash collection business, performing containerized service. A few, including TIDI and ACS, have grown to substantial size, presumably because of good management and service, and also as a result of acquiring other companies. The majority of

> new entrants have either remained relatively small or disappeared as independent entities by going out of business or being acquired by larger companies.
>
> There is no showing of any circumstance, related to ease of entry or the trend of the business, which promises in and of itself to materially erode the competitive strength of TIDI and ACS. With regard to the legal effect of low entry barriers and potential competition in a § 7 case, there is no persuasive authority for allowing such factors to overcome a strong prima facie showing of concentration in the *existing* competitive structure.

The Supreme Court has never directly held that ease of entry may rebut a showing of *prima facie* illegality under *Philadelphia National Bank*. However, on several occasions it has held that **[**18]** ***HN3***[] appraisal of the impact of a proposed merger upon competition must take into account potential competition from firms not presently active in the relevant product and geographic markets. *United States v. Falstaff Brewing Corp., 410 U.S. 526, 35 L. Ed. 2d 475, 93 S. Ct. 1096 (1973)*; *Federal Trade Commission v. Procter & Gamble Co., 386 U.S. 568, 87 S. Ct. 1224, 18 L. Ed. 2d 303 (1967)*; *United States v. Penn-Olin Chemical Co., 378 U.S. 158, 12 L. Ed. 2d 775, 84 S. Ct. 1710 (1964)*. *Falstaff*, for example, involved a large national brewer that did no business in the northeast section of the country until it acquired Narrangansett, the largest brewer in New England. Reversing a district court finding that Falstaff was not likely to enter the New England market *de novo*, the Supreme Court concluded that the very existence of Falstaff as a potential entrant might constrain brewers in the northeast to maintain competitive price levels as a means of forestalling entry by Falstaff. Under that decision, therefore, potential entrants must be considered in appraising a merger.

Moreover, under *General Dynamics*, **[**19]** ***HN4***[] a substantial existing market share is insufficient to void a merger where that share is misleading as to actual future competitive effect. In that case, long-term contracts and declining reserves negated the inference of market power drawn from the existing market share. In the present case, a market definition artificially restricted to existing firms competing at one moment may yield market share statistics that are not an accurate proxy for market power when substantial potential competition able to respond quickly to price increases exists.

Finally, the *Merger Guidelines* issued by the government itself not only recognize the economic principle that ease of entry is relevant to appraising the impact upon competition of a merger but also state that it may override all other factors. ***HN5***[] Where entry is "so easy that existing competitors could not succeed in raising prices for any significant period of time," the government has announced that it will usually not challenge a merger. *United States Department* ***[*983]*** *of Justice 1984 Merger* **[**20]** *Guidelines*, 46 Antitrust & Trade Reg. Rep. (BNA) No. 1169 Spec. Supp. § 3.3, at S-6. If the Department of Justice routinely considers ease of entry as relevant to determining the competitive impact of a merger, it may not argue to a court addressing the same issue that ease of entry is irrelevant. We conclude, therefore, that ***HN6***[] entry by potential competitors may be considered in appraising whether a merger will "substantially lessen competition." [4]

[21]** Turning to the evidence in this case, we believe that entry into the relevant product and geographic market by new firms or by existing firms in the Fort Worth area is so easy that any anti-competitive impact of the merger before us would be eliminated more quickly by such competition than by litigation. *See* R. Bork, The Antitrust Paradox 222 (1978). Judge Griesa specifically found that individuals operating out of their homes can acquire trucks and some containers and compete successfully "with any other company." The government's response to this factual finding is largely to the effect that economies of scale are more important than Judge Griesa believed.

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[4] Section 7 of the Clayton Act, *15 U.S.C. § 18 (1982)* provides in relevant part:

> ***HN7***[] 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 to tend to create a monopoly.

As with his other findings of fact, however, this one is not clearly erroneous, as there are examples in the record of such entrepreneurs entering and prospering.

In any event, entry by larger companies is also relatively easy. At existing prices most Fort Worth and Dallas haulers operate within their own cities, but it is clear from the record that Fort Worth haulers could easily establish themselves in Dallas if the price of trash collection rose above the competitive level. Although it may be true that daily travel **[**22]** from Fort Worth to Dallas and back is costly, there is no barrier to Fort Worth haulers' acquiring garage facilities in Dallas permitting them to station some of their trucks there permanently or for portions of each week. The risks of such a strategy are low since substantial business can be assured through bidding on contracts even before such garage facilities are acquired, as one Fort Worth firm demonstrated by winning such a contract and then opening a facility in a Dallas suburb. That example can hardly be ignored by WMI or other Dallas haulers (not to mention their customers) in arriving at contract bids. The existence of haulers in Fort Worth, therefore, constrains prices charged by Dallas haulers, much as Falstaff constrained pricing by northeast breweries.

The fact that such entry has not happened more frequently reflects only the existence of competitive, entry-forestalling prices, as contemplated in *Falstaff. 410 U.S. at 532-537*. We have no doubt that, if WMI were now to seek to acquire a major hauler in Fort Worth, the *Falstaff* decision would compel us to treat the Fort Worth hauler as a potential competitor of WMI. We perceive no reason why **[**23]** Fort Worth haulers should be treated as potential competitors in those circumstances but not in the present case.

Judge Griesa's conclusion that "there is no showing of any circumstances, related to ease of entry or the trend of the business, which promises in and of itself to materially erode the competitive strength of TIDI and ACS" is consistent with our decision. TIDI and ACS may well retain their present market share. However, in view of the findings as to ease of entry, that share can be retained only by competitive pricing. Ease of entry constrains not only WMI, but every firm in the market. Should WMI attempt to exercise market power by raising prices, none of its smaller **[*984]** competitors would be able to follow the price increases because of the ease with which new competitors would appear. WMI would then face lower prices charged by all existing competitors as well as entry by new ones, a condition fatal to its economic prospects if not rectified.

The government argues that consumers may prefer WMI's services, even at a higher price, over those of a new entrant because of its "proven track record." We fail to see how the existence of good will achieved through **[**24]** effective service is an impediment to, rather than the natural result of, competition. The government also argues that existing contracts bind most customers to a particular hauler and thereby prevent new entrants from acquiring business. If so, they also prevent the price increases until new entrants can submit competitive bids.

Given Judge Griesa's factual findings, we conclude that the 48.8% market share attributed to WMI does not accurately reflect future market power. Since that power is in fact insubstantial, the merger does not, therefore, substantially lessen competition in the relevant market and does not violate Section 7.

Reversed.

[Western Shoe Gallery, Inc. v. Duty Free Shoppers, Ltd.](#)

United States District Court for the Northern District of California

September 7, 1984

No. C-82-0625 EFL

Reporter

593 F. Supp. 348 *; 1984 U.S. Dist. LEXIS 23772 **; 1984-2 Trade Cas. (CCH) P66,195

Western Shoe Gallery, Inc., Stuart E. Conn, a sole proprietorship d/b/a Silvermint, Plaintiffs v. Duty Free Shoppers, Ltd., Okadaya of Yokahama, Space Creation, Inc., Pacifico Creative Service, Inc., Pacifico Creative Service "California", Inc., Japan Travel Bureau International, Inc., Western Travel Plaza, Inc., Nippon Travel Agency Pacific, Inc., Jetour U.S.A., Inc., Nippon Express U.S.A., Inc., Kintetsu International Express (U.S.A.), Inc., Pacific Leisure Management Corp., Japanese Tour Operators Assn., Franciscan Lines, Inc., Tokyu Travels Service, Saga Leather International, Inc. d/b/a Saga Leather Boutique, Hiroaki Takayama, d/b/a San-I Classic Japan, and Marketing Feeders, d/b/a Rawhide of California, Defendants

Core Terms

tourists, damages, defendants', statute of limitations, limitations period, Pollution, antitrust, rebates, gift shop, concerted refusal, four year, conspiracy, permanent

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Governments > Legislation > Statute of Limitations > Time Limitations

Antitrust & Trade Law > Sherman Act > General Overview

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

Governments > Legislation > Statute of Limitations > General Overview

HN1[] **Remedies, Damages**

15 U.S.C.S. § 15b requires that suits for damages under the Sherman Act be brought within four years after the cause of action accrued.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

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

Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. In the context of a continuing conspiracy, to violate the antitrust laws has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

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

Where a refusal to deal is final at its impact, for example, where the plaintiff's business is immediately and permanently destroyed, or where an actionable wrong is by its nature permanent at initiation without further acts, then the acts causing damage are unrepeated, and suit must be brought within the limitations period and upon the initial act.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

Employing the limitations statute to immunize recent repetition or continuation of antitrust violations and damages occasioned thereby not only extends the statute beyond its purpose, but also conflicts with the policies of vigorous enforcement of private rights through private actions.

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

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN5[] **Regulated Practices, Trade Practices & Unfair Competition**

The statute of limitations for a state law antitrust claims is four years. *Cal. Bus. & Prof. Code §§ 16750.1* & *16755*.

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

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN6[] **Regulated Practices, Trade Practices & Unfair Competition**

A three year statute of limitations governs claims under the California Unfair Practices Act. *Cal. Bus. & Prof. Code §§ 17000*-101.

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

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN7[] **Regulated Practices, Trade Practices & Unfair Competition**

State common law claims are governed by a two year statute of limitations. *Cal. Civ. Proc. Code § 339(1)*.

Judges: [1]** Lynch, D.J.

Opinion by: LYNCH

Opinion

[*349] Order Granting in part and Denying in Part Defendants' Motion for Summary Judgment

LYNCH, D.J.:

The complaint in this antitrust action alleges a concerted refusal by the defendants to deal with the plaintiffs. This matter is before the court on the defendants' motion for summary judgment based on the statute of limitations. After reviewing the papers and argument of counsel, the court concludes that the defendants' motion must be granted in part and denied in part. The defendants cannot be held liable for any damages caused by unlawful acts committed more than four years before this suit was filed; however, the statute of limitations, does not protect the defendants from liability for any damages caused by unlawful acts committed within four years of the date this suit was filed.

I. Facts

During the relevant period, plaintiff Stuart Conn ("Conn") operated gift and clothing shops that catered to Japanese tourists visiting San Francisco, California. Western Shoe Gallery, Inc. and Silvermint were two of the names under which Conn operated. [1] The defendants are a diverse **[*350]** group; most significantly, **[**2]** they include competing gift shops and package tour companies, all catering to the Japanese tourist trade. All of the tour operators are American subsidiaries or agents of Japanese Corporations, and they were all members of the Japanese Tour Operator's Association ("JTOA"), which is also a defendant.

[3]** The tour operators provided, among other things, bus tours around northern California. The tours frequently included stops at gift shops oriented towards Japanese tourists. Conn alleges that the defendants conspired to boycott him and to drive him out of the relevant market because he refused to pay secret rebates to the tour operators; the tour operators allegedly brought tourists to the defendant gift shops because these shops paid

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[1] Another of Conn's business entities, the Upstairs Corporation, has already been dismissed from this action because its corporate status had been suspended by state authorities, and it therefore lacked capacity to sue. The defendants have now moved for summary judgment against Western Shoe Gallery, Inc. on the same ground; Western Shoe Gallery's corporate status was suspended on April 2, 1984. The defendants' motion is denied on this issue, however, because Conn has shown that the corporate status of Western Shoe Gallery, Inc. was reinstated as of July 27, 1984. Throughout this opinion, the plaintiffs are referred to simply as "Conn" because it is clear that the defendants did not distinguish between the various entities controlled by Mr. Conn.

rebates based generally upon the value of the purchases made at the store by tourists brought in by the particular tour operator. The tourists were unaware of the rebates. Conn further alleges that the tour operators disparaged his stores and attempted to control where the tourists shopped even when they were not in an organized group. Conn brought this action alleging violations of sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 & 2), section 2(c) of the Robinson-Patman Act (15 U.S.C. § 13(c)), state antitrust laws, and state tort law.

II. Discussion

A. Defendants' Liability for Acts Committed Before February 9, 1978

The defendants bring this motion for summary judgment on the ground that the statute of limitations has run on each of Conn's **[**4]** claims. [2] The longest of the statutes in question is ***HN1***[] 15 U.S.C. section 15b, which requires that suits for damages under the Sherman Act be brought "within four years after the cause of action accrued." After reviewing the affidavits and documents submitted by the defendants, the court has no doubt that Conn had actual knowledge of the defendants' scheme more than four years before February 9, 1982, when this lawsuit was filed. Indeed, on November 28, 1977, Conn's current attorney wrote a letter to one of the defendants; that letter outlined the very conspiracy alleged in this action and threatened to file suit. Therefore, Conn may not recover any damages caused by acts committed before February 9, 1978. Conn attempts to avoid the statute of limitations altogether by invoking the doctrine of fraudulent concealment. *See Mt. Hood Stages, Inc. v. Greyhound Corp., 555 F.2d 687, 698 (9th Cir. 1977)*, *cert. denied*, *449 U.S. 831, 66 L. Ed. 2d 36, 101 S. Ct. 99 (1980)*. This contention is completely without merit.

[5]** Although Conn's fraudulent concealment argument suffers from many flaws, it is sufficient to note that by 1977, at the latest, Conn had *actual knowledge* of the operative facts which are the basis of his claims. Regardless of any actions taken by the defendants to conceal their conduct, Conn's actual knowledge of the alleged antitrust violation prevents him from asserting fraudulent concealment. *See Aurora Enterprises v. National Broadcasting Co., 688 F.2d 689, 693 (9th Cir. 1982)*; *Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 249-50 (9th Cir. 1978)*; *Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1975)*.

B. Defendants' Liability for Acts Committed After February 9, 1978

The defendants argue that this *entire action* is barred under *In re Multidistrict Vehicle Air Pollution, 591 F.2d 68* (9th Cir.), *cert. denied*, *444 U.S. 900, 100 S. Ct. 210, 62 L. Ed. 2d 136 (1979)*, and *David G. Orgell, Inc. v. Geary's Stores, Inc., 640 F.2d 936* (9th Cir.), *cert. denied*, *454 U.S. 816, 102 S. Ct. 92, 70 L. Ed. 2d 84 (1981)*, **[*351]** because *all* of Conn's causes of action accrued when he learned of the alleged conspiracy. The **[**6]** court disagrees. Conn may recover damages caused by acts committed after February 9, 1978.

> ***HN2***[]
>
> Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business. . . . In the context of a continuing conspiracy, to violate the antitrust laws . . . this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.

Air Pollution, 591 F.2d at 71 (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971)*).

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[2] The defendants have also argued that Conn's equitable claims are barred by laches. We need not decide this claim, however, because Conn stated at oral argument that he had abandoned his claims for equitable relief.

Thus, Conn may recover only for damages caused by forbidden "overt acts" within the limitations period. *Air Pollution, 591 F.2d at 71*. In the instant case, discovery provided by the defendants reveals many recent overt acts of the conspiracy. No fewer than six of the tour operator defendants have stated in answers to interrogatories that they continue to receive rebates from some or all of the gift shop defendants. The **[**7]** amount of each rebate is generally calculated as a percentage of the sales made to the tourists brought in by the particular tour operator. The defendants admit that they do not inform the tourists about the rebates.

Documents produced by the defendants also raise material questions of fact as to whether the JTOA has been used as a vehicle to maintain and enforce the group boycott. In 1979, for example, one member apparently felt it necessary to address the JTOA membership to dispel rumors that it was a "spy" for Conn. In 1980, another member had to explain why one of Conn's advertisements appeared in a tourists map of the United States. Also in 1980, one of the defendant tour operators threatened to withdraw from the JTOA because of another defendant's "movement toward" Conn and a rival tour operator allied with Conn. Policy discussions were also held among JTOA members; at one meeting, members stated that they planned to steer tourists to the defendant gift shops and to collect commissions. Other discovered documents reveal that the American subsidiaries of Japanese companies continued, until at least 1980, to send back to Japan intelligence reports concerning Conn and his operations. **[**8]** [3]

On the strength of this evidence, the court concludes that there do exist genuine issues of material fact as to whether, prior to 1978, the alleged concerted refusal to deal was "irrevocable, immutable, permanent and final" as those terms are used in the *Air Pollution* case. *591 F.2d at 71*.

The plaintiff in *Air Pollution* alleged a concerted refusal by the defendants to purchase plaintiff's pollution control device. The defendants **[**9]** had initially refused to purchase plaintiff's device more than four years before the suit was filed. The court found that the statute of limitations began running on plaintiff's entire claim at the time of this initial refusal. The *Air Pollution* court followed two Fifth Circuit cases and ruled that

> ***HN3***[] where the violation is final at its impact, for example, where the plaintiff's business is immediately and permanently destroyed, or where an actionable wrong is by its nature permanent at initiation without further acts, then the acts causing damage are unrepeated, and suit must be brought within the limitations period and upon the initial act.

[*352] *Air Pollution, 591 F.2d at 72* (quoting *Poster Exchange, Inc. v. National Screen Service Corp., 517 F.2d 117, 126-27 (5th Cir. 1975)*, *cert. denied*, *423 U.S. 1054, 46 L. Ed. 2d 643, 96 S. Ct. 784 (1976))*; *see also* *Imperial Point Colonnades Condominium, Inc. v. Mangurian, 549 F.2d 1029* (5th Cir.), *cert. denied*, *434 U.S. 859, 98 S. Ct. 185, 54 L. Ed. 2d 132 (1977)* (also cited in *Air Pollution, 591 F.2d at 72*).

The *Air Pollution* court concluded that any violation was final before the limitations **[**10]** period despite the fact that contacts initiated by plaintiff within the limitations period were again rebuffed. The court described these contacts as "forlorn inquiries" because the defendants had indicated "clearly and irrevocably an intent to look to their own devices or modifications thereof for the [next] model year." *591 F.2d at 72*. The court explained that the relevant market was unique because the integration of original equipment automobile parts required much planning and lead time. The court also noted that plaintiff's pollution control device staff had been substantially disassembled before the limitations period and concluded that the initial refusals to deal with plaintiff had been "irrevocable, immutable, permanent and final." *Id*.

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[3] Conn also contends that in 1980 two of the defendant tour operators demanded rebates from Conn and that certain of his employees did authorize such payments for a limited period of time. The evidence on this issue, however, consists only of Conn's answers to the defendants' interrogatories; these answers were verified by Mr. Conn, but only on information and belief. The court cannot consider this evidence because it does not meet the requirements of *rule 56(e) of the Federal Rules of Civil Procedure*. *S & S Logging Co. v. Barker, 366 F.2d 617, 624 n.7 (9th Cir. 1966)*.

The facts at bar are very different from those present in *Air Pollution*. Most significantly, the alleged concerted refusal to deal with Conn could only be maintained through affirmative conduct by the defendants. The defendant gift, 739 shop operators continued to pay the secret rebates and the defendant tour operators had to channel or steer each new group of tourists away from Conn and toward the defendant gift shops. **[**11]** Indeed, in one sense it is the individual tourist who decides whether to deal with Conn, and the defendant tour operators had to exert influence on each new tourist arriving in San Francisco. Moreover, as discussed above, the JTOA may have been used as a vehicle for keeping the conspiracy together; any such actions within the limitations period would be additional "overt acts;" such acts would necessarily indicate that the *concerted* refusal to deal was not "irrevocable, immutable, permanent and final." *Air Pollution, 591 F.2d at 72*.

These facts also distinguish the instant case from *David Orgell, Inc. v. Geary's Stores, Inc., 640 F.2d 936* (9th Cir.), *cert. denied*, *454 U.S. 816, 102 S. Ct. 92, 70 L. Ed. 2d 84 (1981)*, in which the defendants refused to sell goods to the plaintiff both within and without the limitations period. The court found that the plaintiff's later offers were "forlorn inquiries" and held that the suit was barred under *Air Pollution. Orgell*, 640 F.2d at 638. However, the refusal, within the limitations period, of plaintiff Orgell's two offers to buy the defendants' wares cannot compare in scope, frequency, or effort exerted with the affirmative **[**12]** conduct of the defendants in this case. [4]

[13]** Our conclusion is reinforced by an analysis of the purposes of the statute of limitations in antitrust cases. Those purposes are "to put old liabilities to rest and to **[*353]** relieve courts and parties from 'stale' claims where the best evidence may no longer be available. P. Areeda and D. Turner, ***Antitrust Law*** para. 325 at 119 (1978). The defendants are not exposed to liability for acts committed before February 9, 1978; the repose purpose of the statute of limitations applies with full force to these acts. However, no useful purpose is served by immunizing the defendants' *continued* affirmative acts that allegedly injure Conn unlawfully. ***HN4***[] "Employing the limitations statute to immunize recent repetition or continuation of violations and damages occasioned thereby not only extends the statute beyond its purpose, but also conflicts with the policies of vigorous enforcement of private rights through private actions." *Poster Exchange, 517 F.2d at 127-28*. In addition, the bulk of the evidence relevant to defendants' more recent acts will also be of a recent vintage.

III. Conclusion

For the foregoing reasons, the court concludes that the statute of limitations embodied **[**14]** in *15 U.S.C. section 15b* bars any antitrust claim for damages caused by acts committed before February 9, 1978; the statute of limitations does not, however, bar Conn's antitrust claims for damages caused by acts committed after February 9, 1978. [5]

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[4] The short and cryptic opinion in the *Orgell* case can conceivably be read to hold that a concerted refusal to deal is *always* final from its inception. The *Orgell* court did not explain why the later offers were "forlorn inquiries by one all of whose reasonable hopes had been previously dashed;" this contrasts sharply with the approach of the *Air Pollution* court, which justified its conclusion by reference to the characteristics of the automobile original equipment supply market. Moreover, the *Poster Exchange* case, upon which *Air Pollution* was based, clearly rejected the argument that a concerted refusal to deal is *always* final from its inception. Indeed, the *Poster Exchange* court explicitly assumed that any new refusal to deal *ordinarily* would constitute a new overt act giving rise to a new cause of action. *517 F.2d at 128-29*. For this reason, the *Air Pollution* court found it necessary to explain why the new refusal to deal in that case merely responded to a "forlorn inquiry" and did not give rise to a new cause of action. This court therefore declines to adopt the interpretation of *Orgell* suggested above. Without a clear statement from the Ninth Circuit, we will not adopt such a rigid rule, which goes well beyond *Air Pollution* and *Poster Exchange*, and which conflicts with the basic premise that "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act. . . ." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971)*.

[5] The applicable limitations period for Conn's ***HN5***[] state law antitrust claims is also four years. *Cal. Bus. & Prof. Code §§ 16750.1* & *16755*. ***HN6***[] A three year statute of limitations governs Conn's claims under the California Unfair Practices Act. *Cal. Bus. & Prof. Code §§ 17000*-101. *See* *Cal. Civ. Proc. Code § 338(1)*. Conn's ***HN7***[] state common law claims are governed by a two year statute of limitations. *Cal. Civ. Proc. Code § 339(1)*. The parties have not addressed, and the court does

[15]** It Is So Ordered.

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not decide, whether the continuing violation rationale of *Zenith, Poster Exchange*, and *Air Pollution* applies to Conn's state law claims.

[FTC v. Warner Communications, Inc.]

United States Court of Appeals for the Ninth Circuit

July 2, 1984, Argued and Submitted ; September 13, 1984, Decided

No. 84-5809

Reporter

742 F.2d 1156 *; 1984 U.S. App. LEXIS 18639 **; 1984-2 Trade Cas. (CCH) P66,192; 39 Fed. R. Serv. 2d (Callaghan) 1335

FEDERAL TRADE COMMISSION, Plaintiff-Appellant, v. WARNER COMMUNICATIONS INC., et al., Defendants-Appellees

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

Manual L. Real, District Judge, Presiding

Core Terms

merger, music, prerecorded, preliminary injunction, district court, joint venture, effects, concentration, distributors, anticompetitive, collusion, decisions, present evidence, recorded, injunctive relief, relevant market, recommendations, acquisition, percent, tapes, weak, likelihood of success, deliberative process, legal standard, deliberative, distributes, disclosure, barriers, parties, merits

LexisNexis® Headnotes

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

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

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

HN1[] **Remedial Powers, Federal Trade Commission Act**

See Federal Trade Commission Act, *15 U.S.C.S. § 53(b)*.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Irreparable Harm

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] **Remedial Powers, Federal Trade Commission Act**

The Federal Trade Commission Act, *15 U.S.C.S. § 53(b)*, places a lighter burden on the Federal Trade Commission (Commission) than that imposed on private litigants by the traditional equity standard; the Commission need not show irreparable harm to obtain a preliminary injunction.

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

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

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

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

HN3[] **Remedial Powers, Federal Trade Commission Act**

In determining whether to grant a preliminary injunction under the Federal Trade Commission Act, *15 U.S.C.S. § 53(b)*, a court 1) determines the likelihood that the Federal Trade Commission will ultimately succeed on the merits and 2) balances the equities.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4[] **Standards of Review, Abuse of Discretion**

The denial of a motion for preliminary injunction is reversed only if the district court abused its discretion or based its decision on an erroneous legal premise.

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 > General Overview

HN5[] **Antitrust & Trade Law, Clayton Act**

The Clayton Act, *15 U.S.C.S. § 18*, requires far less than a showing of collusion. It prohibits mergers whose effect may be substantially to lessen competition, or to tend to create a monopoly.

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

Antitrust & Trade Law > Clayton Act > General Overview

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

Mergers & Acquisitions Law > Merger Guidelines

Mergers & Acquisitions Law > Antitrust > General Overview

HN6[] **Antitrust Statutes, Clayton Act**

The core question in a case under the Clayton Act, *15 U.S.C.S. § 18*, is whether a merger may substantially lessen competition.

Antitrust & Trade Law > Clayton Act > General Overview

Mergers & Acquisitions Law > Merger Guidelines

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

It is well established that a violation of the Clayton Act, *15 U.S.C.S. § 18*, is proven upon a showing of reasonable probability of anticompetitive effect.

Evidence > ... > Government Privileges > Official Information Privilege > Deliberative Process Privilege

Evidence > Privileges > Government Privileges > General Overview

Evidence > ... > Government Privileges > Official Information Privilege > General Overview

HN8[] **Official Information Privilege, Deliberative Process Privilege**

The deliberative process privilege permits the government to withhold documents that reflect advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated.

Evidence > ... > Government Privileges > Official Information Privilege > Deliberative Process Privilege

Evidence > Privileges > Government Privileges > General Overview

Evidence > ... > Government Privileges > Official Information Privilege > General Overview

HN9[] **Official Information Privilege, Deliberative Process Privilege**

A document must meet two requirements for the deliberative process privilege to apply. First, the document must be pre-decisional -- it must have been generated before the adoption of an agency's policy or decision. Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies.

Evidence > Privileges > Government Privileges > General Overview

HN10[] **Privileges, Government Privileges**

Purely factual material that does not reflect deliberative processes is not protected.

Evidence > ... > Government Privileges > Official Information Privilege > Deliberative Process Privilege

Evidence > Privileges > Government Privileges > General Overview

Evidence > ... > Government Privileges > Official Information Privilege > General Overview

HN11[] **Official Information Privilege, Deliberative Process Privilege**

The deliberative process privilege is a qualified one. A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure.

Evidence > Privileges > Government Privileges > General Overview

HN12[] **Privileges, Government Privileges**

Among the factors to be considered in making the determination of whether a litigant may obtain deliberative materials are 1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions.

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN13[] **Antitrust & Trade Law, Federal Trade Commission Act**

The Federal Trade Commission (FTC) meets its burden of proving the likelihood of success if it raises questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals.

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Mergers & Acquisitions Law > Antitrust > Market Definition

Antitrust & Trade Law > Clayton Act > General Overview

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

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

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Mergers & Acquisitions Law > General Overview

Mergers & Acquisitions Law > Antitrust > General Overview

Mergers & Acquisitions Law > Antitrust > Remedies

HN14[] **Remedies, Injunctions**

In deciding whether to grant a preliminary injunction, the court's task is not to make a final determination on whether the proposed merger violates the Clayton Act, *15 U.S.C.S. § 18*, but rather to make only a preliminary assessment of the merger's impact on competition.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Mergers & Acquisitions Law > Antitrust > General Overview

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

Mergers & Acquisitions Law > General Overview

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

Factors to consider when determining the impact on competition include the market shares of the merging firms, industry trends towards concentration, the degree of concentration within the industry, prior mergers by the firms in question and the barriers to entry in the industry. This list of factors is not exhaustive.

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

HN16[] **Regulated Practices, Market Definition**

The relevant product market is determined by examining the reasonable interchangeability of use between the product and substitutes for it.

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

HN17[] **Regulated Practices, Market Definition**

The boundaries of the market are determined by considering such factors as industry or public recognition of the market, 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

Mergers & Acquisitions Law > Merger Guidelines

HN18[] **Antitrust & Trade Law, Clayton Act**

The Clayton Act, 15 U.S.C.S. § 18, is concerned only with the effect upon competition of an acquisition, and the statutory language was carefully drafted to refer only to an acquisition's effect. If the acquisition has a substantial anticompetitive effect, it is illegal under the Clayton Act.

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN19[] **Antitrust & Trade Law, Federal Trade Commission Act**

When balancing the equities in a determination of whether to grant a preliminary injunction, private equities may be considered but public equities receive far greater weight.

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN20[] **Antitrust & Trade Law, Federal Trade Commission Act**

When the Federal Trade Commission demonstrates a likelihood of ultimate success, a counter-showing of private equities alone does not justify denial of a preliminary injunction.

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN21[] **Antitrust & Trade Law, Federal Trade Commission Act**

Public equities may include beneficial economic effects and pro-competitive advantages for consumers.

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

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > General Overview

HN22[] **Antitrust & Trade Law, Federal Trade Commission Act**

A denial of a preliminary injunction precludes effective relief if the Federal Trade Commission ultimately prevails and divestiture is ordered.

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Judges: Goodwin, Farris, and Poole, Circuit Judges.

Opinion by: PER CURIAM

Opinion

[*1159] The Federal Trade Commission appeals from the district court order denying the Commission's application for a preliminary injunction to block a proposed joint venture involving Warner Communications Inc. and Polygram Records, Inc. We reverse.

FACTS

Warner Communications Inc. is a diversified communications company that operates three record labels (Warner, Atlantic and Elektra/Asylum) and distributes prerecorded music in the United States and abroad. In 1983, Warner was the second largest distributor **[**2]** of prerecorded music in the United States. Polygram Records, Inc., owned by N. V. Philips and Siemens AG, operates classical and popular record labels and distributes prerecorded music here and abroad. In 1983, Polygram was the sixth largest distributor of prerecorded music in the United States. Warner and Polygram plan to merge part of their record operations and form a joint venture company. Under the terms of the proposed joint venture, Polygram would close its distribution operations in the United States and the joint venture company would distribute Polygram's records.

The Federal Trade Commission brought an action seeking a preliminary injunction under section 13(b) of the Federal Trade Commission Act, *15 U.S.C. § 53(b)*, to block the proposed merger until the completion of administrative proceedings. The Commission alleged that the proposed joint venture would violate section 7 of the Clayton Act (*15 U.S.C. § 18*) and section 5 of the Federal Trade Commission Act (*15 U.S.C. § 45*).

During discovery, the defendants requested that the Commission produce two memoranda prepared by members of the Commission's **[**3]** Bureau of Economics. The memoranda, prepared before the Commission filed the action for preliminary relief, recommended that the Commission not challenge the merger. The district court ordered the Commission to produce the memoranda.

On April 10, 1984, the district court denied the Commission's motion for a preliminary injunction. On April 12, 1984, the Commission filed an Emergency Motion for Injunction Pending Appeal, which we granted.

We now reverse the district court decision because the district court applied an incorrect legal standard and improperly relied on the Bureau of Economics memoranda. Applying the correct legal standard, we hold that preliminary injunctive relief is warranted.

DISCUSSION

Section 13(b) of the Federal Trade Commission Act provides that ***HN1***[] "upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest . . . a preliminary injunction may be granted. . . ." *15 U.S.C. § 53(b)*. **[**4]** Section 13(b) ***HN2***[] places a lighter burden on the Commission than that imposed on private litigants by the traditional equity standard; the Commission need not show irreparable harm to obtain a preliminary injunction. *See* Conference Report **[*1160]** No. 924, 93d Cong., 1st Sess. 11, *reprinted in* 1973 U.S. Code Cong. & Admin. News 2533; *Federal Trade Commission v. Weyerhaeuser Co., 214 U.S. App. D.C. 254, 665 F.2d 1072, 1082 (D.C. Cir. 1981)*.

HN3[] In determining whether to grant a preliminary injunction under section 13(b), a court must 1) determine the likelihood that the Commission will ultimately succeed on the merits and 2) balance the equities. *Federal Trade Commission v. Simeon Management Corp., 532 F.2d 708, 713-14 (9th Cir. 1976)*. **HN4**[] The denial of a motion for preliminary injunction will be reversed only if the district court abused its discretion or based its decision on an erroneous legal premise. *American Motorcyclist Association v. Watt, 714 F.2d 962, 965 (9th Cir. 1983)*; **[**5]** *Simeon Management Corp., 532 F.2d at 711*.

I. THE DISTRICT COURT DECISION

A. Correct Legal Standard Under Section 7

The Commission argues that the district court order denying preliminary injunctive relief should be reversed because the court applied an incorrect legal standard. In its order, the district court said that the recorded music market does not operate in a manner conducive to "collusion," that "collusion" was unlikely at the record label level and that "collusion" regarding prices, critical non-price elements and new releases was impossible. The court mentioned "collusion" in seven of its 18 conclusions of law.

"Collusion" is "[a] secret combination, conspiracy, or concert of action between two or more persons for fraudulent or deceitful purpose." Black's Law Dictionary 240 (5th Ed. 1979). It implies the existence of fraud, the employment of fraudulent means, or the employment of lawful means to accomplish an unlawful purpose. *Id.*

It appears that the district court was applying *section 1* of the Sherman Act when it required a showing of collusion. *Section 1* prohibits every unreasonable "contract, combination . . . or conspiracy, **[**6]** in restraint of trade or commerce." *15 U.S.C. § 1*. It is unlawful, for example, for businesses that compete in the same market to collude by entering into agreements which divide up the market. *See* *Aydin Corp. v. Loral Corp., 718 F.2d 897, 899-900 (9th Cir. 1983)*; *Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348, 1354 (9th Cir. 1982)*.

Section 7 of the Clayton Act **HN5**[] requires far less than a showing of collusion. Section 7 prohibits mergers whose effect "*may be* substantially to lessen competition, or to tend to create a monopoly." *15 U.S.C. § 18* (emphasis added). It was intended to arrest the anticipated anticompetitive effects of acquisitions and other intercorporate transactions in their incipiency. *See* *United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 589, 597, 1 L. Ed. 2d 1057, 77 S. Ct. 872 (1957)*; *Ash Grove Cement Co. v. Federal Trade Commission, 577 F.2d 1368, 1378* (9th Cir.), *cert. denied*, *439 U.S. 982, 58 L. Ed. 2d 653, 99 S. Ct. 571 (1978)*; **[**7]** *United States v. Coca-Cola Bottling Co., 575 F.2d 222, 23*l (9th Cir.), *cert. denied*, *439 U.S. 959, 58 L. Ed. 2d 351, 99 S. Ct. 362 (1978)*. **HN6**[] The "core question [in a Section 7 case] is whether a merger may substantially lessen competition. . . ." *Federal Trade Commission v. Procter & Gamble Co., 386 U.S. 568, 577, 87 S. Ct. 1224, 18 L. Ed. 2d 303 (1967)*. **HN7**[] It is well established that a section 7 violation is proven upon a showing of reasonable probability of anticompetitive effect. *See, e.g.,* *Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 274 (7th Cir. 1981)*, *cert. denied*, *455 U.S. 921, 71 L. Ed. 2d 461, 102 S. Ct. 1277 (1982)*.

Since Section 7 requires only a showing of reasonable probability of anticompetitive effect and the district court required a showing of collusion, we conclude that the court applied an incorrect legal standard.

B. Bureau of Economics Memoranda

The Commission argues that the district **[**8]** court erred also in ordering production **[*1161]** of and in relying on the two memoranda prepared by members of the Bureau of Economics. The Commission contends that the memoranda were protected from disclosure under the government's "deliberative process privilege." **HN8**[] This privilege permits the government to withhold documents that reflect advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 44 L. Ed. 2d 29, 95 S. Ct. 1504 (1975)*. It was developed to promote frank and independent discussion among those responsible for making governmental decisions, *Environmental Protection Agency v. Mink, 410 U.S. 73, 87, 35 L. Ed. 2d 119, 93 S. Ct. 827 (1973)*, and also to protect against premature disclosure of proposed agency policies or decisions. *Coastal States* *Gas Corp. v. Department of*

Energy, 199 U.S. App. D.C. 272, 617 F.2d 854, 866 (D.C. Cir. 1980). The ultimate purpose of the privilege is to protect the **[**9]** quality of agency decisions. *Sears, 421 U.S. at 151*.

HN9[] A document must meet two requirements for the deliberative process privilege to apply. First, the document must be predecisional -- it must have been generated before the adoption of an agency's policy or decision. *Coastal States*, 617 F.2d at 866. The Bureau of Economics memoranda satisfy this requirement. The authors investigated the proposed joint venture and drafted the memoranda before the Commission made the decision to challenge the venture. *See White v. IRS, 707 F.2d 897, 902 (6th Cir. 1983)*. Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies. *Coastal States*, 617 F.2d at 866. ***HN10***[] Purely factual material that does not reflect deliberative processes is not protected. *Mink, 410 U.S. at 87-89*. The Bureau of Economics memoranda contain analyses of the record industry and the merger's **[**10]** potential effects on competition, and recommendations on whether the Commission should challenge the venture. Analyses and recommendations play a critical role in the Commission's decision whether or not to challenge a merger. The memoranda go to the heart of the deliberative and policy-making processes. Moreover, the factual material in the memoranda is so interwoven with the deliberative material that it is not severable. *See Binion v. Department of Justice, 695 F.2d 1189, 1193 (9th Cir. 1983)*. The deliberative process privilege applies to the two memoranda.

HN11[] The deliberative process privilege is a qualified one. A litigant may obtain deliberative materials if his or her need for the materials and the need for accurate fact-finding override the government's interest in non-disclosure. *See United States v. Leggett & Platt, Inc., 542 F.2d 655, 658 (6th Cir. 1976)*, *cert. denied*, *430 U.S. 945, 51 L. Ed. 2d 792, 97 S. Ct. 1579 (1977)*; **[**11]** *United States v. American Telephone and Telegraph Co., 524 F. Supp. 1381, 1386 n.14 (D.D.C. 1981)*. ***HN12***[] Among the factors to be considered in making this determination are: 1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions. *See, e.g., Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 327-329 (D.D.C. 1966)*, *aff'd*, *128 U.S. App. D.C. 10, 384 F.2d 979* (D.C. Cir.), *cert. denied*, *389 U.S. 952, 19 L. Ed. 2d 361, 88 S. Ct. 334 (1967)*; *In re Franklin National Bank Securities Litigation, 478 F. Supp. 577, 583 (E.D.N.Y. 1979)*; 2 J. Weinstein & M. Berger, Weinstein's Evidence para. 509[07] at 46-47 (1982).

In the present case, the Bureau of Economics memoranda are relevant; they contain material regarding various aspects of market structure and the merger's effect on competition. However, information regarding market structure and competitive effects was available to the defendants. The defendants **[**12]** presented extensive evidence on relevant market, market structure, barriers to entry and effects on competition. Because the defendants were able to obtain and introduce evidence on **[*1162]** these issues, they had little need for the memoranda.

The parties characterize differently the government's role in this litigation. Although the memoranda take positions which conflict with the Commission's litigation position, the defendants have presented no evidence of bad faith or misconduct on the part of the Commission. The fact that the Commission has in the past disclosed reports supporting its litigation position does not show bad faith in this case, nor does the fact that, prior to its decision to sue, the Commission disclosed the conclusions reached in one of the memoranda. Only the conclusions were disclosed; the analysis was kept secret.

Finally, compelled disclosure of the memoranda almost certainly injures the quality of agency decisions. It chills frank discussion and deliberation in the future among those responsible for making governmental decisions. It also encourages the Commission to have deliberative reports and recommendations prepared only by those economists **[**13]** who will draw the conclusions sought by the Commission.

Since the defendants were able to obtain and present evidence on the merger's effects on competition, there was no bad faith or misconduct on the part of the Commission, and compelled disclosure would likely hinder effective agency decision making, we conclude that the district court abused its discretion in ordering the production of the memoranda.

The record reflects that the district court relied on the memoranda and that this improper reliance materially affected its decision to deny injunctive relief. In its order, the court said that the affidavits, declarations, other exhibits "and, in particular," the two Bureau of Economics memoranda established that the Commission was unlikely to succeed on the merits of the claim. The error was not harmless.

II. WHETHER TO GRANT PRELIMINARY RELIEF

The decision whether to grant preliminary relief turns on a determination of the likelihood of the Commission's success on the merits and on a balance of the equities. *Simeon Management Corp., 532 F.2d at 714*. We do not accord the usual deference to the district court's findings regarding relevant market, market **[**14]** concentration and barriers to entry because these findings were improperly based on the Bureau of Economics memoranda.

A. Likelihood of Success

The issue is whether the Commission has demonstrated a likelihood of ultimate success. ***HN13***[] The Commission meets its burden if it "raise[s] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals." *Federal Trade Commission v. National Tea Co., 603 F.2d 694, 698 (8th Cir. 1979)*; *Federal Trade Commission v. Beatrice Foods Co., 190 U.S. App. D.C. 328, 587 F.2d 1225, 1229 (D.C. Cir. 1978)* (statement of Judges MacKinnon and Robb); *Federal Trade Commission v. Rhinechem Corp., 459 F. Supp. 785, 789 (N.D. Ill. 1978)*; *Federal Trade Commission v. Lancaster Colony Corp., 434 F. Supp. 1088, 1091 (S.D.N.Y. 1977)*; *but see* *Federal Trade Commission v. Atlantic Richfield Co., 549 F.2d 289, 291 (4th Cir. 1977)* **[**15]** (court imposes more rigorous burden).

The parties have presented conflicting evidence on the relevant product market, market concentration, market shares, barriers to entry and the merger's probable effect on competition. ***HN14***[] Our present task is not to make a final determination on whether the proposed merger violates Section 7, but rather to make only a preliminary assessment of the merger's impact on competition. *See* *Federal Trade Commission v. Food Town Stores Inc., 539 F.2d 1339, 1344 (4th Cir. 1976)*. ***HN15***[] Factors to consider when determining the impact on competition include the market shares of the merging firms, industry trends towards concentration, the degree of concentration **[*1163]** within the industry, prior mergers by the firms in question and the barriers to entry in the industry. *Marathon Oil Co. v. Mobil Corp., 530 F. Supp. 315, 325* (N.D. Ohio), *aff'd*, *669 F.2d 378 (6th Cir. 1981)*, *adhered to*, *669 F.2d 384* (6th **[**16]** Cir.), *cert. denied*, *455 U.S. 982, 71 L. Ed. 2d 691, 102 S. Ct. 1490 (1982)*. This list of factors is not exhaustive.

HN16[] The relevant product market is determined by examining the reasonable interchangeability of use between the product and substitutes for it. *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. ***HN17***[] The boundaries of the market may be determined by considering such factors as industry or public recognition of the market, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. *Id.;* *Equifax, Inc. v. Federal Trade Commission, 618 F.2d 63, 66 (9th Cir. 1980)*.

The Commission argues that the relevant market is prerecorded music, which includes all recorded sound performances sold to consumers in the form of singles, long playing albums, cassettes, tapes, eight track cartridges and **[**17]** compact disks. The defendants contend that the relevant market is recorded music, which includes "home tapes" of prerecorded music. The determination of relevant market is critical because the respective markets have significantly different structures.

The Commission offered record company documents and affidavits from company officials that indicate that the record industry recognizes prerecorded music as a market separate from the recorded music market. Although there is no direct evidence that consumers regard the prerecorded music market as a separate market, prerecorded music has distinct characteristics. Prerecorded music, unlike home tapes, is a ready-to-play product, sold in an attractive package which often includes artwork and liner notes. These characteristics suggest that prerecorded music and home tapes are not interchangeable. Also, there is a price difference of approximately 300 percent between home tapes and prerecorded music, and the Commission presented evidence that an increase in the price of prerecorded music would not cause a massive shift to home taping.

The Commission also presented evidence that 1) the prerecorded music industry is moderately concentrated **[**18]** at the distributor level and 2) the top four record distributors command approximately 67 percent of the domestic market. Warner, the company with the second highest share, distributes 18.9 percent of the prerecorded music products and Polygram, with the sixth highest share, distributes 7.1 percent. If the proposed joint venture is completed, the market share of the combined firm would be approximately 26 percent and the market share of the top four firms would be approximately 75 percent. [1]

The parties agree that there has been a trend toward increased concentration among record distributors. The record reflects that many companies have recently **[**19]** terminated their distribution operations. Many other record companies have attempted to enter the distribution market but have failed.

The Commission presented evidence showing the difficulty of entering the distribution market due to high capital costs, lack of expertise, inability to attract top performers, disadvantages in obtaining radio air play and point of sale promotion, and inability to demand and receive payment from retailers on an equal basis with established distributors. Moreover, the Commission presented evidence that sub-distributors and video distributors could not become national prerecorded music distributors because of the special expertise and facilities required. Finally, affidavits **[*1164]** from record company executives suggest that at least $125,000,000 in sales at wholesale is required to maintain a national record distribution operation. There is an insufficient supply of independently produced prerecorded music to allow a new entrant to obtain and sustain this volume.

The Commission has made a tenable showing that the relevant market is prerecorded music, that this market is moderately concentrated, that there is a trend toward increased concentration, **[**20]** that the proposed joint venture would accelerate this trend and that there are substantial barriers to entry. The government has met its burden of demonstrating a likelihood of success by presenting evidence sufficient to raise "serious, substantial, difficult" questions regarding the anticompetitive effects of the proposed joint venture. *See* *National Tea, 603 F.2d at 698*; *Rhinechem Corp., 459 F. Supp. at 789*; *Lancaster Colony Corp., 434 F. Supp. at 1091*.

In so holding, we do not ignore the evidence presented by the defendants which conflicts with the Commission's evidence. Because the issue in this action for preliminary relief is a narrow one, we do not resolve the conflicts in the evidence, compare concentration ratios and effects on competition in other cases, or undertake an extensive analysis of the antitrust issues. *See* *Lancaster Colony Corp., 434 F. Supp. at 1094, 1096*. We hold only that the Commission has met its burden of showing a likelihood of success on the merits.

The defendants attempt to justify the proposed merger by arguing that the merger would not be the cause for the reduction in the **[**21]** number of distributors and any resulting anticompetitive effects, because Polygram intends to leave the distribution market due to economic necessity. (The parties agree that Polygram is not asserting a "failing company" defense.) *See* *International Shoe Co. v. Federal Trade Commission, 280 U.S. 291, 302, 74 L. Ed. 431, 50 S. Ct. 89 (1930)*; *Brown Shoe, 370 U.S. at 346*.) We reject the argument. In *United States v. Phillips Petroleum Co., 367 F. Supp. 1226 (C.D. Cal. 1973)*, *aff'd mem.*, *418 U.S. 906, 94 S. Ct. 3199, 41 L. Ed. 2d 1154 (1974)*, the court rejected a similar argument that an acquisition would not violate section 7 where the acquired company intended to go out of business. It said:

> Section 7 ***HN18***[] is concerned only with the effect upon competition of an acquisition, and the statutory language was carefully drafted to refer only to an acquisition's effect. If the acquisition has a substantial anticompetitive effect, it is illegal under § 7. . . . The issue in an antitrust case is not a determination of **[**22]** the reasons for selling, but only the anticompetitive effect of the sale.

[1] We recognize that statistics concerning market share and concentration are not conclusive indicators of anticompetitive effects, but they provide a meaningful context within which to address the question of the merger's competitive effects. *See* *United States v. General Dynamics Corp., 415 U.S. 486, 498, 39 L. Ed. 2d 530, 94 S. Ct. 1186 (1974)*.

Id. at 1258-59.

The defendants cite several cases in which courts have upheld mergers and affirmed the denial of preliminary injunctions where a financially troubled company or a weak competitor has been acquired by a strong competitor. *See, e.g., Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255 (7th Cir. 1981)*, *cert. denied*, *455 U.S. 921, 71 L. Ed. 2d 461, 102 S. Ct. 1277 (1982)*; *Federal Trade Commission v. National Tea Co., 603 F.2d 694 (8th Cir. 1979)*; *United States v. International Harvester Co., 564 F.2d 769 (7th Cir. 1977)*. Such decisions have been criticized by courts and commentators. *See, e.g., Kaiser Aluminum & Chemical Corp. v. Federal Trade Commission, 652 F.2d 1324, 1338-40 (7th Cir. 1981)*; 4 P. Areeda & D. Turner, ***Antitrust Law*** para. 935 b, c (1980). In *Kaiser, supra*, the court said that "financial weakness, while perhaps relevant in some cases, is probably the weakest ground of all for justifying a merger." *652 F.2d at 1339*. The acquisition of **[**23]** a financially weak company hands over the company's customers to the acquiring company, thereby deterring competition by preventing others from securing those customers. *Id.* Also, a "weak company" defense would expand the failing company doctrine, a defense which has strict limits. *Id.*

Phillips Petroleum and *Kaiser* provide persuasive reasons for rejecting or attaching little weight to a defense of financial **[*1165]** plight as a ground for justifying a merger. However, we need not resolve the question of how much weight, if any, should be given to the weak financial condition of a company in a section 7 case. We hold only that a company's stated intention to leave the market or its financial weakness does not in itself justify a merger.

B. Balance of Equities

The second step in deciding whether to grant a preliminary injunction is to balance the equities. *Simeon Management Corp., 532 F.2d at 714*. Although ***HN19***[] private equities may be considered, public equities receive far greater weight. *Federal Trade Commission v. Weyerhaeuser Co., 214 U.S. App. D.C. 254, 665 F.2d 1072, 1083 (D.C. Cir. 1981)*; **[**24]** *Federal Trade Commission v. National Tea Co., 603 F.2d 694, 697 & n.4 (8th Cir. 1979)*; *but see Federal Trade Commission v. Food Town Stores, Inc., 539 F.2d 1339, 1344, 1346 (4th Cir. 1976)* (private equities not to be considered). ***HN20***[] When the Commission demonstrates a likelihood of ultimate success, a countershowing of private equities alone does not justify denial of a preliminary injunction. *Weyerhaeuser, 665 F.2d at 1083*.

HN21[] Public equities may include "beneficial economic effects and pro-competitive advantages for consumers." *Federal Trade Commission v. Pharmtech Research, Inc., 576 F. Supp. 294, 299 (D.D.C. 1983)*. In the present case, because the record contains conflicting evidence on the anticompetitive effects of the merger, it is unclear whether these equities support the grant or denial of injunctive relief.

A different public equity, however, supports the grant of injunctive relief. **[**25]** ***HN22***[] A denial of a preliminary injunction would preclude effective relief if the Commission ultimately prevails and divestiture is ordered. *See Federal Trade Commission v. Great Lakes Chemical Corp., 528 F. Supp. 84, 87 (N.D. Ill. 1981)*. Since the proposed joint venture calls for Polygram to dismantle its distribution operations, it would be exceedingly difficult for Polygram to revive the operations to comply with a divestiture order. The defendants argue that effective relief would still be possible because the Commission could compel Polygram to make alternate distribution arrangements upon withdrawing from the joint venture. In light of the high concentration in the distribution market, however, it may not be possible to make an arrangement which is permissible under section 7.

With respect to private equities, the defendants argue that a preliminary injunction would force them to abandon the joint venture. The defendants would not be able to operate effectively due to the uncertainties resulting from the pendency of the proposed transaction. Polygram asserts that its efforts to sign artists have been hindered **[**26]** and that many employees have left the company because of the uncertainty. The defendants also argue that there are private equities in allowing Polygram to escape its troubled financial condition by merging with Warner, *see*

United States v. G. Heileman Brewing Co., 345 F. Supp. 117, 122-24 (E.D. Mich. 1972), and in allowing Polygram's shareholders to reap the benefits of the merger. *See* *Great Lakes Chemical, 528 F. Supp. at 98*.

Although these asserted private injuries are entitled to serious consideration, private equities alone do not outweigh the Commission's showing of likelihood of success. *Weyerhaeuser, 665 F.2d at 1082-83*. Since the Commission has demonstrated a likelihood of success and the public equities do not support the denial of injunctive relief, a preliminary injunction is warranted.

CONCLUSION

We reverse the district court's denial of the Commission's application for a preliminary injunction. The preliminary injunction shall remain in effect until the completion of the administrative proceedings. Because undue delay could force the parties to abandon the proposed merger, the Commission is ordered to expedite **[**27]** proceedings. We shall retain jurisdiction to ensure compliance with this order.

IT IS SO ORDERED.

Airweld, Inc. v. Airco, Inc.

United States Court of Appeals for the Ninth Circuit

June 6, 1984, Argued and Submitted ; September 17, 1984, Decided

No. 83-3625

Reporter

742 F.2d 1184 *; 1984 U.S. App. LEXIS 18574 **; 1984-2 Trade Cas. (CCH) P66,197

AIRWELD, INC., Plaintiff-Appellant, v. AIRCO, INC., Defendant-Appellee

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

The Honorable James A. Redden, Presiding

Core Terms

gases, acetylene, prices, atmospheric, Liquid, industrial, manufacturers, distributor, terminated, argon, district court, total cost, purchases, monopolization, bulk, tying arrangement, antitrust, customers, predatory, cylinder, variable, tying product, products, plant, price discrimination, tied product, anticompetitive, argues, buyer, sales

LexisNexis® Headnotes

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > Judgment Notwithstanding Verdict

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

HN1[] **Reviewability of Lower Court Decisions, Adverse Determinations**

The appellate court's standard for determining the propriety of granting j.n.o.v. is the same as that used by the trial court. The appellate court must affirm the trial court if, without accounting for the credibility of the witnesses, the court finds that the evidence and its inferences, considered as a whole and viewed in a light most favorable to the nonmoving party, could support only one reasonable conclusion -- that the moving party is entitled to judgment notwithstanding the adverse verdict. Neither the trial court nor the appellate court is free to weigh the evidence or reach a result that it finds more reasonable as long as the jury's verdict is supported by substantial evidence.

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

HN2[] **Standards of Review, Substantial Evidence**

Substantial evidence is more than a scintilla; it is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.

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

HN3[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A tying arrangement occurs when a seller refuses to sell one product (the tying product) unless the buyer also purchases another (the tied product).

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

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

HN4[] **Tying Arrangements, Per Se Rule**

Three primary elements establish a per se illegal tying arrangement: (1) a tie-in between two distinct products or services; (2) sufficient economic power in the tying product market to impose significant restrictions in the tied product market; and (3) an effect on a not insubstantial volume of commerce in the tied product market.

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

HN5[] **Price Fixing & Restraints of Trade, Tying Arrangements**

There are two other independent, but related, elements of a tying arrangement. First, the seller of the tying product must have an economic interest in the sale of the tied product. Second, there must be a showing that the seller of the tying product coerced to some extent the purchaser into buying the tied product. Coercion occurs when the buyer must accept the tied item and forego possibly desirable substitutes. It may be shown directly through evidence that the purchaser was actually coerced, or indirectly from a showing that an appreciable number of buyers have accepted burdensome terms, such as a tie-in, and there exists sufficient economic power in the tying product market.

Civil Procedure > ... > Affirmative Defenses > Statute of Limitations > Revival

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

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > Sherman Act

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN6[] **Statute of Limitations, Revival**

The effect of a continuing violation is to restart the statute of limitations. In the context of a conspiracy to violate *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, the cause of action will begin to run anew whenever the defendant commits an overt act in furtherance of the conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > Tolling

HN7[] **Antitrust & Trade Law, Sherman Act**

The cause of action may also reaccrue, in the absence of a conspiracy to violate the antitrust laws, when the defendant commits an act which by its nature is a continuing antitrust violation.

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

Contracts Law > Defenses > Illegal Bargains

HN8[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Purchases under a legal contract do not constitute a seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.

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

HN9[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Coercion takes place in the context of power in the tying product market, not in a vacuum.

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

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

A unilateral refusal to deal is not violative of the antitrust laws.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

HN11[] **Robinson-Patman Act, Claims**

A key requirement for a § 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13*, claim is a showing that there have been at least two completed, substantially contemporaneous sales by the same seller.

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

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

HN12[] **Monopolies & Monopolization, Attempts to Monopolize**

There are three interrelated elements in an attempt to monopolize claim: (1) a specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success. Conduct is the most critical element. Specific intent alone will not support an attempted monopolization claim. Predatory or anticompetitive conduct, however, can support an inference of specific intent and dangerous probability of success.

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

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

When evidence of specific intent of unfair or predatory conduct is ambiguous, the plaintiff must introduce evidence of conduct amounting to a substantial claim of restraint of trade or conduct clearly threatening to competition or clearly exclusionary. The conduct must be such that its anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the firm's long term ability to reap the benefits of monopoly power. Such conduct is not true competition; it makes sense only because it eliminates competition. It does not enhance the quality or attractiveness of the product, reduce its cost, or alter the demand function that all competitors confront. Its purpose is to create a monopoly by means other than mere competition.

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

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

The Ninth Circuit Court of Appeals has approved cost-based methods of determining when a price is predatory. Costs are divided into fixed costs (those that do not vary with changes in output) and variable costs (which do so vary). Total cost is the sum of fixed and variable costs. Marginal cost is the increment to total cost that results from producing an additional unit of output. Average cost, or average total cost, is obtained by dividing total cost by output. Likewise, average variable cost is the sum of all variable costs divided by output. Average cost is thus higher than average variable cost for all output levels.

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

HN15[] **Actual Monopolization, Anticompetitive & Predatory Practices**

If the plaintiff proves the prices charged by the defendant were below marginal cost or average variable cost, a prima facie case is made and the burden shifts to the defendant to show that the prices were justified without regard to any anticipated destructive effect they might have on competitors. If the price is above average variable cost, but below average total cost, the burden remains on the plaintiff to otherwise show the predatory nature of the pricing. This can be done if the evidence shows that the defendant sacrificed greater profits or incurred greater losses than necessary in order to eliminate the plaintiff. Last, above average total cost pricing will sustain a monopolization claim only if the plaintiff offers clear and convincing evidence that the defendant's pricing policy was predatory.

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

HN16[] **Monopolies & Monopolization, Attempts to Monopolize**

If market conditions are such that a course of conduct described by the plaintiff would be unlikely to succeed in monopolizing the market, it is less likely that the defendant actually attempted to monopolize the market.

Counsel: David R. Lord, C. David Sheppard, Esq., Ferguson & Brudell, Seattle, Washington, for Appellant/Petitioner.

T. Triplett, Esq., Schwabe, Williamson, Syatt, Moore & Roberts, Portland, Oregon, for Appellee/Respondent.

Judges: Anderson, Poole, and Nelson, Circuit Judges.

Opinion by: ANDERSON

Opinion

[*1186] J. BLAINE ANDERSON, Circuit Judge:

Airweld, Inc., a distributor of industrial gases, brought an action against Airco, Inc., a manufacturer of industrial gases, alleging a variety of antitrust violations including price discrimination, attempted monopolization, and tying arrangements. After a jury trial, the district court granted Airco's motion for judgment notwithstanding the verdict (j.n.o.v.). *576 F. Supp. 676 (D. Oregon 1983)*. Airweld appeals.

I. BACKGROUND

A. *Facts*

This action involves the industrial gas market in the Portland, Oregon area. Industrial gases are often divided into two types: "atmospheric" gases, such as hydrogen, oxygen, nitrogen, helium and argon; and "fuel" gases, such as acetylene and propane. Atmospheric **[**2]** gases are extracted from the atmosphere and generally fuel gases are produced through combining various elements or compounds. Industrial gases are generally sold in two forms. They are compressed into cylinders for resale by distributors and they are also sold in bulk, sometimes in liquid form, to larger industrial buyers.

In 1968, Stanton Richardson, who had been employed by Airco for 23 years, purchased **[*1187]** Industrial Specialties Co. (ISCO), an industrial gas and welding products distributor in Portland, Oregon. ISCO, now known as Airweld, Inc., had been a distributor of Airco, Inc. products since at least the early 1960's. Airco was, and apparently still is, one of the major manufacturers of industrial gas and welding products in this country. It has an acetylene plant in Portland and manufactures atmospheric gases in nearby Vancouver, Washington.

After Richardson's purchase, Airweld and Airco entered into a new distributorship agreement. The contract had a five-year term, but was terminable by either party upon one year's notice. At this time, Airweld became the sole distributor of Airco products in Portland and Airco ceased acting as its own distributor in **[**3]** that locale.

In 1973, a new three-year agreement was executed. Soon, however, Airweld became unhappy with Airco's price increases in argon and, on or before April 1, 1975, Airweld gave notice of its intent to terminate the atmospheric gas portion of the agreement. Negotiations to reconcile the differences failed and on March 31, 1976, the entire Airweld-Airco relationship ended.

1. *Tying Claim Facts*

In 1969, Airweld began to purchase acetylene from another manufacturer. When Airco learned of this, it told Richardson, Airweld's president, that it would terminate the agreement if outside purchases of acetylene continued. Airweld then resumed buying the gas from Airco. Airweld allegedly acquiesced because it did not feel it could economically secure another source of supply for atmospheric gases at economically feasible prices.

From 1969 to 1971, Rexarc, a manufacturer of acetylene plants, encouraged Richardson to build his own plant. Richardson was interested in this prospect because Rexarc was convinced that Airweld would save substantially on the cost of acetylene. Airco indicated to Richardson, however, that Airweld could not remain a distributor if it built its **[**4]** own plant. Airweld continued purchasing its acetylene requirements from Airco until the agreement terminated in 1976.

2. *Price Discrimination Facts*

Airweld's price discrimination claim involves agreements that Airco had with the Linde Division of Union Carbide Corp. and Liquid Air, Inc., two of the other major manufacturers of industrial gases in this country. Since at least 1968, Airco and Linde had a formal agreement to "swap" atmospheric gases on a national basis. For example, Linde did not have an atmospheric gas manufacturing plant in the Portland area prior to at least 1976. Airco would supply Linde with these gases from its Vancouver, Washington facility, and Linde made its gases available to Airco at its Indiana facility. Gas was traded only as available. Imbalances in the amount respectively received were to be kept within 50 million cubic feet, and only on a short term basis. Originally, imbalances were to be remedied solely through the provision of product. This changed, and in July 1974 through April 1976, "settlement values" were to be used. The settlement value was a trade price set for the particular gas.

In 1973, a similar, although less formal, agreement **[**5]** was entered between Airco and Liquid Air in which Airco agreed to supply Liquid Air with gas from Vancouver and Liquid Air made its gases produced in Phoenix available to Airco. Imbalances over one million cubic feet were to be rectified by use of a settlement price of $.080 per cubic foot.

Linde and Liquid Air each sold the atmospheric gases they received from Airco in the swaps in bulk to industrial users as well as to distributors in cylinder form. Airweld competed with Linde and Liquid Air to some extent in the bulk user market.

3. *Attempt to Monopolize Facts*

After Airweld terminated the distribution agreement, Airco decided to establish its own distributor in the Portland area, called Airco Welding Supply (AWS). Airco invested $400,000 to $500,000 in this operation. **[*1188]** Since Airco was without any cylinder gas and hard goods customers in Portland after Richardson terminated the distribution agreement, AWS attempted to attract these customers back to using Airco products. It did this by approaching Airweld customers and offering lower prices. The evidence showed that at least some of the prices quoted by AWS were below its average total cost.

Airco also **[**6]** sought to obtain A & A Welding Supply, owned by Al Fick, as an Airco hard goods distributor for the Portland area. A & A was a relatively small distributor and it rejected Airco's proposals. Fick testified that Airco officials stated they were going to regain the market share lost when Airweld terminated the agreement. He also stated that Airco, through AWS, targeted his customers and offered them lower prices because he declined to become an Airco distributor.

Airweld also presented evidence that in the early 1970's, Airco encouraged it to distribute argon to "small bulk" customers. To service this need, Airweld invested in "stations" from which to supply the small bulk user. Airweld grew rapidly in this market and it became one of the most important facets of its business. By 1975, Airweld had begun to compete to some extent with Airco's bulk gas supplier in Portland, Airco Industrial Gases. Around that same time, Airco raised its prices on argon and this ultimately was the major reason Airweld decided to terminate the relationship. Richardson claimed that Airco was "squeezing" him out of the bulk argon business in the hope of taking over the accounts he had secured.

B. **[**7]** *Procedure*

Airweld filed this action on December 10, 1979. On August 12, 1980, the district court denied Airco's motion to dismiss the complaint based on the four-year statute of limitations, *15 U.S.C. § 15b*, ruling that the limitations period was tolled by a Federal Trade Commission proceeding against Airco instituted on May 19, 1977. Thus, the claims period was extended through May 19, 1973.

Airco's motion for summary judgment was denied on December 29, 1981, and the case proceeded to a two-week trial in February, 1982. A directed verdict by Airco at the close of plaintiff's evidence was denied. Airco elected not to present any evidence. On March 1, 1982, the jury returned special verdicts in favor of Airweld, finding that Airco had unlawfully engaged in a tying arrangement, price discrimination, and in an attempt to monopolize a portion of the industrial gas market. Judgment, with damages of $1,139,799 after trebling, was entered accordingly.

Airco then moved for judgment notwithstanding the verdict (j.n.o.v.) and/or a new trial. The j.n.o.v. was granted and the trial court also conditionally granted the new trial. Airweld appeals.

II. **[**8]** STANDARD OF REVIEW

HN1[] Our standard for determining the propriety of granting j.n.o.v. is the same as that used by the district court. [1] *See California Computer Products v. I.B.M. Corp., 613 F.2d 727, 734 (9th Cir. 1979)*.

> We must affirm the district court if, without accounting for the credibility of the witnesses, we find that the evidence and its inferences, considered as a whole and viewed in a light most favorable to the nonmoving party, can support only one reasonable conclusion -- that the moving party is entitled to judgment notwithstanding the adverse verdict. Neither the district court nor this court is free to weigh the evidence or reach a result that it finds more reasonable as long as the jury's verdict is supported by substantial evidence.

[*1189] *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1026 (9th Cir. 1981)*, (citations omitted), *cert. denied*, *459 U.S. 825, 103 S. Ct. 57, 74 L. Ed. 2d 61 (1982)*. **[**9]** ***HN2***[] Substantial evidence is more than a scintilla; it is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 853 n.2 (9th Cir. 1977)*, *cert. denied*, *439 U.S. 829, 58 L. Ed. 2d 122, 99 S. Ct. 103 (1978)*.

III. THE TYING ARRANGEMENT [2]

[10]** ***HN3***[] A tying arrangement occurs when "a seller refuses to sell one product (the tying product) unless the buyer also purchases another (the tied product)." *Roberts v. Elaine Powers Figure Salons, Inc., 708 F.2d 1476, 1478-1479 (9th Cir. 1983)*. ***HN4***[] Three primary elements establish a per se illegal tying arrangement:

> (1) a tie-in between two distinct products or services; (2) sufficient economic power in the tying product market to impose significant restrictions in the tied product market; and (3) an effect on a not insubstantial volume of commerce in the tied product market.

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[1] The granting of a motion for new trial is subject to a less stringent standard. The trial court may order a new trial if it believes the jury's verdict is clearly against the weight of the evidence and we may reverse that decision only if we find it to be an abuse of discretion. *Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 1027 (9th Cir. 1977)*, *cert. denied*, ***439 U.S. 829, 58 L. Ed. 2d 122, 99 S. Ct. 103 (1978)***.

[2] Airweld claimed that the tying arrangement violated both *section 1* of the Sherman Act, *15 U.S.C. § 1*, and *section 3* of the Clayton Act, *15 U.S.C. § 14*. This court has stated that the elements for establishing a violation under each provision are virtually the same. *Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1214 (9th Cir. 1977)*; *see In re Data General Corp. Antitrust Litigation, 490 F. Supp. 1089, 1100 (N.D. Cal. 1980)* (the distinction has faded beyond recognition). In our analysis, therefore, we treat them alike.

Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc., 732 F.2d 1403, 1407 (9th Cir. 1984) (citing *Elaine Powers, 708 F.2d at 1479*); *see Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 1557-1561, 80 L. Ed. 2d 2 (1984)*.

[11]** ***HN5***[] The courts have identified two other independent, but related, elements. First, the seller of the tying product must have an economic interest in the sale of the tied product. Second, there must be a showing that the seller of the tying product "coerced" to some extent the purchaser into buying the tied product. "Coercion occurs when the buyer must accept the tied item and forego possibly desirable substitutes." *Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1217 (9th Cir. 1977)*. It may be shown directly through evidence that the purchaser was actually coerced, or indirectly "from a showing that an appreciable number of buyers have accepted burdensome terms, such as a tie-in, and there exists sufficient economic power in the tying product market." *Id.* (citation omitted).

The district court granted Airco's motion for j.n.o.v. because there was no "substantial evidence of a tie during the limitations period." *576 F. Supp. at 678*. The court reached this result despite its conclusion that Airweld offered substantial evidence of a tying arrangement during the late 1960's. What the court found lacking was evidence that during the claims period Airco **[**12]** coerced Airweld into purchasing acetylene because of its threats to discontinue supplying atmospheric gases. Not only must a defendant seek to require purchase of the tied item, it must have the power to do so. *Hyde, 104 S. Ct. at 1558*.

The gist of the district court's reasoning is that Airweld failed to prove a continuing antitrust violation. There is a four-year statute of limitations for antitrust claims. *15 U.S.C. § 15b*. This action was filed on December 10, 1979. The district court ruled prior to trial that the four-year period was tolled by a Federal Trade Commission action against Airco, which extended the limitations period to May 19, 1973. The evidence showed that Airweld's tying claim accrued prior to May, 1973; Airco attempted to dissuade Airweld in the late 1960's and the early 1970's from either securing an alternative supply of acetylene or building its own plant. The court found, however, that no overt acts designed to enforce the tie occurred during the relevant portion of the claims period.

As a general rule, a cause of action accrues when a defendant commits an act **[*1190]** that injures the plaintiff. *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971)*; **[**13]** *In re Multidistrict Vehicle Air Pollution, 591 F.2d 68, 71* (9th Cir.), *cert. denied*, *444 U.S. 900, 100 S. Ct. 210, 62 L. Ed. 2d 136 (1979)*. Since Airweld's tying cause of action first accrued under these general principles prior to the beginning of the limitations period, it had to rely on one of two doctrines. First, and primarily, Airweld argues that the continuing violation exception to the general rule of accrual applies. Second, Airweld relies on the related rule that a cause of action does not accrue on the date of injury if damages are speculative. *Id.*

HN6[] The effect of a continuing violation is to restart the statute of limitations. In the context of a conspiracy to violate *section 1* of the Sherman Act, the cause of action will begin to run anew whenever the defendant commits an overt act in furtherance of the conspiracy. *See Zenith Radio Corp., 401 U.S. at 338*. ***HN7***[] The cause of action may also reaccrue, in the absence of a conspiracy to **[**14]** violate the antitrust laws, when the defendant commits an act which by its nature is a continuing antitrust violation. *Kaiser Aluminum, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1051 (5th Cir. 1982)*, *cert. denied*, *459 U.S. 1105, 74 L. Ed. 2d 953, 103 S. Ct. 729 (1983)*. An example of this latter type of continuing violation is when a defendant actively enforces an illegal contract. *Aurora Enterprises, Inc. v. National Broadcasting Co., 688 F.2d 689, 694 (9th Cir. 1982)* (citing *Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1270 (9th Cir. 1975))*.

Importantly, for the cause of action to reaccrue Airweld was required to show Airco committed acts which not only caused it injury but also caused antitrust injury during the limitations period. *National Souvenir Center v. Historic Figures, Inc., 234 U.S. App. D.C. 222, 728 F.2d 503, 509 (D.C. Cir. 1984)*; *Kaiser, 677 F.2d at 1055*; *Electroglas, Inc. v. Dynatex Corp., 497 F. Supp. 97, 105 (N.D.Cal. 1980)*. In the context of a tying arrangement, competitive injury is presumed when **[**15]** the elements discussed above are shown. *See Hyde, 104 S. Ct. at 1556*.

Therefore, Airweld was required to show that Airco had the ability and actually did enforce the tie of acetylene to atmospheric gases during the claims period.

The parties agree that the contracts entered into are not illegal. The 1973 agreement involved requirements contracts for oxygen and acetylene in cylinders, and also provided for the supply of liquid argon, oxygen and nitrogen in bulk. In and of themselves, the contracts did not tie the sale of acetylene to the allegedly unique or desirable atmospheric gases. Therefore, Airweld's argument that it was injured and its cause of action accrued with each purchase of acetylene avails it nothing. ***HN8***[] Purchases under a legal contract do not constitute a "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." *Hyde, 104 S. Ct. at 1558*. Certainly, the parties' voluntary conduct **[**16]** pursuant to the contracts does not involve "active enforcement of an illegal contract." *Aurora Enterprises, 688 F.2d at 694*.

Airweld also argues that, based on Airco's prelimitations period discouragement of Airweld's attempt to secure another source of acetylene, the jury could have inferred that it was coerced during the claim period. Again we disagree. While the district court focused on lack of evidence of acts of coercion during the claims period, what we find most critical is Airweld's failure to offer sufficient proof of Airco's *ability* to force Airweld to purchase its acetylene during the claims period. ***HN9***[] Coercion takes place in the context of power in the tying product market, not in a vacuum. *Hyde, 104 S. Ct. at 1560-1561*; *see* *Robert's Waikiki, 732 F.2d at 1407*. The record is virtually devoid of any evidence from which the jury could have found that Airco's posture in the atmospheric gas market in Portland was such **[*1191]** that it could require Airweld to purchase its acetylene. All the record shows is Richardson's **[**17]** equivocal statements that prior to 1973 Airco was the only supplier that he felt could economically provide atmospheric gases to Airweld in Portland. In particular, he stated that in 1969, Liquid Air, one of the two other manufacturers operating in Portland, probably could not have supplied him because Liquid Air was already buying some of its own supplies from Airco. He also stated that prior to 1973, Liquid Air indicated it would not be able to supply him. Finally, he testified that after he terminated the agreements with Airco in April 1975, he had not yet checked to see if alternative manufacturers would supply him. After the termination notice, he stated that Linde and, initially, Liquid Air indicated they would not be able to supply a full line of atmospheric gases. Air Products, another manufacturer, did, however, agree to replace Airco as Airweld's argon source. Soon, Liquid Air offered a full line of industrial gas to Airweld.

This evidence does not prove that Airco had a corner on the atmospheric gas market in Portland. For the jury to have concluded that it did was mere speculation, and the trial court was obligated not to sustain its finding. In fact, the evidence **[**18]** shows the atmospheric gas market in Portland was competitive. Once Airweld cut its ties to Airco, the other suppliers became available when they learned Airweld was now a serious customer.

Even assuming that Airco threatened to terminate the distribution agreement during the claims period does not, then, show that it forced Airweld into purchasing acetylene. ***HN10***[] A unilateral refusal to deal is not violative of the antitrust laws. *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775 (1984)*. Airweld's evidence showed nothing more.

Airweld also argues that the speculative damage exception to the general rule of accrual applies. Assuming that Airweld offered sufficient proof of a tying arrangement imposed prior to 1973, it nonetheless is only entitled to damages for injury incurred during the claims period, May 1973 to May 1977. *Hanson v. Shell Oil Co., 541 F.2d 1352, 1361 (9th Cir. 1976)*, *cert. denied*, *429 U.S. 1074, 50 L. Ed. 2d 792, 97 S. Ct. 813 (1977)*. If, as Airweld claims, it was injured **[**19]** with each purchase of acetylene, that injury was certainly complete when all the purchases of acetylene under the first agreement were consummated. That apparently would have been no later than April 1, 1973, when the second agreement went into effect. Airweld offered no proof that purchases of acetylene under the first agreement occurred after that time. In conclusion, we affirm the district court's j.n.o.v. on this claim. [3]

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[3] Airweld also claims that the jury's verdict in Airweld's favor on the attempt to monopolize the acetylene market claim should still stand. We disagree. Attempt to monopolize will be discussed in more detail later in another context. At this point, we need only

[20]** IV. PRICE DISCRIMINATION

The district court also granted Airco's motion for j.n.o.v. on the price discrimination claim. Airweld had alleged that Airco's swaps of industrial gases with Linde and Liquid Air violated section 2(a) of the Robinson-Patman Act, *15 U.S.C. § 13*, which prohibits discrimination "in price between different purchasers of commodities of like grade and quality." *See Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 547 (9th Cir. 1983)*, *cert. denied*, *465 U.S. 1038, 104 S. Ct. 1315, 79 L. Ed. 2d 712 (1984)*. ***HN11***[] A key requirement for a Robinson-Patman section 2(a) claim is a showing that there have been at least two completed, substantially contemporaneous sales by the same seller. *Id.; see Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 755, 91 L. Ed. 1219, 67 S. Ct. 1015 (1947)*; **[*1192]** *Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668, 677 (9th Cir. 1975)*.

The district court ruled that as a matter of law the swaps were not sales. In reaching **[**21]** its decision, it relied on the only decision of which we are aware that has held that exchanges of the same product are not sales within the ambit of the Robinson-Patman Act, *American Oil Co. v. McMullin, 508 F.2d 1345, 1353 (10th Cir. 1975)*. In *McMullin*, the Tenth Circuit rejected the argument that an exchange of like types of gasoline between petroleum manufacturers constituted a sale, at least on the record before it. Nor can we, on this record, conclude that the exchange of fungible atmospheric gases by manufacturers are "sales."

Also, we agree with the district court's alternative holding that even if there were "sales," Airweld never actually proved discrimination in price. Airweld never proved when the sales actually occurred and therefore that they were contemporaneous to its purchases. Although it attempted to use the "settlement price" schedule to prove the price charged, Airweld never showed that the settlement price was ever used to settle accounts. We note further that because Airweld was not a manufacturer, it simply was in no position to swap. It could not offer Airco the same "price" as Liquid Air and Linde because it could not offer large **[**22]** quantities of gas at areas around the country where Airco did not have a manufacturing plant. It could not, therefore, offer the same consideration as Linde and Liquid Air. For these reasons, we conclude that the district court correctly granted Airco's motion for judgment notwithstanding the verdict on this claim.

V. ATTEMPT TO MONOPOLIZE

The trial court also overturned the jury's finding that Airco attempted to monopolize the cylinder gas market in Portland. Airweld argues that substantial evidence was before the jury from which it could infer that Airco attempted to monopolize the market by trying to squeeze Airweld out of the bulk argon business and by Airco Welding Supply's below cost pricing.

HN12[] There are three interrelated elements in an attempt to monopolize claim: "(1) a specific intent to control prices or destroy competition in some part of commerce; (2) predatory or anticompetitive conduct directed to accomplishing the unlawful purpose; and (3) a dangerous probability of success." *William Inglis & Sons Baking Co., 668 F.2d at 1027*.

In *Inglis* **[**23]** , the relationship of these elements was discussed in detail. *Id. at 1027-1031*. Conduct is the most critical element. Specific intent alone will not support an attempted monopolization claim. *Id. at 1028*. Predatory or anticompetitive conduct, however, can support an inference of specific intent and dangerous probability of success. *Id. at 1028-1029*.

Airweld argues that it offered adequate proof of Airco's intent to eliminate it as a competitor as discipline for the decision to terminate the distributorship agreement. In particular, Airweld points to evidence that shows Airco officials intended to "target" Airweld's accounts and to testimony that Airco officials stated Airco would get its share of the Portland marketplace back "any way it could."

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state that Airweld's failure to prove a substantive tying violation precludes it from claiming that Airco's actions in that respect also constituted an attempt to monopolize. *See Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 543 (9th Cir. 1983)*, *cert. denied*, ***465 U.S. 1038, 104 S. Ct. 1315, 79 L. Ed. 2d 712 (1984)***.

This evidence is slim proof at best of specific intent to "destroy competition." Airco's desire to regain a share of the marketplace, and in so doing reduce Airweld's share, does not show an intent to interfere with the competitive process. As noted in *Inglis*, the "intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation." **[**24]** *668 F.2d at 1028* (footnote omitted).

Our focus, then, must be on the sufficiency of Airweld's proof of unfair or predatory conduct. ***HN13***[] When, as here, evidence of specific intent is ambiguous, the "plaintiff must introduce evidence of conduct amounting to a substantial claim of restraint of trade or conduct clearly threatening to competition or clearly exclusionary." *Id. at 1030* (footnote omitted).

> **[*1193]** [The conduct] must be such that its anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the firm's long term ability to reap the benefits of monopoly power. Such conduct is not true competition; it makes sense only because it eliminates competition. It does not enhance the quality or attractiveness of the product, reduce its cost, or alter the demand function that all competitors confront. Its purpose is to create a monopoly by means other than mere competition.

Id. at 1030-1031 (footnote omitted).

Airweld presented evidence which it argued showed **[**25]** that Airco encouraged it to enter the small bulk argon market and then attempted to "squeeze" it out and take over the accounts Airweld had secured. First, we fail to see how this evidence relates to Airweld's claim that Airco attempted to monopolize the cylinder gas market. Bulk argon is not sold in cylinders. This conduct also precedes the general time frame in which Airweld claims the attempt to monopolize occurred. Second, this is not conduct that amounts to "a substantial claim of restraint of trade" or that is "clearly threatening to competition or clearly exclusionary." *Id. at 1030*. Airco's price increases in the argon it sold to Airweld were not inherently anticompetitive. Airweld was not, as it seems to assert, locked into buying argon from Airco. After a price increase, Airweld had the right to shop the market to secure a better deal. If Airco failed to meet the lower price, Airweld could purchase from a new supplier.

Airweld also attempted to prove that Airco subsidized the AWS "company" store with up to $500,000 in order to enable it to engage in predatory below-cost pricing. Simply stated, "pricing is predatory only where the firm forgoes short-term **[**26]** profits in order to develop a market position such that the firm can later raise prices and recoup lost profits." *Id. at 1031* (quoting *Janich Bros. v. American Distilling Co., 570 F.2d at 856*).

HN14[] This circuit has approved cost-based methods of determining when a price is predatory:

> Costs are divided into *fixed costs* (those that do not vary with changes in output) and *variable costs* (which do so vary). *Total cost* is the sum of fixed and variable costs. *Marginal cost* is the increment to total cost that results from producing an additional unit of output. *Average cost*, or *average total cost*, is obtained by dividing total cost by output. Likewise, *average variable cost* is the sum of all variable costs divided by output. Average cost is thus higher than average variable cost for all output levels.

Transamerica Computer Co. v. IBM Corp., 698 F.2d 1377, 1384-1385 (9th Cir.) (footnote omitted), *cert. denied*, *464 U.S. 955, 104 S. Ct. 370, 78 L. Ed. 2d 329 (1983)*; *see* **[**27]** *Inglis, 668 F.2d at 1033-1038*.

HN15[] If the plaintiff proves the prices charged by the defendant were below marginal cost or average variable cost, a prima facie case is made and the burden shifts to the defendant to show "that the prices were justified without regard to any anticipated destructive effect they might have on competitors." *Inglis, 668 F.2d at 1036*. If the price is above average variable cost, but below average total cost, the burden remains on the plaintiff to otherwise show the predatory nature of the pricing. *Id. at 1036*. This can be done if the evidence shows "that the defendant sacrificed greater profits or incurred greater losses than necessary in order to eliminate the plaintiff." *Id.; see* *Zoslaw* *v. MCA Distributing Corp., 693 F.2d 870, 888 (9th Cir. 1982)*, *cert. denied*, *460 U.S. 1085, 103 S. Ct. 1777, 76 L. Ed. 2d 349 (1983)*. Last, above average total cost pricing will sustain a monopolization claim only if the plaintiff offers "clear and convincing evidence . . . that the defendant's **[**28]** pricing policy was predatory." *Transamerica Computer Co., 698 F.2d at 1388*.

At trial, Airweld attempted to prove, through an Airco official's testimony, **[*1194]** that 47 of 50 prices offered to 17 Airweld customers were below Airco's average variable cost. On appeal, Airweld contends only that these price quotes were below *average total* cost. Airco argues that only a few of these price quotes were below average total cost.

Since below average total cost pricing does not prove Airweld's claim, Airweld was required to offer additional proof of anticompetitive conduct. *Zoslaw, 693 F.2d at 888*. In addition to its cost evidence, Airweld offered evidence to show that price competition was an unnecessary (and impliedly frowned upon) method of entering the Portland market; competition normally occurred in the area of services. The simple reason that most gas distributors in Portland engaged in only limited price competition does not mean, however, that it was an unfair means of competition for Airco to do so. If we held otherwise, it "would support the perverse rationale that a defendant may not compete by lowering its prices 'if competition **[**29]** would injure its competitors. '" *Id.* (quoting *California Computer Products, Inc. v. IBM Corp., 613 F.2d at 742*).

The other examples of anticompetitive conduct relied upon by Airweld do not aid its claim. The argon "squeeze" and targeting of customers have already been discussed. Neither of these practices is inherently anticompetitive.

Airco's conduct is most reasonably understood as a response to market conditions. Once Airweld terminated the distributorship agreement, Airco's presence in the Portland cylinder gas market was lost. In an effort to regain some or part of that market, it charged prices lower than Airweld, who had become one of its competitors. ***HN16***[] "If market conditions are such that a course of conduct described by the plaintiff would be unlikely to succeed in monopolizing the market, it is less likely that the defendant actually attempted to monopolize the market." *Inglis, 668 F.2d at 1030* (footnote omitted); *see* *Zoslaw, 693 F.2d at 888*. This is the situation here. Similarly, even if Airco's prices were below **[**30]** average total cost, this is not the type of conduct "clearly threatening to competition or clearly exclusionary" which a plaintiff must prove in order to show that a firm without market power intended to monopolize the market. *See Inglis, 668 F.2d at 1028*. As Professors Areeda and Turner discuss, promotional below cost pricing may be a valid means for a firm to attempt to gain entry into a market. III P. Areeda & D. Turner, ***Antitrust Law*** para. 716 (1978).

For the foregoing reasons, we affirm the district court's j.n.o.v. on the attempted monopolization claim. Below average total cost pricing, without more, is not the kind of conduct that will support a finding of attempted monopolization by a firm without market power.

VI. CONCLUSION

The judgment of the district court is

AFFIRMED.

Eurim-Pharm GmbH v. Pfizer, Inc.

United States District Court for the Southern District of New York

September 17, 1984

No. 83 CIV. 2430 (MJL)

Reporter

593 F. Supp. 1102 *; 1984 U.S. Dist. LEXIS 23571 **; 1984-2 Trade Cas. (CCH) P66,208

EURIM-PHARM GmbH, Plaintiff, v. PFIZER INC., PFIZER GROUP LIMITED: PFIZER GmbH, PFIZER ITALIANA, S.p.A., PFIZER FRANCE, S.A.: LABORATOIRES PFIZER S.A.R.L., AND PFIZER CORPORATION, Defendants

Core Terms

commerce, defendants', import, antitrust, export, domestic, distributors, Sherman Act, wholesalers, foreign manufacturer, pharmaceutical, manufacturing, transactions, jobbers, reasonably foreseeable, foreign nation, expiration, inflated, products, alleges, abroad, patent, prices

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Jurisdiction

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

International Law > Authority to Regulate > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Sherman Act, Jurisdiction**

See 15 U.S.C.S. § 6a (1982).

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

Business & Corporate Law > Foreign Corporations > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

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

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

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

HN2[] **International Aspects, Commerce With Foreign Nations**

Under section 7 of the Sherman Act, *15 U.S.C.S. § 6a (1982)*, the proscriptions of the Act apply to trade or commerce with foreign nations, other than import transactions, only when the conduct providing the basis for the claim has a direct, substantial and reasonably foreseeable anticompetitive effect on United States domestic, import or export commerce. This section clearly exempts from United States ***antitrust law*** conduct that lacks the requisite domestic effect, even where such conduct originates in the United States or involves American-owned entities operating abroad.

Counsel: [1]** Schwartz, Klink & Schreiber, P.C., New York, New York, for Plaintiff.

Gibson, Dunn & Crutcher, New York, New York, for Defendants.

Judges: Mary Johnson Lowe, D.J.

Opinion by: LOWE

Opinion

[*1103] MEMORANDUM OPINION AND ORDER

MARY JOHNSON LOWE, D.J.

Plaintiff Eurim-Pharm GmbH has brought this action against defendants Pfizer, Inc., Pfizer Group Limited, Pfizer GmbH, Pfizer Italiana, S.P.A., Pfizer France, S.A., Laboratoires Pfizer S.A.R.L., and Pfizer Corporation, claiming violations of *section 1* of the Sherman Act, as amended (*15 U.S.C. § 1*). Defendants have moved pursuant to *Rules 12(b)(1)* and *12(b)(6) of the Federal Rules of Civil Procedure* to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. For the reasons set forth below, the motion is granted.

Background

Plaintiff is a limited entity organized and existing under the laws of the Federal Republic of Germany with its principal place of business in Piding/Reichenhall, Federal Republic. Plaintiff is engaged in business as a distributor, wholesaler, importer and exporter of brand-name pharmaceutical products produced by multinational pharmaceutical **[**2]** companies. There are six named defendants as well as an undetermined number of unnamed co-conspirators. Of the six named defendants, Pfizer, Inc. is a Delaware corporation with its principal place of business in New York, New York. Pfizer, Inc. is engaged in interstate and foreign commerce in various businesses including the formulation, manufacture and sale of pharmaceutical products. The five remaining named defendants are all wholly-owned foreign subsidiaries of Pfizer, Inc., incorporated in and with their principal places of business throughout Europe and Central America. These foreign subsidiaries are all engaged in the business of manufacturing pharmaceutical products, solely within Europe. The unnamed co-conspirators are foreign manufacturers, distributors, jobbers and wholesalers of Pfizer pharmaceutical products, whose identities presently are not known to the plaintiff. [1]

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[1] In *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 52 U.S.L.W. 4821, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984)*, the Supreme Court held that a parent corporation and its wholly-owned subsidiaries are incapable of conspiring with each other

[3]** **[*1104]** *Facts*

The essence of plaintiff's claim is that defendants participated in a price-fixing and market allocation scheme to maintain their stronghold on the world market of the antibiotic Vibramycin after defendants' patent of the drug expired. Plaintiff alleges, and for purposes of this motion we must assume to be true, that under this scheme Pfizer, Inc. granted an exclusive license for producing Vibramycin to a foreign manufacturer in each major foreign market. These foreign manufacturers consisted of either wholly-owned foreign subsidiaries of Pfizer, Inc. or local foreign manufacturing companies. The foreign manufacturers agreed with Pfizer, Inc. to restrict their sales of Vibramycin to distributors, wholesalers and jobbers who in turn agreed to confine their sales to specific geographic areas assigned by Pfizer, Inc. at prices prescribed by Pfizer, Inc. and/or the foreign manufacturer. Any distributor, wholesaler or jobber who failed to honor this agreement with the foreign manufacturer would initially be warned by oral communications and would later be subject to reprisals, such as reduced allocations or delayed shipments. If these warnings and reprisals **[**4]** were not successful, the distributor, jobber or wholesaler would be terminated. In certain instances, Pfizer, Inc. would institute a trademark infringement action against those who did not comply with established policy.

Plaintiff alleges that as a result of this scheme, Pfizer, Inc. has maintained a substantial share of the world market for antibiotic products, both prior to and after the expiration of defendants' patents. Further, plaintiff claims that the price of Vibramycin has been and continues to be artificially inflated due to defendants' activities.

Plaintiff has sold Vibramycin in the Federal Republic of Germany since 1975. [2] In 1979 plaintiff was able to obtain Vibramycin in the United Kingdom at a price substantially lower than that available from the authorized distributors in the Federal Republic of Germany. Plaintiff repackaged the United Kingdom Vibramycin for direct sale to German retail pharmacies. During this time, Pfizer, Inc. brought a trademark infringement action against plaintiff in the German regional court, contending that plaintiff's repackaging and sale of Vibramycin violated Pfizer's rights as holder of the Vibramycin trademark. The German court granted **[**5]** an injunction barring plaintiff's repackaging and sale of United Kingdom Vibramycin in the Federal Republic. On appeal, the court lifted the injunction and found that the use of a national trademark to exclude competition from the sale of goods acquired in another member state of the European Economic community violated Articles 30 and 36 of the Treaty of Rome. This decision was affirmed by the Court of Justice of the European Communities.

Defendants base their motion to dismiss the complaint upon plaintiff's failure to allege the requisite effect on United States import or domestic commerce. According to defendants, the applicability of the United States antitrust statutes to foreign business transactions is limited to "conduct" which has a "direct, substantial, and reasonably foreseeable effect" on United States domestic, import or export commerce. Sherman Act, ch. 647, § 7, *15 U.S.C.* ***[**6]*** *§ 6a (1982)*. Defendants urge that the challenged activities fail to have an anticompetitive effect on United States domestic, import or export commerce because the transactions underlying this action and the effect of these transactions occurred solely within Europe, and the primary actors were European companies doing business solely within Europe.

Plaintiff argues that defendants have participated in and continue to participate **[*1105]** in a worldwide conspiracy which has affected United States domestic commerce by artificially inflating the price of Vibramycin in the United States.

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for the purposes of *section 1* of the Sherman Act as *section 1* does not reach conduct that is "wholly unilateral". Therefore, it is clear that plaintiff can no longer claim that Pfizer, Inc., the parent corporation, conspired with is foreign subsidiaries to violate the antitrust laws. However, since we find that the Court lacks subject matter jurisdiction on other grounds, we need not address the question whether plaintiff has adequately pleaded a conspiracy between Pfizer, Inc. and the non-subsidiary companies mentioned in the complaint.

[2] It is not clear from the parties' papers whether plaintiff continues to sell Vibramycin in the Federal Republic of Germany.

Discussion

Section 7 of the Sherman Act sets forth the criteria for determining United States antitrust jurisdiction over international business transactions. *15 U.S.C. § 6a (1982)*. ***HN1***[] Under section 7, United States ***antitrust law***

> 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 on import trade or import commerce with foreign nations; **[**7]** 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* of this title, other than this section.
>
> If *sections 1 to 7* of this title apply to such conduct only because of the operation of paragraph (1)(b), then *sections 1 to 7* of this title shall apply to such conduct only for injury to export business in the United States.

Section 7, also known as the Foreign Trade Antitrust Improvements Act, was added to the Sherman Act in 1982 when Congress enacted the Export Trading Companies Act. Due to the absence of case law concerning this amendment, we must turn to the legislative history for guidance in reaching our decision.

The legislative history of section 7 indicates that the amendment was designed to accomplish two main goals. First, the amendment was intended to eliminate the perception among business people that United States ***antitrust law*** is a barrier to efficiency-enhancing joint export activities. H.R. Rep. No. 97-686, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2487 (hereinafter **[**8]** cited as "House Report"). Congress sought to place American-owned companies operating entirely abroad or in United States export trade on equal footing with their foreign-owned competitors by freeing them from the possibility of dual and conflicting antitrust regulation. "No longer is there any possibility that, because of uncertainty growing out of American ownership, such firms will be subject to a different and perhaps stricter regimen of antitrust than their competitors of foreign ownership." House Report at 10, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2495.

Second, Congress acted to eliminate the uncertainty that had arisen from the confusing array of standards employed by federal courts for determining when United States antitrust jurisdiction attaches to international business transactions. House Report at 2, *reprinted in* 1982 U.S. Code Cog. & Ad. News at 2487. [3] **[**9]** Congress adopted a single objective test that would "serve as a simple and straightforward clarification of existing American

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[3] Even before the enactment of section 7, it was the situs of the effect which determined whether United States ***antitrust law*** applied to a particular transaction. *United States v. Aluminum Co. of America, 148 F.2d 416, 443-44 (2d Cir. 1945)* (Learned Hand, J.). However, in applying this rule, courts had arrived at different formulations for the nature and quantum of "effects" needed. *See, e.g., National Bank of Canada v. Interbank Card Association, 666 F.2d 6, 8 (2d Cir. 1981)* (any anticompetitive effect on either United States commerce within the United States or export commerce from the United States); *Dominicus America Bohio v. Gulf & Western Industries, Inc., 473 F. Supp. 680, 687 (S.D.N.Y. 1979)* (not necessary for the effect on foreign commerce to be both substantial and direct as long as it is not *de minimus*); *Waldbaum v. Worldvision Enterprises, Inc., 1978-2 Trade Case (CCH) P 62,378, at 76,257 (S.D.N.Y. 1978)* (anticompetitive effects in the United States); *Industria Sciliana Asfalti, Bitumi, S.P.A. v. Exxon Research & Engineering Co*., 1977-1 Trade Case (CCH) Par. 61.256 at 70,784 (S.D.N.Y. 1977) (impact upon United States commerce); *Todhunter-Mitchell & Co., Ltd. v. Anheuser-Busch, Inc., 383 F. Supp. 586, 587 (E.D. Pa. 1974)* (direct effect on the flow of foreign commerce into or out of the United States).

law and **[*1106]** the Department of Justice enforcement standards." House Report at 2, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2487-88. [4]

HN2[] Under section 7, the proscriptions of the Sherman Act apply to trade or commerce with foreign nations, other than import transactions, only when the conduct providing the basis for the claim has a direct, substantial and reasonably foreseeable anticompetitive effect on United States domestic, import or export commerce. The amendment clearly was intended to exempt from United States ***antitrust law*** conduct that lacks the requisite domestic effect, even where such conduct originates in the United States or involves American-owned entities operating abroad.

Section 7 does not, however, preclude all persons or entities injured abroad from recovering under United States antitrust laws. When the activity complained of has a demonstrable effect on United States domestic **[**10]** or import commerce, foreign corporations injured abroad may seek recovery under the Sherman Act. [5] As the House Report states, section 7 "preserves antitrust protections in the domestic marketplace for all purchasers, regardless of nationality or the situs of the business. . . ." House Report at 10, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2495.

In the case at bar, plaintiff fails to allege in its complaint any effect on United States trade or commerce resulting from defendants' alleged conduct. Plaintiff merely alleges that the effects of defendants' activities have been to: (1) create artificially high and inflated prices for Vibramycin (the complaint does not specify *where* prices have **[**11]** been inflated); (2) restrict distribution of Vibramycin to defendants and those selected by defendants; (3) prevent pharmaceutical wholesalers, jobbers and distributors from selling to customers of their choice; and (4) exclude wholesalers, jobbers and distributors from the sale of Vibramycin in interstate and foreign commerce. Moreover, it is apparent from plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss that even if plaintiff were given an opportunity to amend its complaint, it would be unable to allege the requisite effects on United States trade or commerce.

Plaintiff concedes in its memorandum that defendants' conduct lacks a direct, substantial and reasonably foreseeable effect on either import commerce into the United States or export commerce from the United States. Plaintiff argues, however, that defendants' activities have had a spillover effect on domestic commerce within the United States. Plaintiff characterizes defendants' conduct as a worldwide cartel directed by Pfizer, Inc. from the United States to ensure that prices for Vibramycin remained at or increased to monopolistic levels after the patent for the drug had expired. Plaintiff claims that **[**12]** this worldwide price-fixing and market allocation conspiracy had the direct, substantial and reasonably foreseeable effect of artificially inflating the price of Vibramycin in the United States. According to plaintiff, from 1981 to 1983 the price for 500 capsules of 100 milligrams of Vibramycin rose from $343.95 to $550.64, representing more than a 38% increase when drug prices during the same period rose only 15%. In addition, plaintiff maintains that due to the expiration in 1982 of defendants' patent on Vibramycin, the price should have declined, not have increased.

Even assuming the truth of plaintiff's allegations that the United States price of Vibramycin has risen since the expiration **[*1107]** of defendants' patent, plaintiff has failed to allege any facts demonstrating a causal connection between defendants' conduct in Europe and the price increase in the United States. Plaintiff has not and apparently cannot allege [6] that defendants' conduct has prevented the import of foreign manufactured Vibramycin into the

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[4] The objective nature of this test is evident from the use of "reasonably" and "foreseeable". The test is whether the effect would have been evident to a reasonable person making practical business judgments, not whether actual knowledge or intent can be shown. House Report at 9, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2494.

[5] Where the conduct is solely export oriented, only domestic exporters (injured in the United States) have a remedy under the Sherman Act. "But a foreign firm whose non-domestic operations were injured by the very same export oriented conduct, would have no remedy under our antitrust laws." House Report at 11.

United States or prevented United States companies other than Pfizer, Inc. from manufacturing and selling the drug in the United States. Indeed, plaintiff has made **[**13]** no allegations whatsoever regarding the manufacture, sale or marketing of Vibramycin in the United States other than its allegation that the United States price has increased. Thus the link between defendants' conduct abroad and the price of Vibramycin in the United States is far from apparent.

Plaintiff has utterly failed to establish that defendants' alleged foreign price-fixing and market allocation scheme resulted in an anticompetitive effect on United States domestic or import commerce. This is precisely the type of case Congress sought to eliminate from United States antitrust jurisdiction when it amended the Sherman Act in 1982 to "more clearly **[**14]** establish when antitrust liability attaches to international business activities." House Report at 7, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 2492 (remarks of Chairman Rodino). Accordingly, this Court grants defendants' motion to dismiss for lack of subject matter jurisdiction.

IT IS SO ORDERED.

End of Document

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[6] After defendants filed their motion to dismiss, plaintiff was on full notice of the issues involved. Yet plaintiff's responding memorandum does not contain allegations sufficient to cure the deficiencies in the complaint. It is reasonable to assume that plaintiff has no further facts to allege with respect to the impact of defendants' conduct in the United States.

Coal Exporters Asso. v. United States

United States Court of Appeals for the District of Columbia Circuit

March 14, 1984, Argued ; September 18, 1984

Nos. 83-1629, 83-1633

Reporter
745 F.2d 76 *; 1984 U.S. App. LEXIS 18523 **; 240 U.S. App. D.C. 256

COAL EXPORTERS ASSOCIATION OF THE UNITED STATES, INC. and NATIONAL COAL ASSOCIATION, Petitioners v. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Respondents; NORFOLK & WESTERN RAILWAY COMPANY et al., COASTAL STATES ENERGY COMPANY, ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al., NIPPON STEEL CORPORATION et al., and PATRICK W. SIMMONS, Intervenors: EASTERN COAL TRANSPORTATION CONFERENCE, Petitioner v. INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, Respondents NORFOLK & WESTERN RAILWAY COMPANY et al., COASTAL STATES ENERGY COMPANY, and PATRICK W. SIMMONS, Intervenors

Prior History: [1]** Petitions for Review of an Order of the Interstate Commerce Commission.

Core Terms

coal, railroad, shippers, export, exemption, market power, carriers, rates, transportation, effective, factors, traffic, rents, regulation, pricing, constrain, costs, price discrimination, reasonable rate, monopolistic, predicted, deregulation, intermodal, producer, port, delivery price, world market, captive, conditions, geographic

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

Communications Law > Regulators > US Federal Communications Commission > Jurisdiction

Transportation Law > Rail Transportation > General Overview

HN1[] **Interstate Commerce, US Interstate Commerce Commission**

49 U.S.C.S. § 10505(a) provides that in a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the commission shall exempt a person, class of persons, or a transaction or service when the commission finds that the application of a provision of this subtitle (1) is not necessary to carry out the transportation policy of *section 10101a* of this title; and (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

Administrative Law > Agency Rulemaking > General Overview

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

Transportation Law > Rail Transportation > General Overview

HN2[] **Administrative Law, Agency Rulemaking**

Where the Interstate Commerce Commission (ICC) properly finds the conditions in the exemption provision of the Staggers Rail Act, *49 U.S.C.S. § 10505*, to be present, it has no choice but to grant an exemption. But in the absence of such findings ICC has no exemption authority.

Administrative Law > Agency Rulemaking > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Business & Corporate Compliance > ... > Transportation Law > Rail Transportation > Rates & Tariffs

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

HN3[] **Administrative Law, Agency Rulemaking**

The major shipper-protective limits on Interstate Commerce Commission's exemption authority are *49 U.S.C.S. §§ 10101a(6)* and *10505(a)(2)(B)*. The former provision establishes that national railroad policy is to maintain reasonable rates where there is an absence of effective competition so long as railroads earn revenues which exceed the amount necessary to maintain the rail system and to attract capital. The latter limits the exemption power where regulation is necessary to protect shippers from the abuse of market power.

Administrative Law > Agency Rulemaking > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

HN4[] **Administrative Law, Agency Rulemaking**

The limits placed on the Interstate Commerce Commission's exemption power by *49 U.S.C.S. §§ 10101a(6)* and *10505(a)(2)(B)* are met with a proper finding of an absence of "market power" and the presence of "effective competition."

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

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

HN5[] **Monopolies & Monopolization, Actual Monopolization**

The ability of a firm to price discriminate is an indicator of significant monopoly power.

Administrative Law > Judicial Review > Standards of Review > Deference to Agency Statutory Interpretation

Governments > Legislation > Interpretation

Administrative Law > Judicial Review > Standards of Review > General Overview

HN6[] **Standards of Review, Deference to Agency Statutory Interpretation**

Considerable weight should be accorded to an agency's construction of a statutory scheme it is entrusted to administer. This is especially so where the agency is assigned to formulate a policy accommodating competing policies or interests. But there are limits to the court's deference. If the agency's notice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, the 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.

Governments > Legislation > Interpretation

Transportation Law > Rail Transportation > General Overview

Transportation Law > Carrier Duties & Liabilities > Market Dominance

HN7[] **Legislation, Interpretation**

The rate reasonableness provision of 18 U.S.C.S. § 10101a(6) and the "abuse of market power" provision of 18 U.S.C.S. § 10505(a)(2)(B) should be read as reflecting the policies of the statutory scheme of which they are a part. It is unreasonable to view a statutory scheme that allows shippers to complain that a market dominant carrier is charging rates that unnecessarily generate excessive profits as being indifferent concerning the distribution of economic rents between monopolistic carriers and their captive shippers. Similarly, such an indifference seems incompatible with a scheme that allows a shipper to complain that its higher rate is unjustified because necessary carrier revenues could be more equitably generated elsewhere on the carrier's system. Protecting the revenues of shippers who face carriers with market power was an essential goal, though not the only goal, of the compromise that produced the Staggers Rail Act, *49 U.S.C.S. § 10505*.

Administrative Law > Agency Rulemaking > General Overview

Transportation Law > Rail Transportation > General Overview

HN8[] **Administrative Law, Agency Rulemaking**

Though competitive forces may exist and somewhat constrain railroad power, when they nevertheless do not rise to the level of "effective competition" the Interstate Commerce Commission must explain why reliance on them is sufficient to protect those interests of shippers protected in the Staggers Rail Act, *49 U.S.C.S. § 10505*, and alluded to in the policy declarations of 18 U.S.C.S. §§ 10101a(6), 10505(a)(2)(B).

Administrative Law > Judicial Review > Standards of Review > General Overview

HN9[] **Judicial Review, Standards of Review**

An agency cannot hide the standards under which it operates, for the courts are unable to evaluate whether its reasoning meets the reasoned decision-making requirement unless they know against what standards its factual findings have been judged.

Counsel: John Louis Oberdorfer, with whom Scott N. Stone, Robert Stauffer, and Garret G. Rasmussen, were on the brief, for Petitioners Coal Exporters Association of the United States, Inc. and National Coal Association in No. 83-1629.

C. Michael Loftus, with whom David A. Sutherland, was on the brief, for Petitioner Eastern Coal Transportation Conference in No. 83-1633 and Intervenor Coastal States Energy Company in Nos. 83-1629 and 83-1633.

W. Glenn Scammel, Attorney, Interstate Commerce Commission, with whom John Broadley, General Counsel, and Lawrence H. Richmond, Deputy Associate General Counsel, Interstate Commerce Commission, and John J. Powers, III and John P. Fonte, Attorneys, Department of Justice, were on the brief, for Respondents. J. Paul McGrath, Assistant Attorney General, entered an appearance for Respondent United States of America.

Robert Eden Martin, with whom G. Paul Moates, Vincent F. Prada, Richard W. Kienle, Roland W. Donnem, Richard B. Allen, Renee D. Rysdahl, and Emried D. Cole, Jr., were on the brief, for Intervenors Norfolk & Western Railroad Company et al. in Nos. 83-1629 and **[**2]** 83-1633. Richard A. Hollander, entered an appearance for Intervenors Norfolk & Western Railway Company et al. in No. 83-1629.

Gordon P. MacDougall, was on the brief for Intervenor Patrick W. Simmons in Nos. 83-1629 and 83-1633.

Noel Hemmendinger, was on the brief for Intervenors Nippon Steel Corporation et al. in No. 83-1629.

Milton E. Nelson, Jr., Richard E. Weicher, Kendall T. Sanford, Thormund A. Miller, Louis P. Warchot, Stuart E. Vaughn, J. Thomas Greene, and Fredereck W. Read, III, were on the brief for Intervenours Atchison, Topeka & Santa Fe Railway Company et al. in No. 83-1629. Robert B. Batchelder, entered an appearance for Intervenors Atchison, Topeka & Santa Fe Railway Company et al.

Judges: Wright, Tamm, and Mikva, Circuit Judges. Opinion for the court filed by Circuit Judge Wright.

Opinion by: WRIGHT

Opinion

[*78] WRIGHT, Circuit Judge:

In this case we review a decision of the Interstate Commerce Commission to exempt all rail transportation of coal destined for export through United States ports from all provisions of the Interstate Commerce Act (ICA), as amended. [1] Here, challenges are brought to the exemption decision by organizations of coal producers **[**3]** and other export coal shippers.

This case began when, on March 30, 1981, the Norfolk & Western Railway Company, a major carrier of export coal, filed a petition with the ICC under the exemption provision of the Staggers Rail Act of 1980, *49 U.S.C. § 10505 (1982)*. [2] The petition sought an exemption from regulation for all export coal traffic moving by rail through Atlantic and Gulf ports. In September 1981 ICC issued a notice of proposed exemption in which it requested comments on partial or complete exemption of export coal traffic moving through all United States ports. *Notice of Proposed Exemption, Railroad Exemption -- Export Coal, 46 Fed. Reg. 44529 (September 4, 1981),* **[**4]** Joint Appendix

[1] The provisions of the Interstate Commerce Act, as amended, may be found at 49 U.S.C. Subtitle IV (1982). For the Interstate Commerce Commission's decision, *see Ex Parte No. 346 (Sub-No.7), Railroad Exemption -- Export Coal, 367 ICC 570 (1983)* (hereinafter cited as *Decision*).

[2] Pub. L. No. 96-448, Title II, § 213, 94 STAT. 1912 (1980).

(JA) 173. A large number of comments were received, including comments from a number of federal government entities. Railroads uniformly favored an exemption, and their position was supported by the United States Department of Transportation. Mine owners and other shippers opposed the exemption, as did a number of river carrier, port, and ocean carrier interests, the Departments of State and Commerce, the ICC's Office of Special Counsel, and the United States Trade Representative. The Department of Justice took no position except to state that any such exemption must end antitrust immunity for exempted transportation. *Ex Parte No. 346 (Sub-No. 7), Railroad Exemption* -- *Export Coal, 367 ICC 570, 571 (1983)* (hereinafter cited as *Decision*).

On March 3 and 4, 1983 the Commission announced its decision to exempt export coal and advised that an opinion explaining the decision was being prepared. On June 9, 1983 the **[**5]** decision was issued. *See* note 1 *supra*. ICC Chairman Taylor filed a dissenting opinion.

This case again focuses this court on the exemption provision of the Staggers Act, **[*79]** *49 U.S.C. § 10505 (1982)*, *see* *Brae Corp. v. United States, 238 U.S. App. D.C. 352, 740 F.2d 1023 (D.C. Cir. 1984)* (reviewing ICC exemption of boxcar transportation); *see also* *Simmons v. ICC, 225 U.S. App. D.C. 84, 697 F.2d 326 (D.C. Cir. 1982)*; *McGinness v. ICC, 213 U.S. App. D.C. 297, 662 F.2d 853 (D.C. Cir. 1981)*. [3] **[**7]** In particular, this case

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[3] The exemption provision, in relevant part, reads:

> ***HN1***[] In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subchapter, the Commission shall exempt a person, class of persons, or a transaction or service when the Commission finds that the application of a provision of this subtitle --
>
> (1) is not necessary to carry out the transportation policy of *section 10101a* of this title; and
>
> (2) either (A) the transaction or service is of limited scope, or (B) the application of a provision of this subtitle is not needed to protect shippers from the abuse of market power.

49 U.S.C. § 10505(a) (1982). In this case the Commission made no finding with respect to the issue of "limited scope," relying instead on its finding relating to "abuse of market power." *See* *Decision, supra note 1, 367 ICC at 586 n.37*.

Section 10101a, referred to in the exemption provision, reads:

> In regulating the railroad industry, it is the policy of the United States Government --
>
> (1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;
>
> (2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;
>
> (3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;
>
> (4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;
>
> (5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;
>
> (6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;
>
> (7) to reduce regulatory barriers to entry into and exit from the industry;
>
> (8) to operate transportation facilities and equipment without detriment to the public health and safety;
>
> (9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

requires that we examine two closely related ICC findings, each of which is required by *Section 10505* as a precondition to ICC's exercise of exemption authority. The first finding was that the regulation lifted in this exemption was "not necessary to carry out the [national rail] transportation policy of [*49 U.S.C.] section 10101a*[.]" *49 U.S.C. § 10505(a)(1) (1982)*. The second finding was that the regulation was "not needed to protect shippers from the abuse of market power." *See id.* *§ 10505(a)(2)(B)*. The two findings are particularly intertwined **[**6]** in this case because petitioners, as shippers, most emphasize an element of national rail transportation policy that assures the maintenance of "reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital[.]" *Id.* *§ 10101a(6)*. Obviously, the policy reflected in that element substantially overlaps with the provision relating to "protect[ing] shippers from the abuse of market power." Because the ICC's conclusions with respect to these legal **[*80]** standards reflect an unreasonable interpretation of their meaning, we must vacate and remand the exemption decision. [4]

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(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

49 U.S.C. § 10101a (1982).

[4] Petitioners have also argued that ICC's exemption decision must be vacated for failure to comply with a variety of procedural requirements of the Administrative Procedure Act and other laws. Because of our disposition of the case on other grounds, we need reach no conclusions regarding the merits of most of these challenges. One of these challenges, however, we shall examine.

Petitioners contend that Commissioner Gradison, who voted in the exemption decision, was obliged to disqualify herself because her impartiality in this proceeding "might reasonably be questioned." *28 U.S.C. § 455(a) (1982)*. Because Commissioner Gradison may choose to participate in future proceedings concerning the matters raised in this case, we will discuss the contention that she should have disqualified herself in this proceeding.

Petitioners argued below that the Commission's Canon of Conduct, 49 C.F.R. § 1000.735-14(a) (1983), obliged Commissioner Gradison to disqualify herself in this case. In relevant part that canon states: "Members * * * shall not participate in any matter in which they have a substantial pecuniary interest or in which their impartiality might reasonably be questioned." Petitioners do not contend that Commissioner Gradison had any pecuniary interest in the outcome of this case. But they do contend that her impartiality "might reasonably be questioned." They point out that earlier in her career she had been an employee of the Southern Railway Company for eight years. Petitioners also point out that subsequent to Gradison's resignation from Southern it merged with the Norfolk & Western Railway Company, which was the original proponent of the exemption at issue in this case. Commissioner Gradison denied petitioners' motion for disqualification and filed a detailed explanation of her reasoning. Joint Appendix (JA) 177-195.

We reject petitioners' contention that it was improper for Commissioner Gradison to have denied the motion for her disqualification. Petitioners contend that "her duties [at Southern] included developing a rate structure for deregulated fresh fruits and vegetables with a view in part to gain experience should other areas of traffic be exempted." Reply brief of petitioners Coal Exporters Association of the United States, Inc. and National Coal Association (CEA/NCA) at 25 n.49. But even if this were so, such an employment record in itself implies no impropriety in her fully participating in exemption cases such as this. No contention is made that her prior employment experience is significant for reasons other than that it involved the Commissioner in a presumably partisan way in the general issues of rail carrier deregulation. Yet even on this issue no specific evidence of a closed mind is given. It is not surprising that a member of ICC has had substantial employment experience with a rail carrier.

[8]** Two interrelated challenges of petitioners will be discussed in this opinion. First, petitioners challenge the decision on the basis that the reasoning the ICC used to analyze the record before it and justify its action in relation to that record was arbitrary and capricious in violation of Section 10 of the Administrative Procedure Act, *5 U.S.C. § 706(2)(A)(1982)*. Second, petitioners argue that the ICC's interpretation of the Staggers Act's exemption authority, as reflected in the reasoning of the ICC's opinion, is an unreasonable one in relation to the statute's wording and legislative history. The latter argument focuses on the meaning of the provisions protective of shipper interests, particularly *49 U.S.C. §§ 10101a(6)* and *10505(a)(2)(B) (1982)*. Our analysis turns more on this latter contention, but the two arguments are closely interrelated.

I. A GENERAL OVERVIEW OF THE STAGGERS RAIL ACT

Before analyzing the reasoning of the ICC and the challenges to the decision, it is useful to review the decision's statutory basis. The Staggers Rail Act of 1980 was a complex and comprehensive amendment to the ICA. The primary goal **[**9]** of the Act was to revitalize the railroad industry by reducing or eliminating regulatory burdens. **[*81]** Faced with railroad bankruptcies and the need to assure railroads of adequate revenues, Congress revamped the structure of railroad regulation in order to restore the industry to health.

The Staggers Act was not, however, a simple deregulation of the railroad industry. Instead, it was a simultaneous recognition of two conditions. On the one hand, Congress recognized that in large parts of the rail industry heavily regulated rail carriers faced competitive conditions. In many cases these carriers competed with other modes of transportation which were unregulated and therefore able to be more innovative and flexible. Congress found that too often the ICA's regulatory framework had become an unnecessary and crippling burden on the rail industry, and was an impediment to the industry's ability to attract the capital necessary to meet the nation's future needs.[5] **[**12]** On the other hand, however, Congress recognized that sometimes competition would be insufficient to protect the legitimate interests of shippers, small carriers, and the public, and thus that full deregulation of **[**10]** the industry was unjustified by industry conditions. The legislation that eventually became the Staggers Act was subject to significant modification during floor debate, with many of the successful amendments supported by legislators who feared that the bills that emerged from the committees might not afford adequate protection to

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Nor is it surprising that ICC's rulemaking proceedings may involve policies that affect many rail carriers. The fact that a Commissioner had in the past done work for a carrier that has involved that person in the general areas of policy that surround a rulemaking cannot be sufficient to prevent that Commissioner's participation in that rulemaking. A Commissioner is not required to repudiate her past experiences upon assuming public office. Prior involvement in the general public issues facing an agency is not in itself a basis for disqualification from agency actions concerning those issues. *Cf. Ass'n of Nat'l Advertisers, Inc. v. FTC, 201 U.S. App. D.C. 165, 627 F.2d 1151 (D.C. Cir. 1979)*, *cert. denied*, ***447 U.S. 921, 100 S. Ct. 3011, 65 L. Ed. 2d 1113 (1980)***. *See also Laird v. Tatum, 409 U.S. 824, 34 L. Ed. 2d 50, 93 S. Ct. 7 (1972)* (Memorandum of Rehnquist, J.).

[5] Congressional findings were explicitly set out in § 2 of the Act. Among them were findings that

> (3) today, most transportation within the United States is competitive;
>
> (4) many of the Government regulations affecting railroads have become unnecessary and inefficient;
>
> (5) nearly two-thirds of the Nation's intercity freight is transported by modes of transportation other than railroads;
>
> (6) earnings by the railroad industry are the lowest of any transportation mode and are insufficient to generate funds for necessary capital improvements;
>
> (8) failure to achieve increased earnings within the railroad industry will result in either further deterioration of the rail system or the necessity for additional Federal subsidy; and
>
> (9) modernization of economic regulation for the railroad industry with a greater reliance on the marketplace is essential in order to achieve maximum utilization of railroads to save energy and combat inflation.

Pub. L. No. 96-448, § 2, 94 STAT. 1896 (1980), *reprinted at 49 U.S.C. § 10101a* note (1982).

Similarly, § 3 set out as a goal of the Act "reform [of] Federal regulatory policy so as to preserve a safe, adequate, economical, efficient, and financially stable rail system[.]" Pub. L. No. 96-448, § 3 (2), 94 STAT. 1897 (1980), *reprinted at 49 U.S.C. § 10101a* note (1982).

shippers where they might otherwise suffer from abuses of market power. The resulting Act was a compromise that enjoyed overwhelming support. Although the legislation was without doubt a significant reduction in railroad regulation, as this court has said, "The legislation * * * did not strip the Commission of its power and duty to protect shippers from the unreasonably high rates of carriers with market dominance." *Burlington Northern Inc. v. United States, 213 U.S. App. D.C. 52, 661 F.2d 964, 973 (D.C. Cir. 1981)*. Both before and after the amendments the bills' sponsors agreed that the underlying approach of the legislation was to move toward much greater reliance on market forces rather than regulation to govern rail carriage, but to temper that move with a policy of retaining regulation where the market would be insufficient to protect **[**11]** shippers and the public from abusive railroad practices. [6]

[13]** **[*82]** The Staggers Act exemption provision is an "important cornerstone" of the overall statutory scheme in that it represents Congress' determination that there be continuing evaluation of the appropriateness of regulation and continuing deregulation where consistent with the Act's policies. H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 60 (1980). It is also a recognition that an administrative agency is better suited than Congress to evaluate on a continuing basis the specific need for the various aspects of the regulatory scheme in particular contexts. [7] There is no doubt that the exemption provision was intended to give ICC very broad authority to eliminate unnecessary regulation. *See* *American Trucking Assn's, Inc. v. ICC, 656 F.2d 1115, 1118-1120 (5th Cir. 1981)*. Congress' delegation of exemption authority to ICC, however, was a conditional one. It included guidelines that conditioned that authority so as to preserve the policy balance embodied in the Act. As the Conference Report specified, the task of the agency is "to determine where [there] can be deregulat[ion] consistent with the policies of Congress." H.R. Conf. Rep. No. 96-1430, 96th Cong. **[**14]** , 2d Sess. 105 (1980). The statute sets out these policies as conditions on the Commission's exemption authority. ***HN2***[] Where ICC properly finds the conditions to be present, it has no choice but to grant an exemption. But in the absence of such findings ICC has no exemption authority. [8]

As we discussed, petitioners in this case challenge the reasoning used by the Commission with respect to two limits with which Congress **[**15]** conditioned the ICC's exemption power: the element of national rail policy concerned

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[6] The legislative history of the Act is full of descriptions of it by conference committee members, sponsors, leading proponents, and floor leaders as a detailed and delicate compromise that accommodated the interests of carriers, shippers, and the public, reducing or eliminating regulation where appropriate and preserving regulatory protection for shippers where necessary. *See, e.g.*, 126 Cong. Rec. S14005 (daily ed. Sept. 30, 1980) (comments of Sen. Exon); *id.* at S14003 (comments of Sen. Cannon); *id.* (comments of Sen. Long); *id.* at H10086-H10087 (comments of Rep. Rahall); *id.* at H8555-H8556 (comments of Rep. Loeffler); *id.* at H8550-H8551 (comments of Rep. Rahall).

More important, this compromise nature is reflected throughout the Act. It is most recognizable in those general policy provisions of the Act that speak to shipper interests. The statement of goals includes as one of the Act's goals "to provide a regulatory process that balances the needs of the carriers, shippers, and the public[.]" Pub. L. No. 96-448, § 3(4), 94 STAT. 1897 (1980), *reprinted at* 49 U.S.C. § 10101a note (1982). Similarly, the statute's declaration of national rail policy includes such policies as "to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital," *id.* *§ 10101a (6)*, and "to avoid undue concentrations of market power[.]" *Id.* *§ 10101a (13)*. As we discuss in text, the elements of national rail policy limit the Commission's exemption power, *id.* *§ 10505(a)(1)*, and the power is further limited where the regulation to be lifted is "needed to protect shippers from the abuse of market power." *Id.* *§ 10505(a)(2)(B)*.

[7] As the Conference Report states:

> The policy underlying [the exemption] provision is that while Congress has been able to identify [*sic*] broad areas of Commerce where reduced regulation is clearly warranted, the Commission is more capable through the administrative process of examining specific regulatory provisions and practices not yet addressed by Congress to determine where they can be deregulated consistent with the policies of Congress. * * *

H.R. Conf. Rep. No. 96-1430, 96th Cong., 2d Sess. 105 (1980).

[8] *See* note 3 *supra* and accompanying text.

with maintaining reasonable rail rates in the absence of effective competition, *see* 49 U.S.C. § 10101a(6) (1982), and the explicit limit on the ICC's ability to grant exemptions from regulatory provisions "needed to protect shippers from the abuse of market power." *See id.* § 10505(a)(2)(B). To understand how these issues arise in this case, we must turn to the Commission's complex opinion, that opinion's view of the export coal industry, and the Commission's analysis of the legal significance of its factual findings.

II. THE ICC's FINDINGS RESPECTING THE EXPORT COAL INDUSTRY

The ICC's opinion is premised on the general finding that in the absence of regulation railroads would be sufficiently constrained by various forms of competition that they would not be expected to abuse any market power they might hold with respect to shippers of export coal. Four forms of competition were offered and discussed by the Commission: (1) the competition that U.S. railroads face because the coal they carry for export must compete in a world coal market where numerous countries **[**16]** actively produce and market coal for export; (2) the geographic competition that each railroad faces because the coal it carries **[*83]** must compete with coal produced in other regions of the United States; (3) the intermodal competition that each railroad faces because shippers can switch to other railroads to carry their coal; and (4) the intermodal competition that a railroad faces because shippers can switch to other modes of transportation, *e.g.*, trucks, barges, or pipelines.

Petitioners argue here and they and the dissenting chairman of the Commission argued below that these factors simply cannot be expected to effectively constrain railroad market power, that 95 percent of the U.S. coal mines producing for export are served by only one rail line and have no practical alternative method of shipping their coal to port, and that after deregulation these shippers will likely fall victim to the monopolistic practices of the railroads upon which they must rely. They challenge much of the data relied on by ICC and assert that much relevant evidence was ignored or mischaracterized to justify a result contrary to the clear weight of the evidence. The Commission counters that **[**17]** past pricing patterns support the hypothesis that railroad practices have been constrained by market forces and, more important, the Commission predicts how future behavior will be sufficiently constrained. The dispute is in part a dispute over ICC's use of evidence in the record, but it is also a dispute over the legal question of how much constraint market forces must place on railroad behavior before the Commission can deregulate under the exemption provision. We will summarize ICC's discussion with respect to each of the four competitive factors, as well as petitioners' challenges to ICC's discussion. We will then analyze ICC's discussion of the significance of past railroad price behavior and, more important, its discussion of the legal significance of predicted future behavior. In this discussion ICC's understanding of the statutory standards for exemption emerged. We vacate because it is clear to us that ICC misunderstood the content of the statute's demands.

A. *Competition in the World Coal Market*

A large portion of the ICC opinion was devoted to explaining the position of U.S. coal in the world coal market. *See* *Decision, supra, 367 ICC at 571-576.* **[**18]** The analysis focused on the fact that "United States coal shippers face intense competition from major coal suppliers around the world[; that] these competitors are large, well organized, and sometimes government-supported firms in Australia, South Africa, Canada, Poland, and West Germany[; and] that suppliers in these countries have been quite effective in expanding their market shares in recent years * * *." *Id.* at 572.

The opinion painted a picture of a market in which nations aggressively market coal for use in Western Europe and the Far East for steel manufacture (called metallurgical coal or met coal) and generating electricity (called steam coal). Foreign purchasers initially evaluate suppliers "on the basis of quality and security of supply[,]" and because "usually this process identifies several qualified suppliers[, purchasers reach a] final decision * * * almost invariably * * * on the basis of competitive price." *Id.* at 573-574. The market is price sensitive in that any increase in the delivered price of U.S. coal will likely result in a decrease in the quantity demanded and an increase in the quantity of coal purchased from **[**19]** other exporting nations. *Id.* at 575. Because rail transportation costs are a significant component of the delivered price of export coal, the market's price sensitivity, in ICC's view, will limit the ability of railroads to raise rates.

ICC admitted a number of factors that could arguably limit the degree of competition and create substantial foreign reliance on U.S. coal. For example, due to political instability, labor problems, export quotas, or insufficient capital, "to some extent, each of the countries competing with the United States has been hampered in its efforts to expand production." *Id.* at 574. The United States, in contrast, has been a dependable, long-term coal source that can **[*84]** thus demand a higher price. *Id.* at 576. Similarly, ICC admits that coal is not fungible: "There are certain requirements for particular uses because coal must possess the proper ash, moisture, sulfur, and carbon content, have the requisite volatility, and supply the necessary thermal units to be effective at a given site." *Id.* at 573. These "specifications are more rigid for metallurgical" coal, which "must be **[**20]** of a very high quality[,]" *id.*, and this has made "the United States * * * the chief supplier because of its high quality Appalachian coal." *Id.* at 575.

However, ICC went on to explain that these sorts of factors would not give the United States market power in the world market. It found that in spite of the fact that the U.S. is the most dependable supplier of coal and has substantial reserves, "the current development of [other] exporting countries and their plans for further expansion * * * leave little doubt that world coal supply will increase to meet any future increases in demand." *Id.* at 574. [9] It similarly found that the variability of coal qualities, the need for specified qualities for different uses, and the general high quality of U.S. met coal should not alter the conclusion that the U.S. cannot raise its coal prices without lowering its market share. ICC explained, "It is clear that technological improvements in the production of coke and the manufacture of steel, as well as greater experience in blending coals of disparate characteristics to achieve a desired quality of coke, have lessened the restrictions on metallurgical **[**21]** coal and permitted the use of lower grade coal. This has allowed more suppliers into the market and greatly heightened worldwide competition for metallurgical coal sales." *Id.* at 573 (footnote omitted). Moreover, any premium that U.S. coal can demand on the basis of quality or reliability of supply is already reflected in coal prices. *Id.* at 576.

ICC's analysis of the world coal market leads it to the conclusion that any increase in U.S. coal's delivered price will lead purchasers to increase their purchase from other **[**22]** nations. The U.S. market share would thus decline. Although the Commission's opinion contains no economic analysis of exactly how sensitive the world market would be to any U.S. price increases -- indeed the discussion is quite general -- it does conclude that the world market is "extremely sensitive to changes in the delivered price." *Id.* at 574. At one point it describes the world "pricing arena" as one "in which the world delivered price of coal is highly constrained by competitive market forces[.]" *Id.* at 592. At another point it concludes that "price competition for export coal is such that even a 10-percent increase in the delivered price of American coal can be the difference between obtaining a market or losing it entirely." *Id.* at 593.

ICC Chairman Taylor in his dissent and petitioners in this court react to ICC's analysis of the world market by challenging its relevance. Even if the world market is such that U.S. market share will decline as price increases, and indeed even if it would establish a world "price cap" above which market share would decline rapidly enough to reduce export coal profits, this would still **[**23]** not protect American shippers from abuses of market power by railroads. [10] The issue is not whether American interests **[*85]** have market power in the world coal market, but

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[9] *See also* [*Decision, supra note 1, 367 ICC at 575*]() ("Coal production has now been expanded throughout the world beyond the reasonable ability of the current market to absorb it, and this surplus is aggravated by the current decline in the world price of oil. These trends ensure that there will most likely continue to be vigorous price competition in the world * * * market at least for the near future." (footnote omitted)).

[10] Petitioners did not agree that U.S. rail carriers would lack market power in the world market. For example, one brief cites statistics that first show that 2/3 of all U.S. coal exports are met coal and only 1/3 are steam coal. They go on to show that in 1980 2/3 of Western Europe's met coal imports were from the U.S. They also point out that the Department of Justice, in its filing to the Commission, "stated that the U.S. 'appears to be the dominant supplier' of low and medium volatile metallurgical coal, and that * * 'U.S. railroads would have substantial market power' because 'N&W and CSX (Chessie) have a virtual duopoly on the transportation of met coal.'" CEA/NCA brief at 32 n.*, *quoting* JA 639-640 (Justice Department submission to ICC). ICC Chairman Taylor similarly noted:

> There is considerable question regarding the effectiveness of competition in the movement of metallurgical (met) coal to Western Europe. The U.S. supplies 55 percent of Western European met coal and is considered the "swing supplier." The

whether one component of the American export picture, railroads, have market power in relation to another component, coal producers and other shippers. Even if there is a "price cap" that prevents raising the delivered price of export coal, a railroad could still use monopoly power to raise rates to coal shippers and appropriate to itself an unreasonable portion of the profits generated by each shipment. Because of the cap, a captive shipper would be forced to lower its share of the total coal revenues if confronted with a rail rate increase. Although the existence of a world price cap for delivered U.S. coal means that foreign consumers will not have to pay a higher price, it does not assure that the division of revenues between the railroads and U.S. shippers will be a reasonable one. *See id.* at 600-601 (Chairman Taylor, dissenting).

[24]** B. *Geographic Competition*

In addition to the world market's constraining effect on rail pricing, ICC emphasized that geographic, intramodal, and intermodal competition would also constrain the practices of deregulated railroads. ICC began its analysis of geographic competition with an explanation of the regional nature of U.S. export coal production. "Eastern" coal is that mined in the Appalachian coal-field. Until 1979 the export coal industry centered around shipments of Appalachian metallurgical coal, but since that year's huge oil price increases steam coal export has also become important. *Id.* at 575. Eastern coal export includes both met and steam coal, and export production is mostly shipped to Europe. *Id.* at 577-579. "Midwestern" coal has a relatively high sulfur content and is mined in Ohio, Indiana, and Illinois. *Id.* at 577. ICC does not make clear to what use this coal is put when exported, but export production mostly goes to Europe as well. *Id.* at 579. [11] "Western" export coal includes coal from Colorado and Utah, where "small though increasing amounts" are sent to the Far East **[**25]** through West Coast ports. Coal from Wyoming's Powder River Basin, though there are vast tonnages, does not yet move for export because of its low BTU content. Prior to the 1979 oil price increase, virtually no western or Midwestern coal was exported. By the third quarter of 1981 these coals made up about 12 percent of total export coal traffic.

Generally, different rail carriers transport the export coals of different regions. In the East and Midwest two rail systems transport most of the export coal: the Norfolk & Western Railway Company and the Chessie System (which includes both the Baltimore & Ohio and the Chesapeake & Ohio). Conrail transports small amounts of eastern export coal. Other railroads operate in the West. *Id.* at 577-579. ICC's belief that **[**26]** to some degree competition between regions would act as a restraint on railroad power is premised on the notion that a foreign purchaser could purchase American coal from another American region if a price increased as a result of a railroad's raising prices. This would result in that railroad's loss of business just as if the purchaser had switched to the coal of another country. *Id.* at 579.

In support of its prediction the Commission cites the growth of western and Midwestern export sales between 1979 and 1981 and the fact that during the same period the eastern railroads' percentage share of nationwide export traffic dropped. As ICC concluded:

> **[*86]** Although generally western coal for export now moves only to the Pacific Rim countries and the primary export market for eastern and Midwestern coal is in Europe, competition among the regions appears to be growing. * * *

Id.

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major alternative suppliers, Australia (labor problems), Poland (strikes and martial law), South Africa (political unrest and self-imposed quotas), and the U.S.S.R. are not considered reliable substitutes for U.S. coal.

Decision, supra note 1, 367 ICC at 600 n.78 (Chairman Taylor, dissenting).

[11] Petitioners made an issue of what the possible uses of Midwestern coal were. They offered evidence to show that it could not practicably be used as a substitute for either eastern steam coal or met coal. *See* note 15 *infra*.

The idea that regional competition could be a significant constraint on railroad practices was challenged below in Chairman Taylor's dissent. He and the petitioners complained that, by ignoring the differences between coal qualities, volumes, and costs that result **[**27]** in part from geographic distance, the Commission found significance where none could reasonably be found:

> Geographic and product competition within the United States is neither a counterbalance nor a solution to the problem. The coal producing regions of the U.S. do not compete with each other for most of the export market. According to the railroads' own testimony, the vast coal reserves now available in the Powder River Basin (Montana and Wyoming) are a very long distance from port (over 1,000 miles) and the coal in such reserves is not of export quality, because its energy value is less than 10,000 BTU's and it has a relatively high moisture content. [Midwestern coal] is not of met quality and has too much sulfur for all but a small part of the steam coal export market. Coal from Colorado, Utah, and New Mexico goes to Japan, where there appears to be some competition with eastern coal. However, these western reserves produce no met coal, and the delivered price to Japan of eastern steam coal is more than $20 per ton higher than the delivered price of [this western coal]. Therefore, competition between the two sources is minimal. Almost all of our steam and met **[**28]** coal exports to Europe move through Atlantic ports.

Id. at 602 (Chairman Taylor, dissenting).

C. *Intramodal Competition*

Although Chairman Taylor and petitioners argue strenuously that export coal producers are largely captive to particular railroads and would thus be subject to railroad market power, the Commission found that intramodal competition (*i.e.*, competition between railroads) would provide significant constraints on railroad practices.

ICC did agree to many of the facts that underlay Chairman Taylor's and petitioners' arguments. In the East "very few mines are located on the lines of more than one railroad." *Id.* at 577-578. And "export coal originated on the lines of an eastern rail carrier is generally transported in single-line service to that carrier's own export coal facility." *Id.* at 578. Deviations from single-line rail transit would bring into play joint or combination rates that would be substantially above the single-line rates. *Id.* at 577 n.19. In the West, "as in the East, individual mines are generally located on the lines of only one railroad." *Id.* at 579. **[**29]** For a variety of reasons, in spite of these facts ICC found that intermodal competition would be a significant restraint on railroad practices.

The Commission focused its analysis not on the individual mine but on an export coal "broker known as a transshipper." *Id.* at 571. Most export shipments are arranged by transshippers, which are very large companies that enter contracts with foreign purchasers, put together orders from a number of U.S. mines, and then arrange transportation. The mines may be owned by the transshipper or by other companies. *Id.* Because of the great size of the leading transshippers, and more importantly because they are free to fill their orders from mines on several rail lines, they have substantial bargaining power with respect to rail rates. *Id.* at 572. Their bargaining power may be even further heightened because many are owned by larger conglomerates that "may in some instances be able to exert leverage over particular railroad rates" as a result of other rail shipments with the railroad. *Id.*

ICC also argued that a large portion of export coal comes from mines owned by **[*87]** large coal companies, and **[**30]** that many of these companies own numerous mines located on different railroads. *Id.* at 578. Such a shipper's ability to shift production among its mines might allow it to pit one railroad against another and thus create intramodal competition to reduce a railroad's bargaining power. *Id.*

Again, the dissent and petitioners bitterly dispute the Commission's analysis and assert that the Commission failed to make certain inquiries necessary to its theory's validity and ignored significant evidence that would have called its theory into question. For example, Chairman Taylor first argued that the Commission ignored significant reasons to doubt that transshippers could sufficiently constrain railroads.

> The premise underlying the argument that export contracts can be freely filled from mines on more than one railroad is also unrealistic. First, export tonnage is frequently a blend of coal from several mines, and many

> times, some mines are on one railroad, some on another. Second, for a shipper to be able to substitute tonnage from a mine on a second railroad, certain conditions must be met, i.e., the tonnage must be available and not already committed to a **[**31]** long-term contract, the extraction costs must be relatively the same, and the tonnage from the second mine must be technologically substitutable for the tonnage from the first. Shippers point out that the chance for such substitution does not usually occur, especially since the Chessie hauls primarily met coal and the N & W primarily steam coal. [12] Third, there must be no price leadership, in that if one railroad raises its rates, the other will not, or at least not to the same level. It appears highly unlikely that all three of the foregoing conditions would coalesce, and even if they did, the advantage would accrue only to the particular shippers affected. The fact remains that 95% of the mines producing export coal are captive to the railroads that serve them.

Id. at 602. He then argued that the Commission's theory concerning the power of large shippers was similarly built on assumptions about the industry that ran counter to the evidence.

> The argument that big shippers can play one railroad against another (i.e., by substituting tonnage from mines served by more than one carrier) is still less convincing, even were one to ignore the problem **[**32]** of lack of substitutability [of particular coals]. When a shipper negotiates with a railroad, its corporate affiliation is less important than its access to alternate transportation. There are over 100 companies involved in the export coal trade. Although some of the shippers are large, with connections to still larger entities, only 24 percent of the mines served by the Chessie System and the N & W are controlled by operators having mines on both railroads. As for the West and the Midwest, there appears to be virtually no possibility of substitution between railroads at the present time.

Id. at 602-603.

[33]** D. *Intermodal Competition*

The Commission also concluded that deregulated railroads would have their market power constrained by competition with other modes of transportation. Three other modes are mentioned in the opinion: trucks, barges, and pipelines. The Commission noted, however, that truck and barge movement of export coal would not be feasible in the West. *Id.* at 579.

In support of its reliance on intermodal competition the Commission cites data showing that 13 percent of all coal production in the nation is transported by truck, *id.* at 578 & n.21, which demonstrates that **[*88]** trucks can successfully compete for short-haul movements of coal. [13] While mine-to-port traffic is usually long-haul, in the Commission's estimate trucks can "create[] the real potential for intermodal truck-barge or truck-rail movement to compete with an all-rail movement." *Id.* at 578.

[34]** To the extent a mine has access to inland waterways, ICC reasoned, barges can offer an alternative to rail carriage. This can result from a truck-barge combination or from direct access to waterways. The Commission offered statistics showing that "during the first 9 months of 1981, 17 percent of reported tidewater and coastal port shipments (nearly all of which is for export) was handled by inland water carriers." *Id.*

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[12] According to a study submitted to the Commission on behalf of petitioners, the two major eastern railroads had to a great extent divided the export market between them according to coal type. Thus, in 1980, Norfolk & Western participated in shipping 93% of all eastern steam coal tonnage shipped for export, while Chessie participated in 13%. Chessie participated in shipping 81% of all met coal tonnage, while Norfolk & Western participated in 24%. *See* JA 994.

[13] It seems undisputed that the 13% figure refers to all coal produced, not just coal produced for export. *See* Decision, supra note 1, 367 ICC at 601 (Chairman Taylor, dissenting). Petitioners submitted evidence that less than 1% of export coal is transported to port by truck. CEA/NCA brief at 17 & n.**.

The last form of intermodal competition mentioned by the Commission is coal-slurry pipeline movement. There is no discussion of this, but at two point competitions from coal-slurry pipeline is referred to as being a "partial" or "potential" competitive restraint on railroad power. *Id.* at 589 n.42, 594.

Petitioners and the dissenter dispute most of the premises on which the Commission built the argument for intermodal competition. They first point out that, although the Commission refers to coal-slurry pipeline competition, no such pipeline exists in the United States, *see id.* at 601 (Chairman Taylor, dissenting), and petitioners argue that construction of one would require difficult-to-pass federal legislation.

Petitioners **[**35]** challenge the Commission's reliance on barge transport by arguing that ICC's 17 percent estimate of coal transported at least in part by barge neglects to note a number of important points: (1) The figure was submitted by the railroads and conflicts with a previous ICC estimate placing the figure at seven percent, CEA/NCA brief at 18 n.**. (2) Much of the coal traffic that was transported in part by barge was initially carried from the mine by the same railroad that would otherwise have taken it to port via single-line route. A railroad that serves the origin exclusively would thus have power to determine the extent of export barge traffic movement and its cost. [14] **[**36]** (3) Much of the barge-transported coal is high-sulfur Midwestern coal, which offers little competition to lower-sulfur eastern steam or met coal. [15] (4) Even if some mines are close enough to waterways to be able to use barges without initial reliance on a railroad, such a situation is quite rare.

Their reaction to the Commission's discussion of truck transport was to emphasize that coal is a commodity of sufficient bulk that "truck competition is not economically **[*89]** practical for large shipments **[**37]** or long distances." *Decision, supra, 367 ICC at 601* (Chairman Taylor, dissenting).

E. *The Commission's Discussion of Rail Pricing History*

After discussing these forms of competition, the Commission turned to the history of rail pricing of export coal shipments and concluded that that history supported the conclusion that the competitive factors in fact had constrained railroad pricing. Two arguments were relied on.

First, the Commission noted that no maximum rate complaints concerning export coal rates had been filed prior to 1980. "Moreover, the 1980 complaints appear to have been filed not because of any new railroad rate actions, but because section 229(b) of the Staggers Act provided that rates not challenged by a certain date would forever thereafter be conclusively presumed lawful." *Id.* at 580. In contrast to the pattern for domestic coal transport, where the railroads sought to test and expand the bounds of the rate standards -- thus generating many complaints -- export coal carriers "were content to raise their rates only in connection with general rate increases for all traffic[,]" and "indeed, the railroads 'flagged out' **[**38]** of several general rate increases on export coal." *Id.*

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[14] Both petitioners and the dissenter note that, until complaints had been filed with ICC, eastern rail carriers, to discourage use of barges, had charged rates on export coal going to the Ohio River that were higher than the rates charged on export coal going to the railroads' Atlantic port facilities:

> Barge transportation [thus] almost always involves a prior movement by rail, which makes the railroad indispensable to the water carrier's ability to carry coal. * * * [Only] because the shippers and competing barge lines had recourse under the Interstate Commerce Act [did] the railroads drop[] their rates to the river to the domestic level.

Decision, supra note 1, 367 ICC at 601 (Chairman Taylor, dissenting).

[15] Although ICC did not explain its assertion that high-sulfur Midwestern coal was substitutable for other coals, Chairman Taylor argued that Midwestern coal "is not of met quality and has too much sulfur for all but a small part of the steam coal export market." *Decision, supra note 1, 367 ICC at 602* (Chairman Taylor, dissenting). Evidence submitted by petitioners supported this view. They contended that Midwestern coal cannot be substituted for met coal because of its sulfur content and cannot easily be substituted for steam coal in Europe because of European air pollution requirements that focus on coal quality. They argued that much of the coal exported from the Midwest is used in cement manufacture and thus is not in competition with higher quality steam and met coals. *See* CEA/NCA brief at 27 & n.* (*citing* studies at JA 876-878, 1130).

The Commission also compared the overall rise in coal prices and rail prices from 1969 to 1974, and from 1969 to 1981, and found that the comparisons showed "at a minimum that the unregulated shippers of export coal have considerable economic bargaining power in the contest over division of the economic rents from export coal. * * This history indicates that the pricing restraint of rail carriers was not the result of the exercise of regulatory power by this Commission, but rather resulted from the play of market forces." *Id.* at 580-581.

Again, the opponents of the decision have argued that the Commission has misused data and ignored relevant factors. They argue that the 1980 complaints concerning export rail rates have never been litigated by the Commission, were accompanied by evidence that rates were generating revenues 200%-300% above the railroads' variable costs, and thus are strong evidence of railroad market power and cannot be so lightly dismissed by the Commission. *See* CEA/NCA brief at 33-34. Moreover, they challenge ICC's history of railroad pricing because its figures emphasize pricing **[**39]** behavior before 1976 when rail rates were heavily regulated. [16] Figures limited to the period since 1976, they say, would show significant railroad market power. [17]

[40]** III. ICC's PREDICTIONS OF FUTURE RAILROAD BEHAVIOR AND ITS ANALYSIS OF THE EXEMPTION PROVISION'S LEGAL STANDARDS

The foregoing discussion summarizes ICC's evaluation of data concerning competitive forces that would limit deregulated railroads' ability to abuse market power or unreasonably raise rates. It also reflects the challenges made to this part of ICC's analysis. ICC and the railroad intervenors have in their briefs and at oral argument contended that the Commission, as an expert agency, was entitled to make the factual findings and analyses that it did and **[*90]** based on those findings to conclude that an exemption could be granted because market forces would sufficiently constrain railroads. Petitioners repeatedly assert that ICC's findings and analysis were counter to the evidence presented, ignored significant data and comments, and thus should be found arbitrary and capricious. The finding that market forces would *sufficiently* constrain railroad behavior, however, is only in part a question of analysis of data; it begs the question how much market constraint on railroad behavior is sufficient. Put another way: what must ICC find before an exemption is justified? **[**41]** This is a legal, not a factual, question, and it involves not so much an analysis of the factual record concerning the structure of the relevant industry, but an examination of precisely what ICC actually found, what legal standard ICC used, and an analysis of how that conforms to congressional intent and the reasoned decision-making requirement. When we examine ICC's explanation of the legal theory for its decision, however, we discover that much of the basis for ICC's decision to exempt export coal is only indirectly related to many of the competitive factors that it discussed at such length.

A. *ICC's Findings with Respect to the Existence of "Market Power" and the presence of "Effective Competition" and ICC's Predictions Concerning Price Discrimination by Railroads*

As discussed, ***HN3***[] the major shipper-protective limits on ICC exemption authority are *49 U.S.C. §§ 10101a(6)* and *10505(a)(2)(B) (1982)*. The former provision establishes that national railroad policy is "to maintain reasonable rates where there is an absence of effective competition" so long as railroads earn revenues "which exceed the

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[16] In 1976 Congress enacted the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act), Pub. L. No. 94-210, 90 STAT. 31 (1976). This forerunner of the Staggers Act was a significant lessening of regulation. In contrast, before 1976 "the ICC was charged with general superintendence of rates for transportation by rail. A 'just and reasonable' standard controlled all rates, rail users could challenge the reasonableness of rates, at any time, and the Commission had authority to determine what constituted a just and reasonable rate in each case." *Ford Motor Co. v. ICC, 230 U.S. App. D.C. 92, 714 F.2d 1157, 1158 (D.C. Cir. 1983)*.

[17] *See* joint reply brief of petitioner Eastern Coal Transportation Conference and intervenor-petitioner Coastal States Energy Company at 14 ("Far more probative is the record from 1976 to 1981 when, utilizing new rate freedoms granted by the 4-R Act, carrier rates on export metallurgical coal rose by 59.5%. During the same period, minehead prices for the same product *declined* by almost 9%." (emphasis in original)).

amount necessary to maintain the rail system and to **[**42]** attract capital." The latter limits the exemption power where regulation is necessary to "protect shippers from the abuse of market power."

We begin with our analysis by noting that ***HN4***[] the limits these provisions place on ICC's exemption power are met with a proper finding of an absence of "market power" and the presence of "effective competition." *See, e.g., Brae Corp. v. United States, supra*, 740 F.2d at , slip op. at 28 (Commission found no "market dominance"), *id.* at , slip op. at 33 (Commission found no "monopoly power by railroads"). In this case, however, ICC never explicitly reached a conclusion that the railroad system carrying export coal would face "effective competition" and lack "market power." Indeed, the Commission specified that "the issue is not whether deregulation will give the railroads *some* market power but whether we conclude that an exemption will result in abuse. * * * We point out that we may make a ['not needed to protect shippers from the abuse of market power'] finding even when there is no effective competition." *Decision, supra, 367 ICC at 592* (emphasis in original). [18]

[43]** ICC's predictions concerning future railroad pricing policies make even clearer that its exemption decision was not premised on either an implicit or an explicit finding of "no market power" or of "effective competition." ICC's discussion of how the railroads are likely to behave in an unregulated environment rested on the premise that unregulated railroads would be able and willing to price discriminate actively among coal shippers. Price differences would not **[*91]** simply reflect differing costs of providing transportation, but instead would reflect the availability to each shipper of transportation alternatives and each shipper's long-term marginal costs.

The regime of price discrimination envisioned by the Commission clearly assumes some significant degree of railroad monopoly power. First, it is well established that ***HN5***[] the ability of a firm to price discriminate is an indicator of significant monopoly power. *See, e.g.*, 2 P. AREEDA & D. TURNER, ***ANTITRUST LAW*** 342 ("Persistent price discrimination * * * clearly indicates * * * that there is a lack of effective competition in the market where the higher net returns are made. In other words, it shows that the seller has **[**44]** market power."); R. BORK, THE ANTITRUST PARADOX 395 (1978) (it is "essential" to " persistent or stable price discrimination in favor of specific customers" that a "seller possess[] * * * a substantial degree of market power or monopoly"); R. POSNER, ***ANTITRUST LAW*** 63 (1976) ("persistent discrimination is very good evidence of monopoly because it is inconsistent with a competitive market"); L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 89 (1977) ("A firm will not discriminate unless it has market power."). Second, the way the Commission discussed its predictions of price discrimination makes clear that it assumed railroads would have some significant degree of monopoly power.

ICC's prediction of future price discrimination was, in part, framed as a response to the comments opposing the exemption filed by the Departments of State and Commerce, the petitioners, and National Economic Research Associates (NERA), a research firm that submitted an extensive economic study on petitioners' behalf. These groups raised most of the points already discussed concerning the likely inability of competitive factors to supply effective competition to export coal carriers. They concluded that an **[**45]** exemption would allow railroads to use monopoly power to raise rates substantially, and that that would reduce demand for U.S. coal abroad and thus reduce production levels. ICC summarized these arguments as follows:

> [They] believe that the railroads are[, because of the high proportion of shippers who are captive,] in a position to extract substantial premiums without fear of diverting traffic to other carriers. They fear that if export coal were deregulated the railroads would choose to raise rates to the point where a given volume will maximize revenues, even though some coal producers are excluded from the market and overall production is reduced.

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[18] The Commission was correct in this assertion. The Conference Report makes clear that even where there is no effective competition constraining railroad market power an exemption may be proper if there will nevertheless be no abuse of market power. The kinds of situations envisioned, however, are not clear. The only one alluded to in the report is where other federal remedies would assure that market power will not be abused. *See* H.R. Conf. Rep. No. 96-1430, *supra note 7, at 105* ("The bill permits exemptions wherever regulation is not needed to prevent abuses of market power, regardless of the presence of effective competition. * * * The conferees anticipate that through the exemption process the Commission will eventually reduce its exercise of authority to instances where regulation is necessary to protect against abuses of market power where other federal remedies are inadequate for this purpose.").

> They perceive substantial potential for railroad abuse of market power and predict severely reduced coal exports and an overall decline in the Nation's prosperity.

Decision, supra, 367 ICC at 583; *see also id.* at 584.

The Commission's principal response was to assert that railroads would not price as would "simple monopolists" and reduce production levels. Instead, by price discrimination they could receive both monopoly revenues *and* maximized production. In the Commission's **[**46]** words:

> Opponents argue that railroads would accept the loss of some export coal since the loss would be more than offset for the railroads by an increased return on each ton of coal moved at higher rates. However, opponents' belief is the result of their mistaken assumption of uniform rate increases, *e.g.*, in the NERA model, the railroads are assumed to act like simple monopolists. A simple monopolist must accept the loss of one customer's business in order to raise prices to its other customers. The railroads, however, have persuaded us that they are not likely to act as simple monopolists but will price their services according to the cost and demand characteristics of each particular mine in order to retain the traffic. * * *

Id. at 592-593. [19] Indeed, the Commission attached an appendix to its decision where **[*92]** it analyzed the NERA study and offered as its major reason for not crediting it that "the NERA study is * * * based on a simple rather than a discriminating monopoly situation as discussed in the text." *Id.* at 615 (Appendix A).

[47]** ICC never explicitly found the presence of "effective competition." Moreover, its extensive discussion of the railroads' ability to sustain a regime of price discrimination based on shippers' long-term marginal costs and access to transportation alternatives, its description of such price discrimination as "a discriminating monopoly situation," and its emphasis on its authority to grant an exemption even if there would be market power and no effective competition, all make clear that ICC was not implicitly finding that these factors established a situation of effective competition. [20] Instead, ICC accepted a model of railroad price discrimination under which carriers -- because of the

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[19] *See also Decision, supra note 1, 367 ICC at 587-588*:

> Exemption will free the railroads to maximize their revenues by pricing on the basis of market demand and each mine's long-run marginal cost (including a return on cost of capital). By charging some of their more price-sensitive mines a lower rate and keeping them in the market, the railroads will be able to increase their revenue above what they would realize by increasing prices uniformly, as they have done in the past.

(Footnote omitted.)

[20] Our discussion of price discrimination and our citation to ***antitrust law*** texts is, of course, not meant to imply that ICC's understanding of "effective competition" must "strictly conform" to ***antitrust law*** standards. *See* S. Conf. Rep. No. 94-595, 94th Cong., 2d Sess. 148 (1976) ("While the absence of effective competition test is not intended to strictly conform [*sic*] with the standards of the antitrust laws, it is intended that when the Commission administers the test it will recognize the absence of forces which normally govern competitive markets.") (report on the 4-R Act).

We also note that ICC's discussion of such competitive factors as geographic, intramodal, and intermodal competition did not attempt to analyze or define the degree to which these forces could actually provide shippers and receivers with substantial enough quantities of sufficiently substitutable goods or services at competitively practical prices. The absence of such relatively specific inquiries would seem to be another factor indicating that "effective competition" was not found. *See Market Dominance Determinations and Consideration of Product Competition, 365 ICC 118, 132-135 (1981)*.

What the Commission clearly did argue in its opinion was that market forces did establish "substantial" constraints on railroad behavior. But that is not in conflict with the existence of monopoly power. As a leading economics text explains, all firms, even the pur monopolist -- an entity which rarely exists in the real world -- are subject to limits established by market forces. The issue is how effective are the limits.

price cap for American coal in the world market -- would price within the constraint of not raising the delivered price of the coal, and thus could maximize their profits without reducing production. The method by which rates would be determined and revenues divided between shippers and railroads is explained as follows:

> If (1) the world market will tolerate a port price of $50 a ton, (2) a mineowner could produce the coal for $20 a ton, and (3) the railroad could haul it to the port for **[**48]** $20 a ton, then the available profit to be shared between the producer and the railroad would be $10 a ton. If the railroad **[*93]** has numerous alternatives and the coal producer has none, the railroad would be likely to receive much of the $10 a ton profit. Similarly, if the coal producer is the party with the opportunities to mitigate the adverse consequences of failure to agree, then the coal producer would receive much of the profit. In many instances, both parties will probably have some alternatives, and the division of the profit should be somewhere between these limits. Under all possible divisions of the available profit, the competitive price of $50 a ton would prevail in the marketplace, and there would be no effect on the volume of coal purchased or produced. * * *

Decision, supra, 367 ICC at 582.

[49]** Although this model of price discrimination explains how railroads might earn monopoly profits without lowering production, it says nothing about what the distribution of rents between shippers and carriers would be. All it says is that the division will be at a point between that at which the shipper only recovers its costs while the carrier recovers all rent and that at which the shipper recovers all rent while the carrier recovers only its costs. *See id.* at 595 ("the railroads will * * * set their rates in an area between an individual mine's long-run marginal cost of extraction at the current cost of capital and the world market price"). The precise point will be determined by the amount of transportation competition that does exist for any particular shipper within this basically monopolistic framework. The competitive factors that we earlier discussed thus again become important. The degree to which they are present in any given case will determine the distribution of rents between shipper and carrier.

We will return to the question of exactly what legal import the Commission has assigned to these competitive factors when we discuss the ICC's analysis **[**50]** of the "not needed to protect shippers from the abuse of market power" provision of *Section 10505(a)(2)(B)*. But first we turn to ICC's analysis of the provisions of the rail transportation policy, particularly the provision relating to "reasonable rates."

B. *ICC's Analysis of the Rail Transportation Policy and Particularly of Section 10101a(6)*

In order to grant an exemption ICC must find that the regulations to be lifted are "not necessary to carry out the transportation policy of [*49 U.S.C. § 10101a*]." *49 U.S.C. § 10505(a)(1) (1982)*. In its opinion ICC stated that it found that "continued regulation of export coal traffic is not needed to carry out any of the 15 elements of rail transportation policy set out in *49 U.S.C. 10101a*." *Decision, supra, 367 ICC at 586*. Although it discussed how the exemption would further a number of the policy provisions, it hardly mentioned the provision of the policy most

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> The policies adopted by a pure monopolist are affected by certain indirect and potential forms of competition. Clearly, the monopolist is not completely insulated from the effects of actions taken in the rest of the economy. All commodities are rivals for the consumer's favor * * *. Clearly this rivalry occurs among different products, as well as among the producers of a given commodity. For example, meat competes in this sense with butter, eggs, and even men's suits. Of course, the extent of the competition from other products depends on the extent to which other products are substitutes for the monopolist's product. For example, even if a firm somehow could obtain a monopoly on the supply of steel in a particular market, it would still face considerable competition from producers of aluminum, plastics, and other materials that are reasonably good substitutes for steel.

E. MANSFIELD, MICROECONOMICS: THEORY AND APPLICATIONS 281 (3d ed. 1979).

Nor is there a conflict between ICC's predictions of future exercise of railroad monopoly power and its descriptions of past pricing behavior as being restrained by "the play of market forces." *Decision, supra note 1, 367 ICC at 581*. A close reading of its discussion of past pricing reveals that it states only that past behavior "is not the kind of behavior which we think characterizes entities exercising *unrestrained* market power." *Id.* at 580 (emphasis added).

clearly related to petitioners' claims, the provision that it is national policy "to maintain reasonable rates where there is an absence of effective competition and where rail **[**51]** rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital." *49 U.S.C. § 10101a(6) (1982)*. The Commission mentioned *Section 10101a(6)* only once in its opinion, and then in a footnote that implied that the provision was inapplicable.

The one mention of *Section 10101a(6)* came in response to shippers' citations to various parts of the legislative history that referred to the need for protecting "captive shippers," particularly coal shippers. The Commission's cryptic response was simply that

> export coal must be distinguished from domestic coal transportation. Export coal traffic is not the captive traffic for which Congress continued rate regulation. See *49 U.S.C. 10101a(6)*. Rather, as we discuss elsewhere in this report, this traffic is subject to vigorous and growing competition from the world market and other transportation modes and energy sources, and these forces will provide adequate restraints on rates.

Decision, supra, 367 ICC at 585 n.32.

This reference to *Section 10101a(6)* is troubling. The section is intended to **[*94]** protect **[**52]** shippers of any commodity where there is an absence of effective competition. Here, the Commission made no finding of effective competition. As discussed, such a finding would clearly have been in substantial tension with other language in the opinion. In spite of the assertedly "vigorous and growing" competitive restraints on the railroads' ratemaking power, the Commission predicted a regime of price discrimination that assumed railroad market power over shippers. Thus the Commission must still justify the exemption's consistency with *Section 10101a(6)*'s assurance of reasonable rates in the absence of effective competition. [21] **[**53]** What explanation there is appears in the Commission's more general analysis of the "abuse of market power" provision. [22]

C. *ICC's* **[**54]** *Analysis of the "Abuse of Market Power" Standard of Section 10505(a)(2)(B) and its Application to This Case*

Most of ICC's analysis of why continued regulation "is not needed to protect shippers from the abuse of market power" focused on the establishment of rail rates and the division of revenues between railroads and shippers under the predicted system of price discrimination. It is also where the Commission made clear its understanding of

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[21] "Effective competition" is not only the standard for rate protection contained in *§ 10101a(6)*. It is also the standard in the rate provisions themselves. The Staggers Act withdrew ICC jurisdiction to regulate the rates of carriers who do not have "market dominance" over the relevant shipper. *49 U.S.C. § 10709(c) (1982)*. "Market dominance" was defined as "an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies." *Id. § 10709(a)*. As we have said, the agency made no explicit or implicit finding of "effective competition."

[22] Although the reference discussed in text was the only reference to *§ 10101a(6)*, the failure to discuss the section explicitly is not in itself fatal. But the Commission must nonetheless offer reasoning that assures this court that *§ 10101a(6)*'s protection was properly considered and applied.

> The national transportation policy must guide the ICC in all its decisions. However, the ICC need not explicitly discuss in its decision each factor enumerated * * *. All that is necessary is that the essential basis of the ICC's rationale be clear enough so that a court can satisfy itself that the ICC has performed its function. * * *

Alamo Express, Inc. v. ICC, 673 F.2d 852, 860 (5th Cir.1982) (citations omitted).

An explanation of the exemption's conformity with the rate reasonableness policy is especially important here, where petitioners throughout their participation below emphasized their concerns for rate reasonableness and submitted substantial amounts of evidence to support their contention that rates will not be reasonable after exemption.

the "abuse of market power" concept as it applies to an exemption where market power does in fact exist. We look at this analysis to understand the Commission's conception of its responsibility to assure that reasonable rates will be maintained, and because we conclude that there was no proper consideration of the shipper protective limitations on the exemption power, we vacate the exemption granted in this case.

The Commission began its analysis of the "abuse of market power" concept by recalling that it had found that "strong worldwide competition" existed for export coal, and that American rail carriers could not by their unilateral action raise the delivered price that foreign users would pay. Given the Commission's expectation **[**55]** that the railroads were so constrained by the world price, the Commission asserted that

> the issue of the potential for market abuse by the railroads must be analyzed in the context of the question of whether the railroads will be able to appropriate all of the economic rents created by the difference in the costs for producing and shipping export coal and the world market price for that coal.

Decision, supra, 367 ICC at 592. It then went on to conclude that "the railroads will not price their services so as to reduce American coal production." *Id.* These two elements become, for the Commission, the standard under which it evaluates whether or not an exemption will result in an abuse **[*95]** of market power. In other words, so long as coal shippers are not forced to reduce production (*i.e.*, so long as the rail rate leaves them a share of the revenue that covers their costs, including their costs of capital) and so long as they are not wholly excluded from any economic rents above that level, their rate is "reasonable" and there is no "abuse of market power."

Use of this standard can be seen in the Commission's repeated equation of a **[**56]** situation of reasonable rates or the absence of market power abuse with the situation in which shippers recovered their costs and were thus able to maintain production levels and maybe even to acquire some economic rents. *See id.* at 587 (transshippers will have sufficient leverage "to prevent the railroads from appropriating all the rents"); *id.* at 593 (railroads will not "raise rates to the point where the traffic stops moving"); *id.* (rate increases are unlikely to be so high as "to reduce the volume of export coal significantly or to force the mineowners into a situation where their return on investment would be inadequate"); *id.* (railroads will not "appropriate all the economic rents"); *id.* at 594 (railroad will not abuse its market position by "raising rates to the point where the traffic stops").

One aspect of this standard is crucial: It is a standard which, in effect, views the distribution of economic rents between carriers with market power and shippers to be largely a matter of regulatory indifference, so long as shippers get some bare minimum. Other than assuring that production will not decline and that **[**57]** "all" rents will not go to the carriers, the Commission only assures that "economic rent will be divided in accordance with the relative bargaining power of the parties involved in particular cases. In some cases the shipper will have leverage; the converse will be true in others." *Id.* at 595 n.67. This regulatory indifference was viewed as proper, in spite of the fact that the situation envisioned would be one in which market power would exist and indeed determine the distribution of rents. As the Commission had stated, "Coal rates in an exempt environment will reflect the interplay of the economic strengths of all parties. That result is, we believe, exactly what Congress meant when it enjoined us in the [national transportation policy] to allow 'to the maximum extent possible' competition and demand for services to establish rail rates." *Id.* at 587.

It is important to note the role, within the Commission's legal argument, played by some of the competitive factors discussed at such length earlier in the opinion. In particular, such factors as geographic, intramodal, and intermodal competition provide the parties with the bargaining power **[**58]** that will determine the division of economic rents between them. But because the Commission views almost all divisions as consistent with the policies of the Act, so long as shippers are not deprived of all rents, the legal importance of these factors seems very slight. Although the Commission, throughout its opinion, continues to insist in general terms that these competitive forces will give shippers substantial bargaining power and thus constrain railroads and assure reasonable rates, it simultaneously voices a standard under which any shipper bargaining power, over a bare minimum, is legally sufficient. We will return to evaluate the Commission's reliance on these competitive forces after evaluating the legal validity of the standard used by the Commission.

D. *The Legal Validity of the ICC's Understanding of the Statute's Protection for Shippers*

We vacate the Commission's exemption decision because the stated standard is a wholly unreasonable construction of the Staggers Act's accommodation between shipper and carrier interests. The concept of rate reasonableness in the Act is a complex one and one whose precise definition was generally left to ICC. Nevertheless, **[**59]** it is clear that Congress did intend for the concept to embody certain considerations, and that the division of revenues between monopolistic carriers and shippers (even when the shipper is still able to fully recover **[*96]** its costs) was certainly not a matter of regulatory indifference.

We take the Commission, in evaluating the exemption according to the standard we discussed, to be articulating a construction of the statutory phrase "abuse of market power." We also take that phrase to include within it *Section 10101a(6)*'s reasonable rate policy. We recognize that ***HN6***[] " considerable weight should be accorded to an [agency's] construction of a statutory scheme it is entrusted to administer[.]" *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, , 104 S. Ct. 2778, 2782, 81 L. Ed. 2d 694 (1984)*. This is especially so where the agency is assigned to formulate a policy accommodating competing policies or interests. But there are limits to our deference. "If [the agency's] notice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb **[**60]** it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Id., 467 U.S. at , 104 S. Ct. at 2783*, *quoting* *United States v. Shimer, 367 U.S. 374, 383, 6 L. Ed. 2d 908, 81 S. Ct. 1554 (1961)*. Here we admit that the Commission has substantial discretion as to how to carry out Congress' instruction concerning the accommodation of shipper and rail carrier interests; but wherever the bounds of its discretion are, we have no doubt that the agency's accommodation, as announced and applied in this case, "is not one that Congress would have sanctioned." Because of the newness and complexity of the statutory scheme, and because the agency has given us little help in interpreting the statute, [23] we will concentrate on only what we feel is the most obvious flaw in the agency's position.

[61]** The legislative history of the Staggers Act is filled with references to the need to reduce rail regulation, and two reasons were repeatedly cited: regulations had often become unnecessary for protection of shippers and the public because of the development of effective competition to rail carriage, and inefficient because they had deprived railroads of the ability to earn adequate revenues to attract the capital necessary for economic health. These concerns were what motivated Congress' deregulatory moves, and the record and legislation is filled with references to these concerns both as the reasons for deregulation *and as the limits of deregulation*.

This can easily be seen in the wording of Section 1010a(6) which adopts a policy of affirmatively seeking maintenance of reasonable rates (1) "where there is an absence of effective competition," and (2) "where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital." But the same interplay of concerns can be seen throughout the structure of rate regulation in the Act, a structure we will briefly summarize.

Most of the rate provisions that seek to assure carrier freedom **[**62]** do so in the name of either effective competition or carrier revenue needs. Thus ICC has no jurisdiction to find a rate unreasonable unless it first finds that the carrier has "market dominance," *49 U.S.C. § 10709 (c) (1982)*, a term defined as "an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies." *Id. § 10709(a)*. Jurisdiction was further limited **[*97]** on the basis of a carrier's revenue needs. The Act established a presumption of no market dominance where a carrier's revenues from the rate would exceed its variable costs by

[23] Although the agency announced a standard concerning the "abuse of market power" provision, it did little to explain, in terms of the statute's language, structure, or history, why the concerns for protecting shippers from carrier monopoly power were met by that standard. In light of this absence of explanation, we note "that the limit placed on the judicial role by an agency's interpretation of a statute 'assumes an adequately articulated administrative decision interpreting the relevant statutory law within a range of reasonableness.'" *Northern Colorado Water Conservancy District v. FERC, 235 U.S. App. D.C. 79, 730 F.2d 1509, 1517 (D.C. Cir. 1984)*, *quoting* *Obremski v. OPM, 226 U.S. App. D.C. 111, 699 F.2d 1263, 1269 (D.C. Cir. 1983)*; *see also* *FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 37, 70 L. Ed. 2d 23, 102 S. Ct. 38 (1981)* ("the thoroughness, validity, and consistency of an agency's reasoning are factors that bear upon the amount of deference to be given an agency's ruling").

less than a designated percentage. *Id.* *§ 10709(d)*. Even if a carrier is found to be market dominant, there are congressionally provided for zones of rate flexibility based, once again, on revenue adequacy. Within them rates can be increased if a carrier's revenues are found to be inadequate. *Id.* *§ 10707a*. *See generally* *Arkansas Power & Light Co. v. ICC, 233 U.S. App. D.C. 189, 725 F.2d 716, 719 (D.C. Cir. 1984)*.

These provisions mirror ICC's traditional justifications for allowing carriers with market power **[**63]** some degree of price discrimination against captive shippers. Use of market power is justified where needed for revenue adequacy.

> The theory of differential pricing is that rates on some rail services must be set above full cost to compensate for services on which railroads are required to price below full cost to remain competitive.

Id. at 718 n.3; *see also* *San Antonio, Texas v. United States, 203 U.S. App. D.C. 249, 631 F.2d 831, 852 (D.C. Cir. 1980)*; *Houston Lighting & Power Co. v. United States, 196 U.S. App. D.C. 224, 606 F.2d 1131, 1148 (D.C. Cir. 1979)*, *cert. denied*, *444 U.S. 1073, 62 L. Ed. 2d 755, 100 S. Ct. 1019 (1980)*.

The statutory scheme's link between revenue needs and rate freedom also, however, serves to limit the rate freedom of rail carriers with market power. As the Conference Report explained, "When the industry is earning revenues which are adequate, it is appropriate for the Commission to have the authority to review rate increases more carefully." H.R. Conf. Rep. No. 96-1430, *supra, at 91*. Concern for limiting the rate freedom of carriers with market dominance also appears in the **[**64]** Long-Cannon Amendment to the Staggers Act, which directs ICC to consider, in determining whether to investigate certain rates.

> (i) the amount of traffic which is transported at revenues which do not contribute to going concern value and efforts made to minimize such traffic; [and]
> (ii) the amount of traffic which contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic[.]

49 U.S.C. § 10707a(e)(2)(B) (1982). The same factors are to be considered in rate reasonableness determinations. *Id.* *§ 10707a(e)(2)(C)*. The underlying logic of these instructions is that monopolistic discrimination should not be used to generate funds that could more efficiently and equitably be recovered elsewhere. The provision certainly assumes that the degree to which a monopolistic carrier will be able to extract rents from a captive shipper will be in some way limited by the carrier's revenue needs.

> The drafters * * * were primarily concerned about shippers of coal and other so-called "captive" shippers, and the amendment sought to assure that rate **[**65]** flexibility would not result in such shippers bearing a disproportionate share of responsibility for the needed improvement in the railroads' financial position. * * *

Arkansas Power & Light Co., 365 ICC 983, 988 (1982). [24]

Elsewhere in *Section 10707a* the idea that revenue needs were not only a justification for rate flexibility but also a limit on monopolistic pricing was made even clearer. In considering challenges to the reasonableness of certain authorized rate increases, **[**66]** the Commission was ordered to "give due consideration to whether the carrier proposing the rate increase has attained **[*98]** adequate revenues, * * * *giving regard to preventing a carrier with adequate revenues from realizing excessive profits on the traffic involved* * * *." *49 U.S.C. § 10707a(e)(1)* (emphasis added). Indeed, the Conference Report expresses an even stronger concern for monopolistic rail carriers extracting "excessive profits" when it declares that "this language is not intended to imply that excessive profits for inadequate revenue carriers are reasonable." H.R. Conf. Rep. No. 96-1430, *supra, at 94*.

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[24] Just as the drafters were concerned with such equitable concerns regarding captive shippers, they were also concerned with disproportionately burdening, as a class, the shippers of any particular captive commodity. Thus the Act requires rate reasonableness determinations to include consideration of "the carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues." *49 U.S.C. § 10707a(e)(2)(C)(iii) (1982)*.

HN7[] The rate reasonableness provision of Section 10101a(6) and the "abuse of market power" provision of Section 10505(a)(2)(B) should be read as reflecting the policies of the statutory scheme of which they are a part. It is unreasonable to view a statutory scheme that allows shippers to complain that a market dominant carrier is charging rates that unnecessarily generate excessive profits as being indifferent concerning the distribution of economic rents between monopolistic carriers and their captive shippers. Similarly, such an indifference **[**67]** seems incompatible with a scheme that allows a shipper to complain that its higher rate is unjustified because necessary carrier revenues could be more equitably generated elsewhere on the carrier's system. Protecting the revenues of shippers who face carriers with market power was an essential goal, though not the only goal, of the compromise that produced the Staggers Act.

ICC rested its standard, in part, on Section 10101a(1) of the rail transportation policy, which speaks of establishing reasonable rates "to the maximum extent possible" through reliance on "competition and the demand for services." *See* Decision, supra, 367 ICC at 587. But this must be read in conformity with the other provisions and policies of the Act. HN8[] Though competitive forces may exist and somewhat constrain railroad power, when they nevertheless do not rise to the level of "effective competition" ICC must explain why reliance on them is sufficient to protect those interests of shippers protected in the Act and alluded to in the policy declarations of Sections 10101a (6) and 10505(a)(2)(B). The standard that it put forth to do this here was not a reasonable one.

ICC also made reference **[**68]** to the policy of promoting railroad revenue adequacy. *See id.* at 587-588. But it saw this duty as the equivalent of maximizing railroad revenue. Again, this fails to accept that the Act was a compromise, recognizing shippers' as well as carriers' interests. It here sought to maximize railroad revenue with no reference to the actual revenue needs of the carriers involved or the size of the revenue gains they would likely receive from the exemption, or the degree to which needed revenue gains would be disproportionately subsidized by one group.

The only protection that ICC recognized as a legal duty to provide shippers was to assure that rail rates would not prevent shippers' full cost recovery and would not totally exclude them from the division of economic rents. This was unreasonable and accordingly it is a basis for vacating the exemption.

E. *The Importance of Geographic, Intramodal, and Intermodal Competition*

Much of the debate in the briefs and at oral argument focused on the Commission's adoption of certain data to determine that significant geographic, intramodal, and intermodal competition would constrain railroad behavior. We discussed this **[**69]** in detail in Part II *supra*. We have not, however, reached specific conclusions on these challenges. We can instead, for a number of reasons, generally reject the Commission's assertion that these competitive factors justify the exemption.

First, the legal importance that the Commission attributed to these factors is not clear. Although the Commission repeatedly referred to these factors as substantial restraints on railroad behavior that made regulation unnecessary, it did not find that, as a result, the railroads lacked market power. Moreover, within the legal standard **[*99]** used by the Commission these factors play a minimal role. The exemption is justified, said the Commission, so long as production is not reduced and some economic rents go to shippers. In its view production would not decline because of the world price cap and the self-interest of the price-discriminating monopolist, so the only significance of the other competitive factors would be to determine the division of rents between shippers and carriers. It is uncontroversial that *some* rents will go to shippers, and above that level, the Commission seemed to believe, the distribution is legally unimportant. **[**70]** Thus the legal importance of these competitive factors would be minimal in spite of the Commission's repeated references to them.

One might argue, however, that when the Commission discussed the standard on which the exemption was based, it was doing so within the understanding that the division of rents would, because of these competitive factors, equal some undisclosed balance that would constitute a condition of reasonable rates and nonabuse of market power. Indeed, the Commission repeatedly referred to these factors when it asserted this conclusion. Except for its discussion of the standard we have rejected, however, the Commission never attempted to explain in nonconclusory terms how much competition was necessary, or what condition would constitute one of reasonable rates and nonabuse of market power. Thus such an argument cannot save the exemption. ***HN9***[] An agency cannot hide the standards under which it operates, for we are unable to evaluate whether its reasoning meets the reasoned decision-making requirement unless we know against what standards its factual findings have been judged. *See* *Environmental Defense Fund, Inc. v. Ruckelshaus, 142 U.S. App. D.C. 74, 439 F.2d 584, 596 (D.C. Cir.1971).* **[**71]**

CONCLUSION

As we have discussed, the Commission's opinion predicts a pricing regime in which there will not be an absence of market power with respect to shippers. Indeed, the regime is premised on the railroads' use of market power. Nevertheless, the Commission predicts that railroad behavior will not constitute "abuse of market power," as it understands the phrase. We have found the Commission's understanding of that statutory phrase to be unreasonable in that it largely ignores the protections Congress meant to guarantee to shippers. We thus hold the Commission's grant of the exemption petition to have been not in accordance with law. We vacate the Commission's decision and order, and we remand the case to the Commission for any further proceedings that may be appropriate.

So ordered.

End of Document

Mozart Co. v. Mercedes-Benz of North America, Inc.

United States District Court for the Northern District of California

September 18, 1984

No. C-81-0531-MHP

Reporter

593 F. Supp. 1506 *; 1984 U.S. Dist. LEXIS 23509 **; 1984-2 Trade Cas. (CCH) P66,225

THE MOZART COMPANY, a corporation, Plaintiff, v. MERCEDES-BENZ OF NORTH AMERICA, INC., a corporation, Defendant

Core Terms

dealers, replacement part, tying arrangement, products, franchise, trademark, economic power, passenger car, tying product, seller, manufacturer, cases, tied product, coercion, contends, tie, per se standard, purchaser, genuine, summary judgment, distributors, tie-in, quality control, consumers, business justification, per se rule, conspiracy, market power, customer, monopoly

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Defenses

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 > Defenses

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

HN1[] **Sherman Act, Defenses**

The per se standard applies in testing an alleged tying violation under *15 U.S.C.S. §§ 1* and *14* regarding an agreement between an automobile distributor and its franchise dealers.

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 > Per Se Rule

HN2[] Tying Arrangements, Defenses

A plaintiff must make three important demonstrations in order to establish a per se illegal tying arrangement: (1) two separate products with the sale of one conditioned on the purchase of the other; (2) a seller with sufficient economic leverage in the tying market to appreciably restrain competition in the tied product market; and (3) a tie-in affecting a not insubstantial amount of interstate commerce. A suggested additional requirement requires that a plaintiff demonstrate that some "modicum of coercion" be exerted upon the purchaser of the tied product by the seller of the tying product. If the plaintiff establishes the above elements, defendant may defend itself "by an affirmative showing of business justification."

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

HN3[] Price Fixing & Restraints of Trade, Tying Arrangements

Under whatever rubric, coercion is a necessary element of an illegal tying arrangement.

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

HN4[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

In order to prove a per se tying arrangement, the likelihood of some coercion must be shown and ordinarily if the purchaser must purchase the tied product in order to get the tying product and the seller has market power in the tying product coercion may be presumed.

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

HN5[] Price Fixing & Restraints of Trade, Tying Arrangements

With respect to the "function of the aggregate" test, separateness is determined in part by whether the products are normally sold or used as a unit and whether their joint sale effects savings beyond those of combined marketing. The critical factor is the extent to which a producer's offerings are in response to independently structured consumer demand. The two-product inquiry is defined as whether there is a "sufficient demand" for the purchase of the tied product separate from the tying product to identify a distinct product market in which it is efficient to offer the two separately.

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

HN6[] Price Fixing & Restraints of Trade, Tying Arrangements

No tying arrangement exists unless it is also demonstrated that the purchase of the tying product is conditioned on the purchase of the tied product.

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

HN7[] Price Fixing & Restraints of Trade, Tying Arrangements

Evidence that tying language in a contract was actually enforced is not necessary to show a tie-in unless the contract itself does not demonstrate a formal tying agreement.

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

HN8[] Price Fixing & Restraints of Trade, Tying Arrangements

The second factor in determining the existence of a per se illegal tying arrangement is whether the seller has some special ability -- usually called market power -- to force a purchaser to do something that he would not do in a competitive market. The use of a per se standard is, indeed, appropriate only if the existence of forcing is probable, i.e., there exists a substantial potential for impact on competition resulting from the economic power of the seller. This standard can be met if the plaintiff makes one of the following showings: (1) the seller has a high share of the tying product market; (2) the tying product is a unique product that the seller's competitors are not able to offer; and (3) a substantial number of consumers have accepted the tie-in and no factor other than the economic power of the seller explains that acceptance.

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

HN9[] Price Fixing & Restraints of Trade, Tying Arrangements

A showing of uniqueness is made by the plaintiff if it can show that the alleged tying product is sufficiently unique to give defendant a competitive advantage in the tying product market. If the tying product is sufficiently desirable to consumers or is a product not easily replicated or commonly available, then the producer of the tying product is likely to have sufficient leverage to restrain the tied product market. Some courts hold that this demonstration can be made when a seller has economic power by virtue of a patent or a copyright in the tying product. Although the ownership of a trademark is not conclusive of economic power, some courts hold that a franchisor's trademark control over a common product confers sufficient economic power to establish a tie.

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

HN10[] Price Fixing & Restraints of Trade, Tying Arrangements

The uniqueness showing with respect to allegedly tied product can be made whenever there are some buyers who find a seller's product uniquely attractive, and are therefore willing to pay a premium above the price for the nearest substitute.The concern is not with the restraint on competition in the tying product but on competition in the market for the tied product. What is required is not monopoly power in the tying product market, but only sufficient power to enable the seller to restrict competition in the tied product. If a seller's product is distinctive, not available from other sources, and sufficiently attractive to some buyers to enable the seller by tying arrangements to foreclose a part of the market for a tied product, the adverse impact on competition in the tied product is not diminished by the fact that other sellers may be selling products similar to the tying product.

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

HN11[] **Price Fixing & Restraints of Trade, Tying Arrangements**

A prestigious and desirable trademark can be persuasive evidence of economic power for purposes of analyzing a purported tying arrangement.

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

HN12[] **Price Fixing & Restraints of Trade, Tying Arrangements**

In order to make a demonstration of economic power, the plaintiff must show that a significant number of customers in the market have accepted the tie-in.

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

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

HN13[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Relevant authority makes it clear that the per se standard is not different for private and government suits.

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

Criminal Law & Procedure > Trials > Burdens of Proof > Defense

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

HN14[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A defendant can excuse itself from an otherwise per se illegal tying arrangement if it can demonstrate the existence of a business justification. The defendant bears the burden of proving that justification.

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Judges: Patel, District Judge.

Opinion by: PATEL

Opinion

[*1508] OPINION AND ORDER

This is an antitrust action, presently before the court on cross-motions for summary judgment. Plaintiff The Mozart Company, successor in interest to Eurasian Automotive Products, Inc., a wholesale automotive parts distributor, brought suit against defendant Mercedes-Benz of North America ("MBNA") alleging violations of *§§ 1* and *2* of the Sherman Act and § 3 of the Clayton Act, *15 U.S.C. §§ 1*, *2*, and *14*. Mozart contends that provisions of the Dealer Agreement between MBNA and each Mercedes-Benz franchised dealer constitute a per se tying violation of *15 U.S.C. §§ 1* and *14*. Plaintiff alleges additionally that MBNA conspired with the franchised dealers to boycott independent replacement parts distributors, such as Eurasian, in further violation of *§ 1*, and also attempted to monopolize the sale in the United States of replacement parts usable in Mercedes automobiles in violation of *§ 2*. **[**2]** Defendant objects to the use of a per se rule and argues that a rule of reason standard should apply in this case. Since, according to defendant, the evidence Mozart has introduced concerning MBNA's alleged conduct involving threats, coercion and intimidation would be insufficient to permit plaintiff to prevail under a rule of reason standard, defendant's motion for summary judgment should be granted.

This court has had previous occasion to deal with most of the issues raised in this litigation. In *United States v. Mercedes-Benz of North America, Inc., 517 F. Supp. 1369 (N.D. Cal. 1981)* ("*MBNA*"), after detailed consideration of the arguments raised by both parties, the court held that ***HN1***[] the per se standard applied. It then proceeded to deny both the government's and MBNA's motions for summary judgment and ordered the case to proceed to trial on "the issue of defendant's economic power and, if that be established, whether defendant can demonstrate sufficient business justification for a tying arrangement." *Id. at 1373*. At the same time, the court held that no factual dispute existed as to whether the Mercedes-Benz automobile and Mercedes replacement parts were two separate **[**3]** products tied together by the MBNA Dealer Agreement, or whether the agreement affected a not insubstantial amount of interstate commerce. *Id. at 1391*.

[*1509] Other courts have also considered tying arrangement claims brought against MBNA. In *IAP, Inc. v. Mercedes-Benz of North America, Inc., 571 F. Supp. 262 (D.N.J. 1983)* ("*IAP*"), the court went on at some length about the history of automobile production in general and the manufacture of replacement parts in particular. *Id. at 265-67*. It then cited *Pick Mfg. Co. v. General Motors Corp., 80 F.2d 641 (7th Cir.)*, *aff'd per curiam*, *299 U.S. 3, 57 S. Ct. 1, 81 L. Ed. 4 (1936)*, which held that since "the preservation of the good will of the public is directly involved," General Motors did not violate § 3 of the Clayton Act by requiring Chevrolet and Buick dealerships to sell only genuine GM replacement parts or parts authorized by *GM. 80 F.2d at 643-44*. According to the *IAP* court, *Pick* created an automobile replacement parts "exception" to ***antitrust law*** that, in essence, forecloses any tying claim of this sort against any automobile manufacturer. *571 F. Supp. at 167-68*. [1]

[4]** In another action against Mercedes, *Metrix Warehouse, Inc. v. Daimler-Benz A.G., 1982-2 Trade Case (CCH) P 64,861 (D. Md. 1982)* ("*Metrix I*"), the court denied both parties' motions for summary judgment for substantially the same reasons as this court did in *MBNA*. *Id*. at 72,280. Following the decision in *IAP*, however, the *Metrix* court reconsidered its earlier opinion, concluded that *Pick* was controlling precedent, and granted summary judgment in favor of Daimler-Benz and MBNA. *Metrix Warehouse, Inc. v. Daimler-Benz A.G., 1984-1 Trade Cas. (CCH) P 65,766 (D. Md. 1982)* ("*Metrix II*"). Then, following the opinion of the Supreme Court in *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* ("*Hyde*"), the court determined that its second opinion in the case had been "premature," concluded that *Hyde* showed the notion of a *Pick* exception to be untenable, vacated *Metrix II*, and reinstated *Metrix I*. *Metrix Warehouse, Inc. v. Daimler-Benz A.G.*, No. N 79-2066 (D. Md. June 11, 1984) ("*Metrix III*").

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[1] The specific issue before the *IAP* court was whether plaintiffs, instead of meeting defendant's motion for summary judgment, could dismiss their complaint with prejudice to themselves and without costs, but without prejudice to members of a purported class of plaintiffs which they attempted to have certified. *517 F. Supp. at 263-65*. The court determined, *inter alia*, that since defendant had gone to great expense and trouble to prepare its motion for summary judgment, and plaintiffs had never met that motion as required by the Rules of Civil Procedure, defendant's motion for summary judgment would be granted. *Id. at 269-70*. The court's discussion of the nature of plaintiffs' claim and the *Pick* "exception" was therefore unnecessary in deciding the issue before it.

Now this court must decide once again whether summary judgment should be in favor of or against **[**5]** MBNA. After thorough consideration of the extensive documentary evidence, memoranda, and oral argument presented by both parties, the court has concluded that it must deny both motions for summary judgment. The court has found no reason to disturb its previous determination that a per se standard should be used to test the alleged tying violation at issue here. It also remains clear that Mercedes-Benz automobiles and Mercedes replacement parts are two separate products tied together by the MBNA Dealer Agreement, and that this arrangement affects a not insubstantial amount of interstate commerce. Substantial factual disputes exist regarding whether MBNA had sufficient economic power to coerce its dealers into the tying arrangement and a conspiracy to boycott, and, if that is demonstrated, whether MBNA had sufficient business justification for its conduct. There is also dispute regarding the issue of MBNA's attempt to monopolize the sale of Mercedes replacement parts.

I. *Factual Background* [2]

[6]** Defendant MBNA, since 1965 the exclusive United States distributor of Mercedes-Benz automobiles, markets its passenger cars and genuine and approved replacement **[*1510]** parts through approximately 400 franchised dealerships. [3] **[**7]** Each dealer becomes party to a standard written Dealer Agreement, the second part of which contains numerous "Standard Provisions." Paragraph 9C of that part of the agreement provides:

> Dealer shall neither sell or offer to sell for use in connection with MB passenger cars nor use in the repair or servicing of MB passenger cars any parts other than genuine MB parts or parts expressly approved by DBAG if such parts are necessary to the mechanical operation of such MB passenger cars.

Part one of the Dealer Agreement defines "MB parts" as "parts, accessories, components, assemblies, and optional equipment for MB passenger cars supplied by MBNA, DBAG, [4] or DBNA." [5]

Plaintiff rests its claim of a per se illegal tying arrangement on Paragraph 9C quoted above. Mozart contends further that in connection with this arrangement MBNA coerced its dealers into a conspiracy to boycott all independent replacement parts distributors, such as Eurasian Automotive Products, and also attempted to monopolize the sale of Mercedes replacement parts in the United States.

II. *The Applicable Standard*

In *MBNA*, defendant's primary arguments in favor of its own motion for summary judgment were that "because of the nature of its franchise [arrangements], per se tying standards are inapplicable and that a rule of reason is the appropriate standard for determining restraint of trade." *517 F. Supp. at 1374*. Even though this court determined in that action that a per se tying standard did indeed apply, MBNA repeats the same argument in this proceeding, contending **[**8]** that the cases of *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)* and *Jefferson Parish Hospital Dist. v. Hyde, supra*, plus a series of franchise/trademark cases decided by the Court of Appeals for the Ninth Circuit, compel a different result. According to Mercedes, these cases, taken together, stand for the proposition that tying arrangements are not per se illegal unless they are imposed upon the ultimate consumer. This means, contends defendant, that the law of tying essentially has no application to exclusive dealing arrangements between franchisors and franchisees. These remarkable conclusions do not find support in the authority MBNA cites. Neither *GTE Sylvania* nor *Hyde* provides a basis for the argument that a per se standard should not apply in this case, and the Ninth Circuit cases relied upon only support the theory

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[2] For a more detailed discussion of MBNA's operational structure and parts distribution system, see this court's opinion in *United States v. Mercedes-Benz of North America, Inc., 517 F. Supp. 1369, 1373-74 (N.D. Cal. 1981)*.

[3] This case deals only with replacement parts. It is not argued nor could it be that parts for original use are separate products. Furthermore plaintiff's claim does not involve warranty parts. (Pl.'s Mem. Supp. Summ. Judgment, at 48; Pl.'s Reply Mem., at 23).

[4] Daimler-Benz A.G., the manufacturer of Mercedes automobiles, trucks, and other vehicles, and their replacement parts.

[5] Daimler-Benz of North America, Inc., the exclusive United States importer of DBAG products.

that MBNA "may condition the sale of the passenger *car* on use of the Mercedes-Benz trademark." *MBNA, 517 F. Supp. at 1374* (emphasis in original). [6]

[9]** As this court pointed out in *MBNA, GTE Sylvania* essentially overruled *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967)* and criticized the *Schwinn* court for departing from a long line of authority treating vertical restrictions as subject to the rule of reason and for adopting the per se rule without performing the analysis required **[*1511]** by *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. While some may have believed *GTE Sylvania* argued the Supreme Court's abandonment of the per se rule, *Hyde* certainly has dispelled that notion insofar as tying arrangements are concerned. Unlike its observation in *GTE Sylvania* that some vertical restrictions have an economic benefit, the court in *Hyde*, using a *Northern Pacific* analysis, announced its continuing belief that most tying arrangements are inherently anticompetitive. [7] Furthermore, application of the per se rule to tying arrangements has a thirty-seven year history. By contrast the per se rule was short-lived in vertical restriction cases. Moreover, the reasoning of the *GTE Sylvania* opinion gives **[**10]** no hint that the per se rule "long . . . applied to tying arrangements because of 'their pernicious effect on competition and lack of any redeeming virtue'" was no longer to be applied to those cases. *MBNA, 517 F. Supp. at 1377* (quoting *Northern Pacific Ry. Co., 356 U.S. at 5*). Defendant's assertion that *GTE Sylvania* somehow upsets established tying law is therefore clearly without foundation.

Mercedes nevertheless contends that *Hyde* all but forecloses the use of a per se standard in tying cases. The case holds, according to defendant, that a per se standard **[**11]** can be used only if the alleged tying arrangement is shown, through market analysis, to impose an actual restraint on the ultimate consumer's freedom of choice.

This argument mischaracterizes the holding and reasoning of the case. [8] In fact the court could not have made it clearer: "It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and are therefore unreasonable 'per se. '" *104 S. Ct. at 1556*. The essential characteristic of such an arrangement, the Court continued, is the seller's power to "force" a purchaser to do what he would not do in a purely competitive market. When it is "probable" that a consumer would be "forced" into the purchase of the tied product because of the seller's "market power" in the tying product market, per se condemnation, which is by definition "condemnation without inquiry into actual market conditions," is warranted with respect to the arrangement. *Id. at 1558-60*. Such market power can be demonstrated, the Court noted, by a showing that the "seller's share of the market is high" or by evidence that he "offers a unique product **[**12]** that competitors are not able to offer. . . ." *Id. at 1560-61*. The alleged tying arrangement at issue in *Hyde* was an exclusive contract between the hospital and a firm of anesthesiologists that provided for all anesthesiological services offered by the hospital to be performed by the firm. *Id. at 1554-56*. Because there was no showing that the hospital had any probable forcing power in the tying product market of hospital services, the per se standard was not applicable in that case. *Id. at 1561-67*.

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[6] These cases, *California Glazed Products, Inc. v. Burns & Russell Co., 708 F.2d 1423 (9th Cir.)* *cert. denied*, ***464 U.S. 938, 104 S. Ct. 348, 78 L. Ed. 2d 314 (1983)***; *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau, 701 F.2d 1276 (9th Cir.)* *cert. denied*, **464 U.S. 822, 104 S. Ct. 88, 78 L. Ed. 2d 96 (1983)**; *Hamro v. Shell Oil Co., 674 F.2d 784 (9th Cir. 1982)*; and *Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348 (9th Cir. 1982)* all consider whether the products involved in the alleged tying arrangements were "separate products," not whether a per se standard applied. These cases are therefore discussed, *infra*, in the "separate products" section.

[7] Justice O'Connor argued forcefully that tie-ins have economic utility. However, she could persuade only three other members of the Court to join her. In her rationale she relied in part on the reasoning of Justice White in *Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)* ("*Fortner I*"). Justice White, however, joined with the *Hyde* majority in upholding the per se rule.

[8] Defendant's reading of the Court's opinion is based largely on the concurring opinion of Justice O'Connor, which, although MBNA disagrees, clearly is at fundamental variance with the opinion of the Court regarding the continued validity of per se analysis. *See*, *104 S. Ct. at 1569, 1576* (O'Connor, J., concurring).

Hyde thus makes no change in the law concerning the use of a per se standard in tying cases. The three-part test articulated by this court in *MBNA* continues to have validity. **[**13]** *See* Digidyne Corp. v. Data General Corp., 734 F.2d 1336, 1338 (9th Cir. 1984). There is also no indication in *Hyde* or in any other authority that tying analysis is only relevant when the tie is imposed on the ultimate consumer. The alleged tie-in in *Hyde* was imposed on the consumer of hospital services, and was therefore analyzed from that perspective. Nothing in the case suggests that all tying cases must be analyzed from that point of **[*1512]** view, and no other cases impose that criterion. In Anderson Foreign Motors, Inc. v. New England Toyota Distributor, Inc., 475 F. Supp. 973 (D. Mass. 1979), plaintiff automobile dealers contended that a requirement by Toyota that they use Toyota delivery services in order to purchase Toyota passenger cars was an illegal tying arrangement. Agreeing that the dealers were the appropriate consumers from whose perspective the tie should be analyzed, the court concluded that the plaintiffs should be allowed to go to trial on their claim, noting that "dealer freedom of choice is an important value protected by tie-in law." *Id. at 984*. *Accord,* Grappone, Inc. v. Subaru of New England, Inc., 534 F. Supp. 1282, 1289 (D.N.H. **[**14]** 1982); Joe Westbrook, Inc. v. Chrysler Corp., 419 F. Supp. 824, 835 (N.D. Ga. 1976).

In Blanton v. Mobil Oil Corp., 721 F.2d 1207 (9th Cir. 1983), Mobil dealers contended that the parent company had, among other things, coerced them into a tying arrangement that required them to purchase other Mobil products in addition to gasoline in order to retain their dealerships. The court viewed the evidence to indicate that "Mobil dealers were used as captive consumers of Mobil products," and were therefore victims of an illegal tying arrangement. *Id. at 1211*.

Finally, in the recent case of *Digidyne*, the court determined that defendant Data General's refusal to license a software system except to purchasers of its "central processing units" was an illegal tie. *734 F.2d at 1338*. Data General sold these materials "primarily to original equipment manufacturers ("OEMs") who combine them with application software . . . to create a complete computer system for resale." *Id. at 1342*. The tie was therefore imposed on these OEMs, not on the ultimate consumer of the finished computer product. *Id. at 1342-44*. Thus, defendant's "ultimate consumer" argument is without merit.

[15]** *Hyde* also appears to put to rest any possibility that *Pick* creates an "automobile replacement parts exception" to antitrust tying law. In *MBNA*, this court suggested that "the law of tying has evolved substantially since 1935 and . . . the considerations relied on by that court are more properly construed as possible arguments for a business justification defense rather than as reasons mitigating against the application of a per se standard." *517 F. Supp. at 1376*. As noted above, the *IAP* and *Metrix II* decisions have since appeared to give some new vitality to *Pick*. This is not the case, however. The discussion of *Pick* in *IAP* was dictum unnecessary to the result the court reached. [9] What is more, the court relied for this dictum solely upon *Pick* without any discussion of the lengthy history of tying cases after *Pick. Pick* was decided in 1935 and affirmed by the Supreme Court in 1936. Adoption of the per se rule in tying cases did not take place until 1947 when the Supreme Court decided International Salt Co. v. United States, 332 U.S. 392, 396, 92 L. Ed. 20, 68 S. Ct. 12 (1947). Since *International Salt* there have been substantial developments **[**16]** in the law of tying and application of the per se rule. All of this was inexplicably ignored by the *IAP* court.

The *Metrix II* court reconsidered its opinion regarding *Pick* after *Hyde* was decided, and issued *Metrix III*, which succinctly states that "*Jefferson Parish [Hyde*] concisely summarizes the state of tie-in law, and leaves no room for the so-called *Pick* 'exception. "' *Id. at 3*. *Pick* clearly has no current application other than shedding light on the business justification defense explained below.

III. *Per Se Tying Standard*

Given the continued vitality of the per se standard as applied to tying cases, it remains to be determined whether the arrangement at issue in this case is an illegal tie which warrants per se condemnation. As this court noted in *MBNA*, **HN2**[] a plaintiff must make three important demonstrations in order to establish a per se illegal tying arrangement:

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[9] *See*, note 1, *supra*.

[*1513] "1. Two separate products with the sale of one **[**17]** conditioned on the purchase of the other;
"2. A seller with sufficient economic leverage in the tying market to appreciably restrain competition in the tied product market; and
"3. A tie-in affecting a not insubstantial amount of interstate commerce."

517 F. Supp. at 1378 (citations omitted); *see also* Digidyne, 734 F.2d at 1338. Other cases have suggested an additional requirement: that some "modicum of coercion" be exerted upon the purchaser of the tied product by the seller of the tying product. Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc., 732 F.2d 1403, 1407 (9th Cir. 1984); Roberts v. Elaine Powers Figure Salons, Inc., 708 F.2d 1476, 1479 (9th Cir. 1983). If the plaintiff establishes the above elements, defendant may defend itself "by an affirmative showing of business justification." MBNA, 517 F. Supp. at 1378; *see also* Moore v. James H. Matthews & Co., 550 F.2d 1207, 1217 (9th Cir. 1977) ("*Moore I*").

The development of the coercion aspect is less than clear. In attempting to characterize it, one court suggested that tying law is "a kind of semantic shell game." Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, ***[**18]*** 1223 (3d Cir.), *cert. denied*, *429 U.S. 823, 97 S. Ct. 74, 50 L. Ed. 2d 84 (1976)*. Some courts have looked at coercion in terms of whether the two products were, in fact, tied together, i.e., whether the purchaser was required to buy the tied product in order to get the tying product. Id. at 1224. Other have examined it in terms of market power, concluding that coercion is likely if a seller has a patent, a unique product or a substantial market share. *See* Robert's Waikiki, 732 F.2d at 1407.

HN3[] Under whatever rubric, coercion is a necessary element of an illegal tying arrangement. From the early days of per se application the rule has been that when a buyer is free to purchase the product separately there is no coercion. Northern Pacific Ry. Co., 356 U.S. at 6 n.4. This year in *Hyde* the Supreme Court emphasized the need for some coercion holding that the per se rule may only be used "if the existence of forcing is probable." 104 S. Ct. at 1560. However, the Court goes on to evaluate it in terms of market power, saying that "the likelihood that market power exists and is being used to restrain competition in a separate market is sufficient to make per se condemnation **[**19]** appropriate." Id. at 1561. From all this it is possible to conclude that ***HN4***[] the likelihood of some coercion must be shown and that ordinarily if the purchaser must purchase the tied product in order to get the tying product and the seller has market power in the tying product coercion may be presumed. For the reasons explained in subparagraph A.2 and subparagraph B below, plaintiffs have clearly established the "modicum of coercion" necessary to invoke the per se standard. Thus the court finds coercion based on the Dealer Agreement and the fact of its acceptance by a large number of dealers who have stated they believe they had no choice. That evidence, while sufficient to show forcing is likely, is not sufficient to meet the more rigorous requirement of market power sufficient to impose significant restraints on competition in the tied product market. [10]

[20]** A. *Separate Products Tied Together*

1. *Two Separate Products*

In *MBNA*, defendant contended that the Mercedes-Benz passenger car and its replacement parts were not separate products. In making this argument it relied upon a number of authorities, but principally 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)*, which held that McDonald's franchisees could be required to operate only on premises leased to them by the parent company. This was not an illegal tying arrangement, reasoned the court, because "the challenged aggregation is an essential ingredient **[*1514]** of the franchised system's formula for success," making the franchise and the premises lease "a single product." Id. at 309. MBNA contended that the Mercedes replacement parts arrangement was like the McDonald's lease requirement, since "the purchase of MBNA replacement parts is an 'integral component' of its [MBNA's] franchised business method." MBNA, 517 F. Supp. at 1380.

[10] The court in *Moore I* also noted that the seller of the tying product should have an economic interest in the tied product. 550 F.2d at 1216. MBNA clearly has an economic interest in the allegedly tied replacement parts. MBNA, 517 F. Supp. at 1378 n.10.

This court rejected that argument, noting that while the McDonald's arrangement was essential to the company's purpose of providing **[**21]** fast food products, the basic purpose of a Mercedes-Benz franchise was the distribution of Mercedes-Benz passenger cars, not Mercedes replacement parts. *Id. at 1380-81*. It was held that "there is nothing inherent in the Mercedes-Benz franchise or trademarked automobile that prevents . . . replacement parts from being provided from non-approved sources." *Id. at 1381*. Notwithstanding this reasoning, defendant, citing a number of recent trademark/franchise cases that essentially stand for the same proposition as *Principe*, renews the same contention here. This court must again reject it.

MBNA relies principally on *Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348 (9th Cir. 1982)*. In that case, ice cream store franchisees contend that "Baskin-Robbins ice cream products are unlawfully tied to the sale of the Baskin-Robbins trademark." *Id. at 1351*. The court rejected this claim. Distinguishing between a "business format" franchise system and a "distribution" franchise structure, it noted that while a "business format franchise is usually created merely to conduct business under a common trade name," with the distributor franchise "the franchised outlets serve as conduits **[**22]** through which the trademarked goods of the franchisor flow to the ultimate consumer." *Id. at 1353*. Since "the Baskin-Robbins trademark merely served to identify the ice cream products distributed by the franchise system," the ice cream and its trademark were not separate products, and tying law therefore had no application to the case. *Id. at 1354*.

None of that is relevant to this case. MBNA vigorously insists that *Krehl* stands for the proposition that "the law of 'tying' has no application at all to exclusive dealing arrangements used by manufacturers in the distribution of products to consumers through retail outlets displaying the manufacturer's trademark" (Def.'s Brief Opp. Summ. Judgment at 27), and that MBNA can therefore require its franchised dealers to sell only genuine or approved Mercedes replacement parts. This reasoning mischaracterizes *Krehl*. The court in that case said tying law did not apply to that particular situation because the purpose of the franchise was to distribute the trademarked ice cream; the trademark and the product it identified were therefore not separate. The purpose of a Mercedes-Benz franchise, as this court previously held, is the **[**23]** sale of Mercedes-Benz automobiles. *MBNA, 517 F. Supp. at 1381*. The Mercedes-Benz passenger car and its trademark are therefore not separate products. That reasoning could not be extended to cover any and all other products a franchisor may wish to distribute through a franchisee, however, without swallowing the whole of antitrust tying principles. Indeed, such a state of affairs would make it possible for MBNA or any other franchisor to require its franchisees to distribute "any product it decided to manufacture," whether or not those products were essential to the purpose of the franchise. *Id. at 1380*. *Krehl* cannot be read to support such a result. [11]

[24]** The other cases cited by defendant are likewise unavailing. In *Hamro v. Shell Oil Co., 674 F.2d 784 (9th Cir. 1982)*, a Shell service station operator alleged that the requirement that he purchase Shell gasoline in order to obtain a Shell franchise was an illegal tying arrangement. *Id. at 786.* **[*1515]** In rejecting the claim, the court merely determined that the Shell trademark and the gasoline the franchise had been established to distribute were not separate products. *Id. at 787-88*.

In *California Glazed Products, Inc. v. Burns & Russell Co., 708 F.2d 1423 (9th Cir.)*, *cert. denied*, *464 U.S. 938, 104 S. Ct. 348, 78 L. Ed. 2d 314 (1983)*, a trademark licensee who manufactured finished masonry blocks alleged that an agreement requiring it to purchase from the licensor the trademarked ingredients to finish the blocks was an illegal tie. *Id. at 1426*. The court rejected the claim, holding that since the license existed for the purpose of distributing the trademarked ingredients, those ingredients and its trademark were not separate products. *Id. at 1427-30*.

In *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau, 701 F.2d 1276 (9th Cir.),* **[**25]** *cert. denied*, *464 U.S. 822, 104 S. Ct. 88, 78 L. Ed. 2d 96 (1983)*, the assignee of the claims of a number of individual

[11] Defendant makes much of the argument that since a Mercedes franchise is a "distribution" franchise rather than a "business format" franchise, *Krehl* and the other franchise cases apply to this litigation. As has been clearly demonstrated, Mercedes passenger cars and their replacement parts are separate products; these arguments about the format of the franchise aid MBNA not at all with respect to the sales of replacement parts.

pharmacies contended that a health insurance provider's policy of dispensing drug benefits only through its own pharmacy was an illegal tying arrangement. *Id. at 1284*. The court held that this arrangement came within the "business of insurance" exception to ***antitrust law*** provided by the McCarran-Ferguson Act, and was therefore not an illegal tie. *Id. at 1284-87*. Plaintiff alleged further, however, that the requirement that subscribers to the health plan exercise their drug benefits only at the provider's pharmacy also constituted an illegal tying arrangement. *Id. at 1288-89*. The court rejected this claim, holding that since the subscriber's "purchase of drugs in the required manner was the consummation of the pharmacy benefit, not an unwanted and unnecessary product tied to the desired product," the pharmacy benefit and the restriction on the use of pharmacy services were one product. *Id. at 1289-90*.

Some comments the *Klamath* court made are relevant to the present action. Referring to ***HN5***[] the "function of the aggregate" test articulated in **[**26]** *Siegel v. Chicken Delight, Inc., 448 F.2d 43 (9th Cir. 1971)*, *cert. denied*, *405 U.S. 955, 92 S. Ct. 1172, 31 L. Ed. 2d 232 (1972)*, the court said that "separateness is determined in part by whether the products are normally sold or used as a unit and whether their joint sale effects savings beyond those of combined marketing. [Citation to *Siegel, 448 F.2d at 48*.] The critical factor is the extent to which a producer's offerings are in response to independently structured consumer demand." *701 F.2d at 1289*. The Supreme Court has defined the two-product inquiry as whether there is a "sufficient demand" for the purchase of the tied product separate from the tying product "to identify a distinct product market in which it is efficient to offer" the two separately. *Hyde, 104 S. Ct. at 1563* (citing approvingly this court's earlier decision in *MBNA* as well as *Siegel*). *See also* *Digidyne, 734 F.2d at 1339*. [12]

[27]** It remains undisputed in this action that "MBNA has separate personnel and price lists for new car and replacement part sales," and that "many replacement (as well as original) parts are manufactured by outside suppliers." *MBNA, 517 F. Supp. at 1380*. It is also clear that there is a demand for Mercedes replacement parts separate from the demand for the Mercedes-Benz passenger car itself. This court therefore finds, for a second time, that the Mercedes-Benz automobile and its replacement parts are separate products.

2. *Products Tied Together*

HN6[] No tying arrangement exists, however, unless it is also demonstrated that the **[*1516]** purchase of the tying product is conditioned on the purchase of the tied product. In *MBNA*, this court determined that the "express wording of the Dealer Agreement" tied the purchase of Mercedes-Benz passenger cars to the purchase of MBNA-supplied replacement parts. *517 F. Supp. at 1381-84*. It so concludes again now.

Defendant previously argued that notwithstanding the language of Paragraph 9C of the Dealer Agreement, the understood practice is that "dealers are free to purchase non-Mercedes-Benz parts and that [this] evidence of the parties' **[**28]** understanding should be controlling." *Id. at 1381*. Defendant repeats that argument here, with the additional contention that two other provisions of the Dealer Agreement, taken together with Paragraph 9C, demonstrates the lack of a tie between the Mercedes-Benz automobile and its replacement parts.

Paragraph 9D of the Dealer Agreement provides:

> Dealer shall not represent as new, genuine MB parts or as parts approved by DBAG any parts used by it in the repair or servicing of MB passenger cars, which are not in fact new, genuine MB parts or parts expressly approved by DBAG or MBNA.

Paragraph 13F of the Agreement provides: [13]

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[12] Defendant argues that *Siegel* is an "odd-ball" case that is a singular exception to the rule established in the franchise/trademark cases. *Siegel* cannot be dismissed so easily. The Supreme Court saw fit to treat *Siegel* approvingly in *Hyde* when the Court included it in an enumeration of cases consistent with its two-product analysis. *104 S. Ct. at 1563 n.35*. The tied products in that case were clearly not central to the purpose for which the franchise had been established, and thus were part of an illegal tie-in. The replacement parts at issue in this case are also not central to the purpose of the Mercedes franchise. If other elements are demonstrated, they also may be shown to be part of an illegal tie.

> If Dealer sells for use in the repair of any MB Product any parts which are not genuine MB Parts or parts expressly approved by DBAG or MBNA, Dealer will advise the purchaser by appropriate written notice on the Invoice that such parts are not genuine MB Parts supplied by MBNA and are not warranted by MBNA. Dealer will also, by appropriate written notice on the Invoice, advise the purchaser of the source of such parts and of the warranty, if any, given by the supplier of such parts.

According to defendant, since Paragraph 9D provides for **[**29]** disclosure by the dealer of the use or sale of any non-MBNA parts, "if Paragraph 9C compelled exclusive dealing with MBNA, Paragraph 9D would be to no purpose at all." (Def.'s Brief Supp. Summ. Judgment, at 14). Moreover, MBNA continues, the basic, "implicit" purpose of Paragraphs 9C and 9D is to provide for "full and conspicuous disclosure"; Paragraph 13F is the "explicit" declaration of that purpose. *See, id*. And, in any event, continues defendant, 9C is, in practice, irrelevant, since "dealers interpret [it] (as well as the other provisions of the Agreement) in various ways, or they simply ignore it. Some do not know of it; others interpret it as going only to 'safety related' parts; all feel free to overlook it." *Id. at 15*. In sum, contends MBNA, all 9C does is require dealers to "buy some MBNA parts as a condition of the privilege to display the trademark." *Id*.

None of these arguments is sufficient to convince this court to alter its previous **[**30]** determination of this question. Notwithstanding any other provision of the Agreement, Paragraph 9C clearly forbids the use or sale of non-genuine or unapproved replacement parts "if such parts are necessary to the mechanical operation of such MB passenger cars." That has nothing to do with "full and conspicuous disclosure"; it clearly prohibits dealers from using or selling certain equipment.

It is also clear that these three provisions deal with different types of replacement parts. While Paragraph 9C pertains only to parts "necessary to the mechanical operation" of the car, Paragraphs 9D and 13F, which do not contain this limiting language, clearly pertain only to those non-genuine parts that 9C does not prohibit dealers from using. Thus, Paragraph 9C cannot be read into superfluity or given interpretations its language will not bear, as defendant would wish; if it had no purpose, it would not be in the Agreement. [14]

[31]** **[*1517]** Defendant's further attempt to scuttle 9C by arguing that the dealers either interpreted it to suit their own purposes or ignored it entirely is also without merit. Even if the dealers did feel free to ignore the provision -- and there is substantial evidence to the contrary -- the fact of the existence of tying language is enough to evidence a tie. As this court previously noted, such language by itself has considerable "coercive potential," and ***HN7***[] evidence that it was actually enforced is not necessary to show a tie-in unless "the contract itself does not demonstrate a formal tying agreement." *MBNA, 517 F. Supp. at 1381-82* and n.17; *see also* *Northern Pacific Ry. Co., supra, 356 U.S. at 11-12*; *Ungar v. Dunkin' Donuts of America, Inc., supra, 531 F.2d at 1224*. Since Paragraph 9C clearly does contain tying language, the fact that some dealers may have ignored it does not defeat the existence of a tie.

The fact that Paragraph 9C applies only to those parts "necessary to the mechanical operation" of the car also does not defeat the existence of a tie. In *MBNA*, this court noted that this language was ambiguous, rendering it impossible for the dealers to know **[**32]** what parts were covered in the proscription. There was also considerable evidence suggesting that the phrase referred, in practice, to virtually the entire automobile. *Id. at 1382* and nn.18-19. [15] These factors led the court to conclude that the limiting language did not alter the explicit tying arrangement the provision imposes, and it sees no reason to change that determination now.

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[13] This provision was added to the Agreement in 1983.

[14] The fact that MBNA earlier considered and then rejected a less restrictive version of Paragraph 9C indicates that the provision was not intended to be without effect. *See*, "Business Justification" section, *supra*.

[15] MBNA officials still appear to consider parts "necessary to the mechanical operation" of the Mercedes car to include virtually the entire car. *E.g*. (Stoehr Dep. at 249-54, Pl.'s App. II).

It is true that Paragraph 9C permits the use of outside parts if they have been "expressly approved" by DBAG. As this court has noted, the existence of an illegal tie-in may in fact be defeated if an actual "approved source" clause and approval mechanism exist. *Id. at 1382-83*. The court determined, however, that no such procedures were available to Mercedes dealers, and the hint in 9C at some possible approval mechanism was therefore **[**33]** illusory. *Id. at 1383-84*. The court has been given no reason to find otherwise now.

For the foregoing reasons, the court is constrained to conclude, for a second time, that the Mercedes-Benz automobile and its replacement parts are separate products tied together by Paragraph 9C of the MBNA Dealer Agreement. [16]

[34]** B. *Sufficient Economic Power*

HN8[] The second factor in determining the existence of a per se illegal tying arrangement is whether "the seller has some special ability -- usually called 'market power' -- to force a purchaser to do something that he would not do in a competitive market." *Hyde, 104 S. Ct. at 1559*. The use of a per se standard is, indeed, appropriate only if "the existence of forcing is probable," i.e., there exists a "substantial potential for impact on competition" resulting from the economic power of the seller. *Id. at 1560*. This standard can be met if the plaintiff makes one of the following showings:

1. The seller has a "high" share of the tying product market, *id*.;

2. The tying product is a unique product that the seller's competitors are not able to offer, *id. at 1560-61*;

[*1518] 3. A substantial number of consumers have accepted the tie-in and no factor other than the economic power of the seller explains that acceptance. *MBNA, 517 F. Supp. at 1384*; *see also, Hyde, 104 S. Ct. at 1561 n.26* (quoting *Northern Pacific Ry., 356 U.S. at 7-8*).

Plaintiff bases its argument primarily on the second, or "uniqueness" factor, **[**35]** though it does suggest that the third factor is also met here. [17]

As this court held in *MBNA*, ***HN9***[] a showing of uniqueness is made by the plaintiff if:

> . . . it can show that the alleged tying product, the Mercedes-Benz automobile, is sufficiently unique to give defendant a competitive advantage in the tying product market. If the tying product is sufficiently desirable to consumers or is a product not easily replicated or commonly available, then the producer of the tying product is likely to have sufficient leverage to restrain the tied product market.

517 F. Supp. at 1385-86 (citations omitted). Some courts have held that this demonstration can **[**36]** be made when a seller has economic power by virtue of a patent or a copyright in the tying product. *See, e.g., United States v. Loew's Inc., 371 U.S. 38, 45-46, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962)*. In *Northern Pacific Ry*., the Court held that the railroad's vast land holdings gave it a unique bargaining position sufficient to establish the requisite economic

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[16] Defendant argues that since plaintiff in its damage study admits that BMW imposed no tying arrangement on its dealers, and BMW has in its dealer agreement a provision similar to Paragraph 9C, plaintiff in effect admits that MBNA is not acting in restraint of trade. (Def.'s Brief Supp. Summ. Judgment, at 4, 12, 13, 23, 24, 37). This argument misconstrues the import of the damage study and plaintiff's use of it.

The damage study deals specifically with impact, something that is not at issue in this proceeding. The study took as an assumption the belief of the former officers of Eurasian Automotive Parts that "whereas MBNA was coercing the Mercedes-Benz dealers to eliminate outside purchases, and insisting that the dealers had agreed not to buy except from MBNA and that they honor their agreement 'or else,' BMW employees were not coercing the BMW dealers." (Pl.'s Brief Opp. Summ. Judgment, at 30-31). The provision in the BMW agreement is thus of no import in analyzing whether MBNA's products are tied together.

[17] Plaintiff also attempts to argue that the market dominance test is also met here, since the market for the tying product, the Mercedes-Benz passenger car, consists of the Mercedes dealers. (Pl.'s Reply Brief, at 22-23). This argument misconstrues the nature of the market dominance test. *See, Digidyne, 734 F.2d at 1336, 1340 (9th Cir. 1984)*.

power. 356 U.S. at 7-8. Although the ownership of a trademark "is not conclusive of economic power," MBNA, 517 F. Supp. at 1386, some courts have held that a franchisor's trademark control over a common product confers sufficient economic power to establish a tie. *E.g.,* Siegel v. Chicken Delight, 448 F.2d at 49-50.

Mozart contends that such factors as the special advantages a Mercedes dealer enjoys and the alleged technological superiority and immense prestige of the Mercedes-Benz passenger car make this automobile and the opportunity to distribute it so uniquely valuable that its producer has power to "force" the dealers to purchase the tied product, MBNA replacement parts. [18] Defendant contends that none of this is sufficient to demonstrate uniqueness for the purpose of establishing economic power on the part **[**37]** of MBNA. Relying primarily on United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 51 L. Ed. 2d 80, 97 S. Ct. 861 (1977) ("*Fortner II*"), MBNA argues that its product is not unique "in the antitrust sense" because Mozart has not shown that it confers on the manufacturer "something approaching the insulation of a patent or a copyright." (Def.'s Brief Supp. Summ. Judgment, at 40). The proper focus in this inquiry, contends defendant, is not the self-laudatory comments of MBNA officials, or the praises heaped upon the Mercedes-Benz passenger car by satisfied customers or automobile critics, but is rather the capacities of MBNA's competitors. Unless it can be shown that they are somehow prevented from marketing products comparable to those offered by MBNA, continues defendant, Mercedes products are not sufficiently unique to give MBNA economic power over the tying product market. *Id*.

[38]** Defendant appears to read *Fortner II* to require a producer to have something approaching a monopoly in the tying product market in order for its product to be unique. MBNA made this argument in the previous action before this court; it was rejected then, MBNA, 517 F. Supp. at 1386, and must be again now. *Fortner II* does contain language indicating that "the question is whether the seller has some advantage **[*1519]** not shared by his competitors in the market for the tying product," 429 U.S. at 620, and that the producer's competitors must be "in some way prevented from offering the distinctive product themselves." Id. at 621 (quoting Fortner I, 394 U.S. at 505). The Court's opinion made it clear, however, that this reasoning did not impose a monopoly requirement, and that ***HN10***[] the uniqueness showing could be made "whenever there are some buyers who find a seller's product uniquely attractive, and are therefore willing to pay a premium above the price for the nearest substitute. . . ." Id. 429 U.S. at 621 n.14 (quoting Note, *The Logic of Foreclosure: Tie-In Doctrine after Fortner v. U.S. Steel*, 79 Yale L.J. 86, 93-94 (1969)). As the court in *Digidyne* **[**39]** noted:

> The concern is not with the restraint on competition in the tying product but on competition in the market for the tied product. What is required is not monopoly power in the tying product market, but only sufficient power to enable the seller to restrict competition in the tied product. If a seller's product is distinctive, not available from other sources, and sufficiently attractive to some buyers to enable the seller by tying arrangements to foreclose a part of the market for a tied product, the adverse impact on competition in the tied product is not diminished by the fact that other sellers may be selling products similar to the tying product.

734 F.2d at 1345. Thus, the plaintiff in that case was able to demonstrate economic power by showing that defendant's software package, arguably the best available and protected by copyright, was sufficiently unique to allow defendant to "force" purchasers of that product to also purchase other materials. Id. at 1340-42. This economic power, based on uniqueness, was further enhanced, in the court's view, by the fact that many of the defendant's customers had become, by virtue of their economic investment, "locked **[**40]** in" to the use of the tying product. Id. at 1342-43.

Such a strong showing has not been made by plaintiff in this case. This court previously noted that "the Mercedes-Benz passenger car is one of the world's finest automobiles and that the Mercedes-Benz trademark, a three-pointed star in a circle, is recognized worldwide for its representation of automotive luxury, performance and technology." MBNA, 517 F. Supp. at 1373. Plaintiff's impressive array of evidence reinforces these impressions, but does little else. ***HN11***[] A prestigious and desirable trademark can be persuasive evidence of economic power, id. at 1387, but this court is unwilling to determine, as a matter of law, that the prestige of the Mercedes-Benz

[18] Plaintiff bases this argument on portions of the extensive deposition and documentary evidence generated by this litigation, mostly on the deposition testimony of MBNA officials. *See*, (Pl.'s Mem. Supp. Summ. Judgment, at 12-24).

trademark, taken together with the evidence of the product's technological, safety and luxury preeminence, bestows on MBNA sufficient economic power to force its dealers to accept an illegal tie-in. All of this evidence should be heard and evaluated by a fact-finder at trial before a conclusive determination regarding uniqueness is made.

Mozart also argues, however, that MBNA's economic power is demonstrated by the fact that no explanation other than defendant's ability **[**41]** to impose a tie-in could account for the acceptance of the burdensome terms of Paragraph 9C by the Mercedes dealers. Plaintiff contends that the dealers continued to purchase replacement parts from MBNA, despite the fact that independent distributors offered equivalent parts for much less, because they feared that their two-year franchise agreements would not be renewed if they did otherwise. (Pl.'s Mem. Supp. Summ. Judgment, at 24-27).

HN12[] In order to make such a demonstration of economic power, plaintiff must show that a significant number of customers in the market have accepted the tie-in, and that there are no explanations other than MBNA's economic power for that acceptance. *MBNA, 517 F. Supp. at 1385*. Mozart falls slightly short on both of these counts. As in *MBNA*, plaintiff has defined the universe of potential buyers as all Mercedes-Benz dealers, and alleges that since 100% of them accepted the adverse terms, a significant number of customers accepted **[*1520]** the tie-in. *See, id*. Again, "there is no identified population against which to compare the 400 Mercedes dealers. Plaintiff might argue that 400 represents an appreciable number of buyers from a total population **[**42]** of import car dealers or of import luxury car dealers. Plaintiff has not attempted such a showing." *Id*.

Plaintiff also has not demonstrated that fear of nonrenewal of franchises is the only possible explanation for the dealers' purchase of parts from MBNA. Indeed, some dealers suggest that the "spectre of non-renewal" did not haunt them at all, and that they had other reasons for purchasing parts directly from Mercedes. [19]

At least one court has determined that since an automobile manufacturer was able to impose burdensome terms on "a significant number of buyers, *i.e*., its dealers," the manufacturer had sufficient economic power to impose an illegal tie. *Grappone, Inc. v. Subaru of New England, Inc., 534 F. Supp. at 1282, 1290* and n.21. This finding was made, however, after a trial enabled the fact-finder to fully hear and evaluate the evidence. The same procedure must occur in this case. This court therefore declines to conclude, as a matter **[**43]** of law, that MBNA had sufficient economic power to impose an illegal tying arrangement on its franchised dealers.

The court makes that conclusion even though there is considerable evidence that dealers were coerced into the purchase of replacement parts from MBNA. The evidence plaintiff uses to demonstrate the fact of coercion consists primarily of letters, deposition testimony, and MBNA Visitor Reports, which were filled out by MBNA field representatives after inspection tours of Mercedes-Benz dealerships. This evidence seems to indicate that at least some Mercedes dealers or their parts employees felt coerced into buying only genuine MBNA parts, if only "safety-related" parts. Parts managers talk of being harassed by MBNA parts representatives regarding the purchase of outside replacement parts, and some evidence points to possible sanctions imposed against one dealer for his failure to abide by the company policy regarding outside purchases. Defendant's evidence essentially consists of eleven volumes of deposition testimony from numerous Mercedes dealers from around the country who say they have never felt threatened or coerced into buying replacement parts solely from MBNA. Although **[**44]** there is surely enough evidence here to satisfy the "modicum of coercion" requirement, this court nevertheless declines to decide the issue of economic power on summary judgment.

C. *Effect on Interstate Commerce*

In the previous action before this court, it was determined, as a matter of law, that a not insubstantial amount of interstate commerce was affected by the alleged tying arrangement. *MBNA, 517 F. Supp. at 1387-88*. The court has been given no reason to change its previous finding, and therefore concludes, for a second time, that a sufficient amount of commerce was involved in this arrangement to satisfy this element of the per se analysis.

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[19] *See* (Terian Dep., Def.'s App. IX, at 1313-15).

The court has thus far concluded that the per se tying standard applies in this case. It has also been determined, as a matter of law, that (1) the Mercedes-Benz passenger car and its replacement parts are separate parts tied together by Paragraph 9C of the Dealer Agreement, and (2) that the tie affects a not insubstantial amount of interstate commerce. The court has also determined that the issue of economic power must be decided at trial. [20]

[45]** IV. *Business Justification*

As this court has noted, ***HN14***[] a defendant can excuse itself from an otherwise per se illegal **[*1521]** tying arrangement if it can demonstrate the existence of a business justification. *Id. at 1388*. The defendant bears the burden of proving that justification. *Id*.

MBNA maintains that the arrangement at issue in this case is necessary to make sure that the customer "will get the real thing" in terms of new cars, service, and repairs, and is essential to protecting the quality of the Mercedes-Benz passenger car and the goodwill of the customer. (Def.'s Brief Supp. Summ. Judgment, at 1-9). Mozart contends that, on the contrary, MBNA is without business justification for the tying arrangement for two reasons: 1) a less restrictive alternative that would maintain the quality of replacement parts is available to Mercedes; and 2) in any event, the quality control argument MBNA makes is without merit, since replacement parts of appropriate design and quality are available from other sources. (Pl.'s Mem. Supp. Summ. Judgment, at 27-35).

Plaintiff's first contention is based on the fact that in drafting Paragraph 9C of the Dealer Agreement MBNA first **[**46]** considered, then rejected, the following version:

> Dealer shall not use, sell, or offer to sell parts other than genuine MB parts or parts expressly approved by DBAG or DBNA if such parts are
> (a) necessary to the mechanical operation of Mercedes-Benz passenger cars; and
> (b) not equivalent in quality and design to genuine MB parts expressly approved by DBAG or DBNA.

Id. at 29 (quoting Armstrong *TLC* Dep. Exh. P-12, at 18-19, Pl.'s App. IV). This version, alleges Mozart, would have addressed MBNA's concerns regarding quality without conferring on Mercedes an "uncontrolled silent veto" with respect to outside parts. *Id. at 29-30*.

Moreover, plaintiff contends, MBNA does not, in any event, have a quality control problem. MBNA purchases 80% of its replacement parts from DBAG; of those parts, one-half are manufactured by DBAG, and one-half are purchased by Daimler-Benz from original equipment manufacturers ("OEMs"), who produce the parts according to DBAG manufacturing and quality control specifications. A selection of the OEM parts are subjected to a "second round" of tests by DBAG, even though they have already been tested by their manufacturer. **[**47]** *MBNA, 517 F. Supp. at 1389*. The remaining 20% of the replacement parts purchased by MBNA come directly from OEMs who "have met DBAG's standards for the quality of their parts and inspection procedures." *Id. at 1389 n.32*. Mozart, citing deposition and declaration evidence, alleges that "almost all" of the replacement parts sold by Eurasian Automotive Products were manufactured by these OEMs, that Mercedes officials knew this, and that independent distributors even offered parts purchased directly from DBAG parts outlets. (Pl.'s Mem. Supp. Summ. Judgment, at 31-32). Moreover, contends plaintiff, MBNA officials had never heard of accidents caused by defective parts sold by independent distributors, and had indeed heard of no defective part sold by those distributors. In fact, according to Mozart, Eurasian had a better record with warranty claims than Mercedes, who has needed to have many "recall campaigns." *Id. at 33-35*. In sum, Mozart asserts that MBNA's quality control justification lacks merit because the parts marketed by Eurasian were, in fact, of the same quality as many of those used, and even marketed, by DBAG and MBNA.

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[20] Defendant also makes much of the argument that a private plaintiff, as opposed to the government, is somehow required, even in a per se case, to prove the entire case, including damages, in order to prevail on any point, and cannot therefore move for partial summary judgment. This argument is without substance. ***HN13***[] Relevant authority makes it clear that the per se standard is not different for private and government suits. *E.g., Hyde, 104 S. Ct. at 1556-61*; *Digidyne, 734 F.2d at 1338, 1339*.

In response, Mercedes claims that its legitimate **[**48]** business objective "is to wed the customer to [the Mercedes-Benz] brand of automobile" and "to keep the car in first class running order." Citing authority used unsuccessfully in its attempt to remove the case from the purview of the per se standard and place it within the parameters of the franchise/trademark cases, MBNA argues that the business of affording the customer "reliable service and quality replacement parts" is an "inseparable aspect of the business of selling new cars" and "vital to good will and competitiveness." (Def.'s Brief Supp. Summ. Judgment, at 1-6). Since, according to defendant, MBNA has no direct control over the quality and design testing of the OEMs and **[*1522]** other manufacturers of replacement parts, and indeed could not have such control, it has no assurance that those parts are of the requisite quality and has a legitimate fear of inferior parts coming from those sources. *Id. at 7-9* and n.2. Defendant also calls into question Mozart's characterization of MBNA's warranty record and recall campaigns, *id. at 42-44*, and, pointing to the allegedly faulty brake disc marketed by Eurasian in 1976, contends that some parts sold by OEMs (apparently **[**49]** those not intended for DBAG, but solely for the wholesale market) and other manufacturers of "copy parts" are often inferior, and "sometimes dangerously inferior in quality," to genuine DBAG parts. *Id. at 7-9, 19-20*. MBNA does admit that 20% of its parts purchases are from OEMs whose parts have not gone through DBAG's rigorous "second test," but suggests that these OEMs were superior to others, that they had never forced its dealers to buy such parts, and that MBNA "is now in the process of establishing a quality control program in the United States that will duplicate what is done in Germany." *Id. at 45*.

MBNA's argument regarding the distinction between the distribution, servicing and repair of passenger cars and the sale of other consumer goods is not without merit. *See, MBNA, 517 F. Supp. at 1390*. Indeed, this court has noted that MBNA "has an important legitimate interest in protecting its trademarked automobile and public confidence in the quality and safety of the product." *Id*. [21] The crucial question is whether the alleged tying arrangement imposed on Mercedes dealers is necessary to protect that interest. The inquiry can only be resolved in defendant's favor **[**50]** if MBNA can demonstrate that its quality control procedures are necessary to protect the passenger car's quality, and show that replacement parts of appropriate quality are unavailable elsewhere. *Id*.

[51]** Plaintiff has presented an impressive array of argument and evidence which strongly suggests that defendant will have great difficulty meeting its burden here. Defendant's only substantial response to that showing, beyond asserting that it has a legitimate interest in the quality of its product, is to cite the declaration of DBAG inspection director Albrecht Koster. (Koster Decl., Def.'s App. XII, at 1803-25). Koster alleges that from 1981 to 1983, numerous shipments from OEMs contained defective parts, *id*. at 1815-18, which, according to MBNA, demonstrates the need for DBAG quality control procedures. Koster also asserts that it would be impossible for DBAG to monitor the quality control procedures of the numerous OEMs, thereby rendering it impossible to know for sure whether the outside parts are of the requisite quality. *Id*. at 1823-24. As plaintiff points out, Koster's declaration deals with replacement part difficulties which took place after the time period relevant in this litigation, and his conclusions regarding the possibility of receiving quality parts from elsewhere is also subject to question. [22] MBNA

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[21] Plaintiff argues that the Magnusson-Moss Warranty, Federal Trade Commission Act of 1974, *15 U.S.C. §§ 2301 et seq.*, especially § 2302(c), is "clear demonstration of Congressional intent that tying arrangements cannot be justified on the ground of preserving goodwill." (Pl.'s Reply Brief, at 23). It is not at all clear to the court that this statute, which prohibits a warrantor from conditioning the warranty on the use of a certain product, and is specifically aimed at prohibiting "the implementation of tying arrangements by means of warranties" (Pl.'s Mem. Supp. Summ. Judgment, at 49) (quoting ***Harmsco, Inc., 41 Fed. Reg. 34,368, 34,369 (1976))***, destroys MBNA's interests discussed here. It is true, of course, that a tie cannot be imposed by Mercedes unless it demonstrates that such an arrangement is the only way the safety and quality of its product can be assured. If such an arrangement proves necessary, this statute would not prohibit it. *See, id., at 48* (quoting House Report of § 2302(c)).

[22] Koster suggests that it would be economically infeasible to require DBAG to monitor all the OEMs who sell on the open market. *Id*. at 1823-24. This does not mean, however, that there are not other possible means available to insure the quality of the parts used in the Mercedes car. Perhaps some quality control system could be implemented directly at the dealer level. The fact that the requirement of quality control poses some problems does not excuse MBNA from doing it. Additionally, Koster and MBNA both appear to misread the import of *Volkswagenwerk A.G. v. Bundeskartellamt* (the "Federal Cartel Office"), No. KVR 8/80 (September 11, 1981). The German court merely held that under German law, VW could not be required to monitor the

also cites the deposition **[*1523]** testimony of parts **[**52]** manager Don Williams, who suggests that, although he does not know "for sure," some OEMs whose parts are rejected by MBNA leave those parts in Mercedes boxes and then sell them to the independent parts distributors, who then sell them to dealers in the same boxes. This, continues Williams, makes it difficult to tell, for warranty and disclosure purposes, whether the part is MBNA-approved or not. (Williams Dep., Def.'s App. I, at 77-78). This testimony is admittedly speculative and is therefore of little probative value.

[53]** As the foregoing discussion indicates, defendant has not made a sufficient showing of the need for DBAG quality control procedures or of the unavailability of quality parts from outside sources to prevail on its own motion for summary judgment. The court also declines, however, to grant plaintiff's motion for summary judgment on this issue. There are serious questions of fact in dispute on the business justification defense that preclude a grant of summary judgment for either party.

If plaintiff is able to establish the requisite economic power to impose an illegal tying arrangement, MBNA will have the opportunity to "demonstrate the necessity for its quality control procedures and the unavailability of comparable mechanically necessary replacement parts from non-MBNA sources." *MBNA, 517 F. Supp. at 1390*.

V. *The Conspiracy and Monopoly Claims*

In addition to the claim of a per se illegal tying arrangement, Mozart alleges that MBNA also engaged, with its dealers, in a conspiracy to boycott independent distributors, and also attempted to monopolize, through "resale price maintenance," the sale of Mercedes-Benz replacement parts, in violation of *15 U.S.C. §§ 1* and *2*. The court **[**54]** does not find it necessary to discuss in detail the parties' arguments regarding these claims. The main focus of argument and dispute has been the tying allegation, and the court need do no more here than state that it declines plaintiff's invitation to grant summary judgment as to the conspiracy claim on its own motion, and also will not grant defendant's motion for summary judgment on both claims. There is sufficient dispute regarding coercion to permit the conspiracy claim to proceed to trial, and neither party has mustered sufficient argument on the monopoly claim to justify summary judgment treatment.

VI. *Conclusion*

Based on the foregoing discussion, the court determines that since there are genuine issues of fact regarding the points raised in plaintiff's motion for summary judgment, that motion must be DENIED. Because the per se standard is applicable as to the tying count, and sufficient factual dispute remains as to the conspiracy and monopoly counts, defendant's motion for summary judgment is also DENIED.

As permitted by *Fed. R. Civ. P. 54(d)*, the court finds that there is no substantial controversy as to the following facts:

1. The Mercedes-Benz passenger car and **[**55]** its replacement parts are separate products tied together by the terms of Paragraph 9C of the MBNA Dealer Agreement; and

2. The tying arrangement affects a substantial amount of interstate commerce.

This matter will proceed to trial on the illegal tying arrangement claim on the issues of:

1. Whether MBNA has sufficient economic power to restrain competition in the tied product market; and

2. Whether MBNA has a legitimate business justification for the tying arrangement at issue in this case and on the conspiracy and monopoly claims.

[*1524] 3. On the conspiracy and monopoly claims.

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quality control processes of the OEMs. (Def.'s App. XIV, at 2123). Again, this does not dispose of the matter, for there could conceivably be other means of insuring the quality of replacement parts coming from OEMs.

IT IS SO ORDERED.

General Leaseways, Inc. v. National Truck Leasing Asso.

United States Court of Appeals for the Seventh Circuit

May 29, 1984, Argued ; September 19, 1984, Decided

No. 83-3173

Reporter

744 F.2d 588 *; 1984 U.S. App. LEXIS 18456 **; 1984-2 Trade Cas. (CCH) P66,205

GENERAL LEASEWAYS, INC., Plaintiff-Appellee, v. NATIONAL TRUCK LEASING ASSOCIATION, d/b/a NATIONAL TRUCK LEASING SYSTEM, et al., Defendants-Appellants

Subsequent History: **[**1]** As Amended.

Prior History: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 83 C 6731 -- Frank J. McGarr, Chief Judge.

Disposition: Affirmed.

Core Terms

trucks, Leasing, firms, preliminary injunction, markets, compete, Music, truck-leasing, Broadcast, repairs, output, customers, trademark, cartel, franchisee, reciprocal, antitrust, consumers, restrictions, advertising, territorial, franchises, injunction, composers, promoting, expelled, dealers, license, member of the association, anticompetitive

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

The cases in the Seventh Circuit usually say that a district judge asked to issue a preliminary injunction must consider four things: the harm (1) to the plaintiff and (2) to the defendant from the denial or grant of the injunction, respectively, (3) the likelihood of the plaintiff's prevailing on the merits when the case is tried, and (4) the effect on the public of granting or denying the preliminary injunction.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] **Injunctions, Preliminary & Temporary Injunctions**

The heart of the four-factor test is a comparison of the likelihood, and the gravity, of two types of error: erroneously granting a preliminary injunction, and erroneously denying it. The likelihood of an error depends on the merits of the case as they appear from the preliminary-injunction hearing. If the plaintiff seems quite likely to win the case when it is tried, then the probability that granting the preliminary injunction will give him an undeserved benefit will seem small, and granting the injunction will be the decision that minimizes the likelihood of an error.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN3[ ] **Injunctions, Preliminary & Temporary Injunctions**

If a plaintiff will be hurt more by denial of the preliminary injunction than the defendant will be hurt by its grant, the gravity of the error in denying the preliminary injunction should it turn out later that the plaintiff was entitled to the injunction, there would of course be no error if it turned out he was not entitled, clearly exceeds that of erroneously granting it; and the disparity is further magnified if the public as well as the plaintiff will be harmed by denying but not by granting the injunction.

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

HN4[ ] **Price Fixing & Restraints of Trade, Vertical Restraints**

A firm that is free from effective competition will reduce its output below the competitive level. Consumers will pay more when supply is scarcer, yet it will cost the firm less to produce a smaller supply--so the firm's profits will be greater at the reduced output. One way the firm can free itself from competition is by agreeing with sellers of the same product that they will not enter each other's markets; such an agreement will create a series of regional or local monopolies. An agreement on output equates to a price-fixing agreement. If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too--in other words, output will be restricted. If instead the firms restrict output directly, price will as mentioned rise in order to limit demand to the reduced supply. Thus, with exceptions, raising price, reducing output, and dividing markets have the same anticompetitive effects.

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

HN5[ ] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

If the elimination of competition is apparent on a quick look, without undertaking the kind of searching inquiry that would make the case a Rule of Reason case in fact if not in name, a practice is illegal per se.

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

HN6[ ] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Under the Rule of Reason analysis, a plaintiff must first prove that a defendant has sufficient market power to restrain competition substantially. If not, the inquiry is at an end; the practice is lawful. But if it seems that the defendant does have the power to restrain trade substantially, then inquiry proceeds to the question whether the challenged practice is likely--with due consideration for any justificatory evidence presented by the defendant--to help rather than hurt competition, viewed not as rivalry as such but as the allocation of resources that maximizes consumer welfare.

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

Civil Procedure > ... > Equity > Maxims > General Overview

Civil Procedure > Preliminary Considerations > Equity > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Unclean Hands

HN7[] **Regulated Practices, Price Fixing & Restraints of Trade**

Whenever some maxim of equity, such as that to get equitable relief you must have "clean hands," collides with the objectives of the antitrust laws, the equity maxim must give way.

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Rodney D. Joslin, Jenner & Block, Chicago, Illinois, for Defendant.

Judges: Posner, and Flaum, Circuit Judges, and Campbell, Senior District Judge. *

Opinion by: POSNER

Opinion

[*589] POSNER, Circuit Judge.

The defendants in this antitrust suit appeal under *28 U.S.C. § 1292(a)(1)* from the grant of a preliminary injunction to the plaintiff, General Leaseways, a company engaged in the business of leasing trucks. The principal (and to simplify this opinion we shall assume the only) defendant is an association of such firms, the National Truck Leasing Association, which decided to suspend General Leaseways indefinitely -- the practical equivalent of expelling it.

The roughly 130 members of the Association lease trucks to businesses on a "full service" basis. This means that the lessor rather than the **[**2]** lessee is responsible for maintaining the trucks and for repairing them if they break down. The leases are short term or long term, local or "over the road." The last of these terms, which means that the lessee may drive the truck anywhere in the country, is critical to this case. Over-the-road customers demand full service. The members of the Association, however, are local companies, none of which owns service facilities throughout the nation. The Association was created in order to set up and administer a reciprocal service arrangement that would enable each member to lease trucks on a full-service over-the-road basis and thus compete with the national truck-leasing companies, which have their own service depots all over the United States. The rules of the Association require each member to give the trucks of the other members prompt and efficient repair service; this is the reciprocal service arrangement. The rules do not regulate the price of the service.

Although reciprocal service is the Association's *raison d'etre*, the members also exchange information of a type normally exchanged through a trade association, engage in some other joint programs (including joint **[**3]** purchasing of fuel), and share a trademark owned by the Association, "NationaLease." But neither the Association nor its members advertise or otherwise promote the trademark extensively, and most **[*590]** members do not even use the mark in their business names.

If this were all there was to the Association, there would be no antitrust controversy. But there is more. Each member operates under a franchise from the Association that designates the particular location at which he may do

* Hon. William J. Campbell, of the Northern District of Illinois, sitting by designation.

business as a National franchisee and forbids him to do business as a National franchisee at any other location. The rules of the Association also forbid the franchisee to affiliate with any other full-service truck-leasing enterprise, such as Hertz or Avis. The significance of the location restriction and the nonaffiliation requirement lies in the fact that the markets for full-service commercial truck leases are local: the lessee invariably leases the truck from a firm having an outlet within a few miles (no more than 25) of the lessee's place of business. For short-term leases the inconvenience of sending the lessee's driver a longer distance to pick up the truck is decisive. For long-term **[**4]** leases the decisive factor is that regular maintenance (as distinct from emergency repair) is part of the full-service package and is therefore provided at the outlet from which the truck is rented. In either case one truck-leasing firm can compete with another only if it has a sales and service outlet near the other's. But the Association's policy is to space franchise locations 10 or (more commonly) 20 miles apart, so that franchisees will not be able to compete for many of the same customers. The franchisee can if he wants open an outlet at an unauthorized location under a different name, but trucks rented under that name would not be entitled to reciprocal service; and even if the member were willing to forgo that advantage, he still could not open an outlet under license from another full-service truck-leasing enterprise such as Hertz or Avis without being expelled from the Association. The overall effect of the Association's rules is thus to severely limit over-the-road leasing competition between members of the Association, since, to engage in such competition, a lessor that does not have its own national service network or access to that of a national company such as Hertz **[**5]** or Avis needs reciprocal service.

General Leaseways decided to defy the location and nonaffiliation restrictions, and it brought this suit to prevent the Association from expelling it for its infractions. The preliminary injunction orders the Association not to expel it pending the trial on the merits. The Association's appeal requires us to consider the standards for granting preliminary injunctions and the outer bounds of permissible cooperation among competitors under *section 1* of the Sherman Act, *15 U.S.C. § 1*.

HN1[] The cases in this circuit usually say that a district judge asked to issue a preliminary injunction must consider four things: the harm (1) to the plaintiff and (2) to the defendant from the denial or grant of the injunction, respectively, (3) the likelihood of the plaintiff's prevailing on the merits when the case is tried, and (4) the effect on the public of granting or denying the preliminary injunction. The latest such decision is *Libertarian Party v. Packard, 741 F.2d 981*, slip op. at 4-5 (7th Cir. 1984). But , **[**6]** ***HN2***[] the heart of the four-factor test is a comparison of the likelihood, and the gravity, of two types of error: erroneously granting a preliminary injunction, and erroneously denying it. *Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119, 123 (7th Cir. 1982)*. The likelihood of an error depends on the merits of the case as they appear from the preliminary-injunction hearing. If the plaintiff seems quite likely to win the case when it is tried, then the probability that granting the preliminary injunction will give him an undeserved benefit will seem small, and granting the injunction will be the decision that minimizes the likelihood of an error. ***HN3***[] If, moreover, the plaintiff will be hurt more by denial of the preliminary injunction than the defendant will be hurt by its grant, the gravity of the error in denying the preliminary injunction should it turn out later that the plaintiff was entitled to the injunction (there would of course be no error if it turned out he was *not* entitled) will clearly exceed that **[**7]** of erroneously granting it; and the disparity **[*591]** will be further magnified if the public as well as the plaintiff will be harmed by denying but not by granting the injunction. The hypothetical case we have just described is an easy one for granting a preliminary injunction. And it is this case.

Expulsion from the Association would force General Leaseways to cease doing business under the NationaLease name and, more important, would deny it the right to obtain prompt and efficient service from members of the Association. This would not wreck General Leaseways completely, because it has other franchises; and, in any event, if it wins the suit, it will be entitled to damages for the loss of business caused by its expulsion. But since its National franchises are a major part of General Leaseways' business, expulsion might be a grievous, though probably not a lethal, blow. Out of a total of 17 franchises under which General Leaseways does business, four are from National. We do not know what fraction of General Leaseways' business is done under them, but the difficulties of proving lost profits (on which see, e.g., *Taylor v. Meirick, 712 F.2d 1112, 1119-22 (7th Cir. 1983)*, **[**8]** and *Hayes v. Solomon, 597 F.2d 958, 976-77 (5th Cir. 1979))* make it chancy to rely on a damage award to provide full compensation even where as in this case a preliminary injunction is not necessary to keep the plaintiff afloat while the suit is proceeding toward final judgment.

The countervailing harm to the Association from being forced to clasp a viper to its breast during what may be the protracted period until final judgment is rendered must also be considered, see *Jack Kahn Music Co. v. Baldwin Piano & Organ Co., 604 F.2d 755, 764 (2d Cir. 1979)*, but probably it is less than the harm to General Leaseways from being expelled. The principal thing the Association complains about is being forced to share confidential information with a firm whose expansion threatens to destroy the present balance among the Association's members. But the Association assures us that the information that members exchange under its auspices is the kind normally exchanged among members of a trade association, and is not so sensitive that it could significantly impair competition between General Leaseways and the other members -- if it were, the Association might **[**9]** stand condemned under other and clearer antitrust grounds than those advanced by General Leaseways. See *United States v. United States Gypsum Co., 438 U.S. 422, 441 n. 16, 446 n. 22, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*; *Penne v. Greater Minneapolis Area Bd. of Realtors, 604 F.2d 1143, 1148 (8th Cir. 1979)*. It seems, then, that while the harm to General Leaseways if the preliminary injunction is denied is not of terminal gravity, the harm to the Association if the injunction is granted will, on the Association's own representations, be slight indeed.

Since the balance of harms strongly favors the grant of the preliminary injunction, it is not necessary for us to decide whether General Leaseways is certain or even highly likely to prevail at trial; it is enough that it has raised a substantial question on the merits. See, e.g., Roland Machinery Co. v. Dresser Industries, Inc., supra, slip op. at 12-14; *American Hospital Ass'n v. Harris, 625 F.2d 1328, 1331 (7th Cir. 1980)*; *Charlie's Girls, Inc. v. Revlon, Inc., 483 F.2d 953, 954 (2d Cir. 1973)* (per curiam). Until a few years ago it would have been possible **[**10]** to opine confidently not only that General Leaseways had some chance of prevailing but that it had an overwhelming chance: that when firms in the same line of business agree not to enter each other's territories they violate *section 1* of the Sherman Act even if they might be able to show that dividing markets had yielded economic benefits greater than any plausible estimate of the costs in diminished competition; that, in short, horizontal market divisions are illegal per se. See, e.g., *United States v. Topco Associates, Inc., 405 U.S. 596, 608, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972)*; *United States v. Sealy, Inc., 388 U.S. 350, 356-57, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967)*; *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598, 95 L. Ed. 1199, 71 S. Ct. 971 (1951)*; *United* ***[*592]*** *States v. Nationwide Trailer Rental System, Inc., 156 F. Supp. 800* (D. Kan.), aff'd without opinion, *355 U.S. 10, 2 L. Ed. 2d 20, 78 S. Ct. 11 (1957)*.

In both *Sealy* and *Topco*, a group of small competitors had divided markets on geographic lines as an incident to the sharing of a trademark, and the **[**11]** group argued that its market share was too small to make cartelization a palpable danger to competition or a plausible explanation of what it was doing. Apparently each group was just trying to prevent members from taking a free ride on other members' efforts to promote the trademark. And yet in both cases the market division was held to be a per se violation of *section 1*. In *Sealy* (as in *Timken*) the division of markets was coupled with price fixing, against which ***antitrust law*** has long come down very hard -- though, as we shall see, price fixing and division of markets have identical competitive effects. But *Topco* held that horizontal market division is illegal per se even if price fixing is not present. *405 U.S. at 609* at n. 9.

This case is even stronger for condemnation, because the free-rider argument made by National Truck Leasing Association is much weaker than the free-rider arguments in *Sealy* and *Topco*. A member of the Sealy group who promoted the Sealy trademark in his sales area by extensive (and expensive) advertising could not recoup his expenses by charging the people who saw his ads for the privilege of seeing them; virtually no **[**12]** one will pay to consume advertising. He could recoup only by selling his mattresses at a price that covered those expenses along with all his other costs. It is this form of recoupment that the free rider -- in *Sealy*, a manufacturer of mattresses under the same trademark who has not borne the expense of promoting the mark -- thwarts by invading the territory of the advertising manufacturer: by seeking, in other words, to reap where he has not sown. But members of National Truck Leasing Association charge each other for emergency repair service.

The Association argues that they do not charge the full price: that is, do not charge the premium -- indeed, the extortionate -- price they could get in an unregulated market for providing the prompt service to which members of the Association are entitled by its rules. When a truck breaks down, the owner is pretty much at the mercy of the nearest repair service. Unless he owns the service or has a contract with the owner or the sort of reciprocal-service arrangement that the Association has created for its members, he will not have access to a competitive market in repairs. (The salvage of ships in distress involves surprisingly similar **[**13]** problems, on which see Gilmore & Black, The Law of Admiralty 578-81 (2d ed. 1975).) Therefore, if one member of the Association -- General Leaseways, say -- grew so large relative to the others that it was consistently demanding more repairs on its trucks than it was performing on its fellow members' trucks, it would be exploiting the "underpricing" of repair service by the other members.

This argument is terribly speculative, though. As a member of the Association grows, he puts himself in a position to expect more service calls on himself (because he is serving a larger area) as well as to demand more service from others. Moreover, there is no evidence that the Association seeks to limit the growth of its members so that all remain about the same size. Also the Association does not limit repair prices, and it has not explained why its members do not (has not even shown they do not) charge fully remunerative prices for the repair services they provide each other. Even if they do refrain from gouging one another, such forbearance would be a burden or cost of repairing a fellow member's truck only if that repair job made it impossible to do another repair job that would fetch **[**14]** a higher price. The Association put in no evidence that this has ever happened.

It is not repairs that sellers find hard to charge for directly. It is *information* -- in the form of advertising, showroom display, sales demonstrations, courteous and informed salesmen, and other presale services -- that free riders in previous cases were **[*593]** able to take advantage of because the information was being "given away" by a seller who could recover his cost only by selling the product to the consumer who used the information. Repairing is not informing. And National's franchisees do little advertising or other promotion of the NationaLease trademark. They are selling to businesses, not consumers, and advertising usually is less important in selling to businessmen than to consumers. But whatever the reason for the lack of promotional effort, the division of markets cannot (on this record) be justified as a measure for promoting the NationaLease mark.

Aware that this is an easy case for condemnation under *Sealy* and *Topco*, the Association urges in veiled but unmistakable terms that these decisions are no longer good law, having been superseded by *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*, **[**15]** and *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*. *Sylvania* held that manufacturers can limit the sales territories of their distributors and dealers when it is reasonable to do so in order to prevent free riding. The Association argues that it is a detail whether the territorial restriction is imposed by the manufacturer on his dealers or by a group of manufacturers on each other, provided the restriction is a reasonable measure to prevent free riding.

The free-rider problem in *Sylvania* arose because dealers who had spent money promoting Sylvania television sets risked being undercut by other dealers -- dealers who had not made such expenditures, and who were thus exploiting the market created by the dealers who had. The free riders could undersell the other dealers because their costs of promotion naturally were lower. The same free-riding problem had called forth the territorial restrictions invalidated in *Sealy* and *Topco*. In all three cases there was plenty of interbrand competition, which is to say competition between sellers of the brand in question and sellers of other brands **[**16]** of the same product (mattresses, groceries, television sets), so the fact that the trademark licenses eliminated intrabrand competition was not worrisome. If the restriction on intrabrand competition did not enable the trademark licenses to make their brand more attractive to consumers, consumers would switch to competing brands.

There is, then, notwithstanding the approving citation of *Topco* in *Sylvania*, see *433 U.S. at 58 n. 28*, and in such later cases as *National Collegiate Athletic Ass'n (NCAA) v. Board of Regents, 468 U.S. 85, 104 S. Ct. 2948, 2959 n. 18, 2960* nn. 19, 21, *82 L. Ed. 2d 70 (1984)*; *Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1283-84 (7th Cir. 1983)*; *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821, 830-31 (7th Cir. 1978)*, and *United States v. Koppers Co., 652 F.2d 290, 293-94, 296 (2d Cir. 1981)*, a tension between *Sylvania* on the one hand and *Sealy* and *Topco* on the other. But since National Truck Leasing Association has not yet made a plausible free-rider argument, this is not the case -- not at the preliminary-injunction stage, **[**17]** anyway -- to try to resolve the tension.

Broadcast Music upheld the blanket licenses by which associations of composers sell musical performance rights to radio stations and other performance outlets. Since the blanket license gives the licensee, for a fixed fee, the right to play any composition in the association's library, it eliminates price competition among the composers belonging to the association. Nevertheless the Supreme Court held that the blanket license was not a per se violation of section 1 of the Sherman Act. National Truck Leasing Association argues in effect that after *Broadcast Music* no reasonable cartel agreement can be a per se violation of section 1. We hesitate to read the decision so broadly. Access to a repertoire of thousands of songs is not something the individual composer can give, so what the performing-rights associations are engaged in is not (or not just) the suppression of price competition among composers. It is the provision of a distinctive product -- access to a vast musical repertoire. Each **[*594]** association is the "producer," and is entitled to price its "product" as it wants as long as it does not collude with the other association. **[**18]** So viewed, *Broadcast Music* was not a cartel case.

There is nothing distinctive about the product involved in this case. Many firms offer full-service over-the-road commercial truck leasing; the Association merely makes it easier for small firms to offer it, by providing a reciprocal service arrangement that enables each member to provide his customers with emergency repair service anywhere in the nation. Unlike the composers' associations in the *Broadcast Music* case, this association sells nothing.

If this analysis is too formalistic -- if *Broadcast Music* is more realistically described as a case where the Supreme Court, though aware that an exclusive sales agency normally is a method of cartelization (see, e.g., *United States v. American Smelting & Refining Co., 182 F. Supp. 834, 855 (S.D.N.Y. 1960)*; Stigler, The Organization of Industry 41 (1968)), upheld exclusive sales agencies of composers because of the enormous efficiency of selling musical performing rights jointly (see *NCAA v. Board of Regents, supra, 104 S. Ct. at 2961*, where *Broadcast Music* is so described) -- National Truck Leasing Association still loses. ASCAP **[**19]** and BMI could not provide ready access to their entire repertoires if each radio station had to negotiate separately with each composer over the price of each song. But National's members could -- were it not for the territorial restrictions -- compete in each other's territories while continuing to provide each other emergency repair services of a specified quality at a specified price. Of course this would make the members each other's competitors in leasing and customers in repairs. But firms often have both a competitive and a supply relationship with one another. A manufacturer of aluminum might both sell aluminum to fabricators and do its own fabrication in competition with its customers. Airlines compete but also feed passengers to each other. Railroads compete but also join in offering through routes and joint rates. Oil companies compete in some markets and are joint venturers in others. It does not follow that because two firms sometimes have a cooperative relationship there are no competitive gains from forbidding them to cooperate in ways that yield no economies but simply limit competition. Compare *49 U.S.C. § 10706* (antitrust exemption of **[**20]** common carrier rate agreements); Newspaper Preservation Act, *15 U.S.C. §§ 1801-1804*; *Committee for an Independent P-I v. Hearst Corp., 704 F.2d 467, 481-82 (9th Cir. 1983)*; 4 Areeda & Turner, ***Antitrust Law*** para. 947, at p. 170 (1980).

After argument in this case, the Supreme Court decided the *NCAA* case, *supra*, and again refused to hold that an agreement between competitors not to compete was illegal per se under the Sherman Act. The agreement was among the college football teams that belong to the NCAA, and limited the number of football games that each team could license for television broadcast. The Supreme Court described this agreement as one to limit output. *104 S. Ct. at 2960*. That is the equivalent of a division of markets. ***HN4***[] A firm that is free from effective competition will reduce its output below the competitive level (whether directly or, as we shall see in a moment, indirectly by raising price). Consumers will pay more when supply is scarcer, yet it will cost the firm less to produce a smaller supply -- so the firm's profits will be greater at the reduced output. One way the firm can free itself from competition **[**21]** is by agreeing with sellers of the same product that they will not enter each other's markets; such an agreement will create a series of regional or local (sometimes, as in *Timken*, national) monopolies. An agreement on output also equates to a price-fixing agreement. If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too -- in other words, output will be restricted. If instead the firms restrict output directly, price will as mentioned rise in order to limit demand to the reduced supply. Thus, with exceptions not relevant here, raising price, reducing output, **[*595]** and dividing markets have the same anticompetitive effects.

The Court held nevertheless that the NCAA's agreement to limit output had to be tested under the Rule of Reason, because organized athletic competition is "an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Id. at 2961*. The essence of successful league competition is maintaining a balance of power among the competitors -- a goal antithetic to the goals of competition in a conventional economic market. *NCAA* may seem to go a **[**22]** step beyond *Broadcast Music* toward a regime in which only unreasonable horizontal restraints are illegal, because the Court in *NCAA* did not condition the applicability of the Rule of Reason on proof that the particular restriction that had been challenged was necessary if the product was to be brought to market at all. There was, however, a plausible connection between the specific restriction and the essential character of the product. Since the balance of power among the teams in the NCAA might be disturbed by disparities in team wealth, limiting the ability of the more popular teams to cash in on their popularity through unrestricted televising of their games might have promoted the NCAA's essential lawful objectives. It was arguable, in other words, that the television output restriction was "ancillary" to a lawful main purpose. See *United States v. Addyston Pipe & Steel Co., 85 F. 271, 281-82 (6th Cir. 1898)*, aff'd as modified, *175 U.S. 211, 44 L. Ed. 136, 20 S. Ct. 96 (1899)*; *Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 265-66 (7th Cir. 1981)*; *Los Angeles Memorial Coliseum Comm'n v. National Football League, 726 F.2d 1381, 1395-96 (9th Cir. 1984)*; **[**23]** Bork, The Antitrust Paradox 29-30 (1978). But in this case the organic connection between the restraint and the cooperative needs of the enterprise that would allow us to call the restraint a merely ancillary one is missing. Although some degree of cooperation among members of National Truck Leasing Association in providing reciprocal services may well promote competition in the truck-leasing industry, no reason has been suggested why that cooperation requires that members be forbidden to compete with each other in leasing trucks.

The per se rule would collapse if every claim of economies from restricting competition, however implausible, could be used to move a horizontal agreement not to compete from the per se to the Rule of Reason category. We are told, therefore, to apply the per se rule when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., Supra*, 442 U.S. at 19-20, quoted in *National Collegiate Athletic Ass'n v. Board of Regents, supra, 104 S. Ct. at 2960*. In other words, **[**24]** ***HN5***[🡅] if the elimination of competition is apparent on a quick look, without undertaking the kind of searching inquiry that would make the case a Rule of Reason case in fact if not in name, the practice is illegal per se.

Taking a quick look here, we conclude, on the basis of the record compiled in the preliminary-injunction hearing, that the division of markets among National Truck Leasing Association's members is a per se violation of *section 1* of the Sherman Act. It is a horizontal market division that does not appear to be ancillary to the reciprocal provision of service or any other lawful activity. Our conclusion is reinforced, though only slightly, by some of the documents in the record. For example, one National franchisee writes another: "We have all the competition we need from the outside without having to compete with our 'brothers'. " And a consultant states with reference to the question of multiple franchises in large metropolitan areas: "Generally, adding an additional franchise to a metropolitan market has minimal benefits to the system as a whole (additional dues), and individual members (an additional service location). **[**25]** However, it has potentially significant competitive disadvantages to existing members in the multifranchise market." We attach rather little weight to internal company documents used to show **[*596]** anticompetitive intent, because, though they sometimes dazzle a jury, they cast only a dim light on what ought to be the central question in an antitrust case: actual or probable anticompetitive effect. But here they corroborate an inference of anticompetitive effect based on the objective evidence of what the defendant had done.

As it is possible that we are wrong in holding that this case is governed by the per se rule, we shall follow the prudent example of the court of appeals in the *NCAA* case (see *Board of Regents v. National Collegiate Athletic Ass'n, 707 F.2d 1147, 1157 (10th Cir. 1983)*, aff'd, *468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984))* and decide also whether, if the case were governed by the Rule of Reason, we would still have to uphold the preliminary injunction on the present record.

HN6[🡅] With the Rule of Reason becoming a more popular **[**26]** rule of decision in the wake of *Sylvania*, some progress has been made toward giving it some structure by requiring that the plaintiff first prove that the defendant has sufficient market power to restrain competition substantially. See, e.g., *Jack Walters & Sons Corp. v. Morton Building, Inc., 737 F.2d 698, 702 (7th Cir. 1984)*; *Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982)*; *Graphic Products Distributors, Inc. v. Itek Corp., 717 F.2d 1560, 1568 (11th Cir. 1983)*; *Muenster

Butane, Inc. v. Stewart Co., 651 F.2d 292, 298 (5th Cir. 1981); cf. Lektro-Vend Corp. v. Vendo Co., supra, 660 F.2d at 268; Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 157-68 (1984). If not, the inquiry is at an end; the practice is lawful. But if it seems that the defendant does have the power to restrain trade substantially, then inquiry proceeds to the question whether the challenged practice was likely -- with due consideration for any justificatory evidence presented by the defendant -- to help rather than hurt competition, **[**27]** viewed not as rivalry as such but as the allocation of resources that maximizes consumer welfare.

The markets for commercial truck leasing are, as we have said, local because of customer preference; and General Leaseways presented evidence that within these local markets, profits are higher the fewer the leasing firms. This suggests an absence (more precisely, a weakness) of competition. In a fully competitive market, price is equal to cost (appropriately measured) regardless of the number of firms; in a noncompetitive market, price rises as the number of firms falls, because collusion is easier with fewer firms. To counter this evidence the Association offered evidence of no great probative force, see United States v. Philadelphia National Bank, 374 U.S. 321, 366-67, 10 L. Ed. 2d 915, 83 S. Ct. 1715 (1963), that the members of the industry consider themselves to be in intense rivalry, and more impressive evidence that truck-leasing companies compete with one another, with motor common carriers, and even with their own customers, who can always buy their own trucks. However, national truck-leasing companies such as Hertz, Avis, and Ryder are not (so far as the **[**28]** record shows) present in every market. And since motor common carriers remain heavily regulated by the federal government (see 49 U.S.C. §§ 10701, 10702, and especially 10704(a)(1)), there is no assurance that the rates these carriers charge are competitive rates; if they are supracompetitive, they create an umbrella beneath which colluding sellers of a substitute product can charge supracompetitive prices too. And while some customers of commercial truck-leasing firms might buy their own trucks if truck-leasing rates rose significantly above the competitive level, others would not have sufficient trucking needs to justify buying their own trucks unless lease rates became astronomical; and even the customers in the first group would have to worry about getting emergency repair service at reasonable cost.

It is not a good enough answer to all this that new firms can easily enter the over-the-road truck-leasing business if rates rise above the competitive level. Since effective competition requires that each lessor be able to guarantee nationwide repair service **[*597]** for his trucks, either the new entrant must enter on a national scale, which would **[**29]** take time, or he must enter as a member of a league of small firms, such as the Association, which may take some time to arrange, too. This also answers the Association's argument that its members are free under its rules to enter each other's markets so long as they do not do so as franchisees either of national firms or of the Association. This means they can enter provided they do not enter on an efficient basis, which would require that they be leagued with other firms in a nationwide service network.

No doubt the Association, with all the competition it does face, is not a powerful cartel. And yet on this record we cannot say that the district judge clearly erred in finding that the restrictions that General Leaseways defied have a substantial anticompetitive potential. This finding is dispositive under the Rule of Reason because the Association's attempted justification based on free-rider problems is unpersuasive. Cf. North American Soccer League v. National Football League, 670 F.2d 1249, 1257-61 (2d Cir. 1982).

If, however, it is quite possible that the Association is attempting to cartelize the local markets its members do business in, what equity **[**30]** has General Leaseways in seeking even temporary protection from being expelled? If cartel members have a falling out, it might seem contrary to the spirit of ***antitrust law*** for a court to lend its aid to one side of the dispute or the other. The question we must ask, however, is not whether General Leaseways makes an appealing plaintiff but whether granting it a preliminary injunction (to be made permanent, presumably, if it prevails in the trial on the merits) would advance or retard the objectives of the antitrust laws. For ever since the Supreme Court, in Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968), rejected the defense of *in pari delicto* in antitrust cases, it has been clear that ***HN7***[] whenever some maxim of equity (such as that to get equitable relief you must have "clean hands") collides with the objectives of the antitrust laws, the equity maxim must give way.

Preserving General Leaseways as a member in good standing of the Association would advance those objectives. If the Association is a cartel, **[**31]** still General Leaseways appears determined to disrupt it. And if General

Leaseways has no remedy against being expelled by the Association, the Association will be able with relative impunity (relative because there is always the possibility of governmental antitrust action) to use expulsion as a sanction against any member who refuses to abide by its anticompetitive restrictions. By depriving the Association of this sanction, the injunction encourages members to ignore those restrictions. There would be a problem if the injunction gave General Leaseways access to enough information about the other members' prices or costs to facilitate price fixing, but both parties assure us that the information exchanges made through the Association are lawful trade association activities (although one of the documents in the record refers to exchanging "intimate proprietary" information), and we are told that the Justice Department is monitoring this litigation. There would also be a problem -- a very serious one -- if General Leaseways were seeking damages measured by the loss of cartel profits that it might obtain as a member in good standing of the Association. See *Kestenbaum v. Falstaff Brewing Corp., 575 F.2d 564, 569-70 (5th Cir. 1978)*; **[**32]** *Murphy Tugboat Co. v. Crowley, 454 F. Supp. 847, 856 (N.D. Cal. 1978)*. But no issue of damages is before us.

Although we uphold the preliminary injunction, we do not mean to prejudge the outcome of the trial on the merits. Our conclusions are based on the incomplete record made in the preliminary-injunction proceeding. The full trial may cast the facts in a different light.

AFFIRMED.

End of Document

Advisory Information & Management Systems, Inc. v. Prime Computer, Inc.

United States District Court for the Middle District of Tennessee, Nashville Division

September 20, 1984

No. 3-83-0972

Reporter

598 F. Supp. 76 *; 1984 U.S. Dist. LEXIS 23471 **; 1984-2 Trade Cas. (CCH) P66,237

Advisory Information and Management Systems, Inc., Plaintiff v. Prime Computer, Inc., Defendant

Core Terms

dealers, sales, hardware, software, market share, percent, manufacturer, products, orders, discounting, negotiations, summary judgment, rule of reason, restrictions, computer system, upgrade, preliminary injunction, complete system, added value, direct sale, end user, interbrand, practices, vertical, argues, retail, monopolization, cancellation, concerted activity, Sherman Act

LexisNexis® Headnotes

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Regulated Practices, Price Fixing & Restraints of Trade**

A Sherman Act, *15 U.S.C.S. § 1*, violation requires concerted action between the manufacturer and other distributors. Unilateral action of the manufacturer does not constitute a Sherman Act, *15 U.S.C.S. § 1* , violation.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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

Antitrust & Trade Law > Sherman Act > General Overview

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

HN2[] **Regulated Practices, Private Actions**

Concerted action is not established merely by proof of a manufacturer's termination of a distributorship in response to complaints by other dealers. Rather, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

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

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

HN3[] **Vertical Restraints, Nonprice Restraints**

Nonprice vertical restrictions are evaluated with lower scrutiny than price restrictions, which are per se illegal.

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

HN4[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Vertical restraints, actions originating as unilateral action from the manufacturer, should generally be analyzed under the rule of reason.

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

HN5[] **Regulated Practices, Price Fixing & Restraints of Trade**

To determine whether restrictions are imposed vertically or horizontally, the court must examine the effect and purpose of the restrictions.

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

HN6[] **Price Fixing & Restraints of Trade, Vertical Restraints**

The per se rule applies where practices have a destructive effect on competition without redeeming qualities.

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

HN7[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Evidence of complaints from dealers to the manufacturer alone are insufficient to establish a horizontal restraint.

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

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

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

HN8[] **Regulated Practices, Market Definition**

Although at trial, the plaintiff has the burden to show market definition, for summary judgment consideration, defendant, as movant, has the burden of establishing the issue in its own favor.

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

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

HN9[] **Regulated Practices, Monopolies & Monopolization**

In determining whether a defendant had monopoly power, the court must examine the strength of competition, the probable development of the industry, customer demand, and the percentage of market share of the defendant.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN10[] **Actual Monopolization, Monopoly Power**

To determine whether defendant is liable for attempted monopolization under Sherman Act, *15 U.S.C.S. § 2*, the court must determine whether defendant has a dangerous probability of success. This requires a showing that the defendant possesses market strength that approaches monopoly power, the ability to control prices and exclude competition.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN11[] **Monopolies & Monopolization, Actual Monopolization**

Where there is strong competition in a rapidly developing industry, a market share of roughly 25 percent cannot present a dangerous probability of monopoly power.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN12[] **Injunctions, Preliminary & Temporary Injunctions**

In order to determine whether to grant a preliminary injunction pursuant to *Fed. R. Civ. P. 56(c)*, the court must evaluate (1) the merits of plaintiff's claim for ultimate relief; (2) the harm facing plaintiff if interim relief is denied; (3) the harm facing defendant or others if interim relief is granted; and (4) the public interest in granting or denying interim relief.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN13[] **Injunctions, Preliminary & Temporary Injunctions**

No single factor is determinative in assessing whether to grant a preliminary injunction; all must be weighed equitably. One of the considerations required is the probability that plaintiff will succeed on the merits. Additionally, plaintiff must demonstrate that in the absence of relief, plaintiff will be irreparably harmed.

Counsel: **[**1]** Daniel C. Kaufman and Paul E. Jennings, of Waddey & Newport, Nashville, Tennessee, for Plaintiff.

Steven A. Riley, of Bass, Berry & Sims, Nashville, Tennessee, James C. Burling and David H. Erichsen, of Hale and Dorr, Boston, Massachusetts, for Prime Computer.

Thomas Wardlaw Steele, Nashville, Tennessee, for Southern States Corp., for Defendant.

Judges: Wiseman, Ch. J.

Opinion by: WISEMAN

Opinion

[*79] Memorandum

WISEMAN, Ch. J.:

This case involves a dispute between Advisory Information and Management Systems, Inc. [AIMS] and Prime Computer, Inc. [Prime], and raises issues of ***antitrust law*** and contract law. The matters before the Court are plaintiff AIMS ' motion for a preliminary injunction and defendant Prime's motion for summary judgment. [1] In order to address these matters, it is necessary to examine the history of transactions between the two parties.

[2]** Prime is a manufacturer of small and medium-sized general purpose computers. It produces actual components or hardware, operating software, which manages the resources and operations of the computer system, application software, and accessories. Prime's components are produced to be compatible with one another so that add-on and upgrade equipment may be added to increase system performance without having to replace the entire system. Prime entered into several dealer agreements in 1978, including one with AIMS ' predecessor in interest, Tennessee Data Systems. The dealers apparently approached Prime because they desired hardware sufficient to support their application software, which performs special functions as part of a complete computer system. Prime retained these dealers because it did not produce very much application software at that time and wanted to market its products to end users who wished to purchase entire systems. (Finney Aff. para. 4; Kelly Aff. para. 3; Naylor Aff. para. 2). Prime's direct sales force had been unable to reach these customers successfully. Prime offered the dealers incentive price discounts to help their marketing. Prime emphasized that these dealer **[**3]** sales of Prime equipment were only for combined sales with the dealer's application software for users principally interested in complete systems with application software. (Finney Aff. para. 5; Kelly Aff. para. 3; Davidson Aff. para. 4).

AIMS is a full line dealer of hardware, software, systems, and service bureau operations. Its principal officer, William Cargile, was also an officer in Tennessee Data Systems. He entered into a dealer agreement with Prime, which was assigned to his new company, AIMS, on September 4, 1980. The dealer agreement did not specifically

[1] At oral argument on pending motions, June 22, 1984, plaintiff conceded that it is not entitled to summary judgment. Prime has continued to pursue its own motion for summary judgment.

prohibit sales of Prime hardware and equipment apart from complete systems incorporating application software. The agreement provided that the dealer was Prime's exclusive dealer of "Information" operating software in the area of Tennessee and was entitled to sell systems and products enumerated by Prime and listed in Schedule 2 to the agreement. (Kirby Aff. Exhibit A). The agreement also provided sales quotas, listing the number of systems the dealer was required to meet to satisfy and maintain the agreement. (*id*. 3.1 Schedule 3). Prime was obligated to install the equipment sold, (*id*. 7), and the dealer was required **[**4]** to promote the Prime products and to maintain facilities to display and demonstrate the systems (*id*. 8).

Prime became aware in early 1981 that some dealers engaged in "hardware-only" sales or sales of Prime's discounted equipment without application software. Prime considered these sales to be disruptive of **[*80]** its direct sales efforts and contrary to its original understanding with its dealers. (Finney Aff. para. 7; Kelly Aff. para. 4). Prime attempted to get the dealers to stop these sales and realized the dealer agreement did not squarely prohibit them. Prime contemplated reaching a new dealer agreement that would limit or remove the dealers' exclusive sales territories for its "Information" operating software and allow for direct sales of this software by Prime. (Finney Aff. para. 8, Kelly Aff. para. 5, Davidson Aff. paras. 5, 6). When presented with the new proposal in early 1982, the existing dealers refused to agree to it. (Finney Aff. para. 9; Kelly Aff. para. 6; Davidson Aff. para. 6; Naylor Aff. para. 3).

In mid-1982, Prime convened a "pricing task force." (Kaufman Supplemental Aff. Exhibit 13; Plaintiff's Appendix 136-37). The committee concluded that domestic **[**5]** sales were made with average discounts of about 20 percent. It found also that customers considered Prime "an aggressive and disorganized discounter." Prime's president "emphasized that discounting is a learned activity" that can be "unlearned." (*Id*.). Other Prime internal memoranda indicate that in June of 1982, it targeted AIMS as a "hardware broker," and in the same notice stressed that AIMS was in default of its dealer quota. (Kaufman Aff. Exhibit 4; Plaintiff's Appendix 81-82). Prime planned to place AIMS on probation for brokering and then terminate its dealer agreement. (*Id*.).

Prime sent notices to most of its dealers in June or July of 1982, advising them that they were in default of their dealer quotas. AIMS received one such letter on June 15, 1982. (Cargile Aff. para. 8 and Exhibit 3; Plaintiff's Appendix 11). At the July 1982 dealer meeting, many dealers, including AIMS, challenged the default letters and Prime's plans to remove the dealers' exclusivity for sales of "Information" software. (Kelly Aff. para. 9; Davidson Aff. paras. 7, 8; Naylor Aff. paras. 4, 5). Prime agreed to negotiate disagreements after the dealers considered retaining an attorney. Prime **[**6]** suspended action on the default letters pending analysis of the dealer program. (Cargile Aff. Exhibit 4; Plaintiff's Appendix 12). Most of Prime's dealers, 82 percent, were in default at this time. (Prime document-Plaintiff's Appendix 187). The dealers selected two negotiators, Davidson and Naylor, to negotiate on their behalf. AIMS and its president Cargile, authorized and supported these negotiations. They were informed of progress by the negotiators. (Davidson Aff. para. 8; Kelly Aff. para. 11; Naylor Aff. paras. 5, 6, & Exhibit A).

In the fall of 1982, AIMS ordered hardware from Prime for resale to DataMation Data Centers [DataMation], including a complete system as well as separate add-on and upgrade hardware. (Supplemental Cargile Aff. para. 21 and Exhibit 14; Plaintiff's Appendix 28, 43). Prime received notice on October 27, 1982, that AIMS was the source of equipment sold at discount to end users and installed and maintained by Prime's field engineering staff. Prime's vice president for marketing Bob Claussen emphasized that this must be stopped. (Prime document, Plaintiff's Appendix 123). Prime planned to "make a file" on AIMS because of this. (Plaintiff's Appendix 133).

[7]** The negotiations between Prime and the dealer committee produced a proposed new amendment to dealer agreements. (Kirby Aff. Exhibit B). The amendment allowed dealers to retain exclusivity for sales of "Information" software but allowed Prime to reduce areas of exclusivity for poor sales. It also reduced sales quotas for dealers. Additionally, it forbade "hardware-only" sales, allowing sales of add-on and upgrade equipment only where incorporated into a system with application software or dealer services "rendered prior to sale or lease to any end user." [2] (*Id*. para. 3). **[*81]** The amendment also provided for additions to the schedule of application software

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[2] The applicable provision states:

allowed for incorporation into systems with Prime hardware. It provided that additions had to be made with the prior consent of Prime, "which consent shall not be unreasonably withheld." (*Id*.). *See supra* footnote 2. On November 5, 1982, Prime forwarded the proposed amendment to AIMS for acceptance. (Cargile Aff. paras. 10, 11 and Exhibit 5; Plaintiff's Appendix 4-5, 13).

[8]** There is some dispute regarding the "concerted activity" underlying adoption of the amendment. President Cargile asserts that the representatives of the dealer committee, Naylor and Davidson, had stated prior to negotiations that price cutting by DataMation and other "hardware brokers" had to be stopped by cutting off their supply. (Cargile Aff. para. 11, Plaintiff's Appendix 5). Cargile also claims that Prime's eastern operations dealer business manager, Jack Kelly, had told Cargile that Prime was under pressure from its direct sales force and other dealers to prevent sales to DataMation because their discounting practices competed with Prime and its dealers. (*Id*. § 5; Plaintiff's Appendix 4). These allegations support AIMS ' contention that the amendment was the result of concerted activity between Prime and the independent dealers. The negotiators themselves and Prime personnel, however, claim that the provision, called an "added value" provision, originated exclusively with Prime. (Davidson Aff. para. 10; Naylor Aff. para. 8; Kelly Aff. para. 16). They claim that the dealer negotiators fought against adoption of the added value provision but ultimately were forced to concede **[**9]** it to attain other concessions from Prime. (*Id*.). Davidson and Naylor each specifically deny ever making statements to Cargile that price cutting by hardware brokers had to be stopped by cutting off their supply. (Davidson Aff. para. 12; Naylor Aff. para. 10). Kelly specifically denies ever telling Cargile that he was under pressure from other dealers to prevent "hardware-only" sales. (Kelly Aff. para. 16). These statements support Prime's assertion that the added value restriction was adopted unilaterally by Prime, without concerted activity. At any rate, in September 1982, when Naylor and Davidson advised dealers of the progress of negotiations, they described the added value provision as "a desireable [sic] objective" and indicated no opposition to it. (Cargile Aff. Exhibit 7; Plaintiff's Appendix 21). They stressed that Prime wanted the provision "to try and stop gross discounting by a Dealer against PRIME's direct sales force, or against another Dealer." (*Id*.).

Prime dealers were given the choice of signing the amendment or continuing under their original agreements. (Davidson Aff. para. 11, Kelly Aff. para. 13, Naylor Aff. para. 9). Under the old agreements, however, **[**10]** most were threatened with default for failure to meet the previous quotas. Several days after sending the proposed amendment to AIMS for signature on November 5, 1982, Prime's Jack Kelly telephoned AIMS ' William Cargile to determine whether he would sign. Cargile indicated that he would agree to the amendment. (Kelly Aff. para. 11). On November 12, 1982, Kelly ordered AIMS ' pending orders "on hold" because they were "hardware only" orders and were contrary to the new amendment to the dealer agreement. (Kaufman Supplemental Aff. Exhibit 9, Plaintiff's Appendix 121; Kelly Aff. para. 14). On November 18, 1982, Kelly canceled the pending orders **[*82]** from AIMS. (Kaufman Supplemental Aff. Exhibit 8; Plaintiff's Appendix 103; Kelly Aff. para. 15). There is some dispute about whether Kelly informed Cargile that cancellation was based on the new amendment. (*Compare* Supplemental Cargile Aff. para. 25, Plaintiff's Appendix 29 *with* Kelly Aff. para. 15). Kelly did send a letter dated December 3, 1982, stating that the orders were cancelled because Prime "will not accept equipment-only orders for items being purchased by AIMS, Inc. for others, who, in turn, compete with our Direct **[**11]** Sales or Authorized Reseller Sales." (Cargile Supplemental Aff. Exhibit 17; Plaintiff's Appendix 57, 124, 139). Regardless of whether Prime actually relied on the amendment to the dealer agreement in canceling AIMS ' orders, the amendment provided a

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"Dealer hereby certifies that each Prime system listed on the Prime Computer, Inc. Domestic Price List attached as Schedule 2 to the Dealer Agreement, purchased and licensed under the cited Dealer Agreement, is to be incorporated into a system consisting of Dealer application software, which Dealer then sells or leases in the regular course of its business. Dealer may substitute Dealer services for the requirement to add application software, and such services may be rendered by either the Dealer or any party in behalf of the Dealer or having a contractual relationship with the Dealer, so long as such services are rendered prior to sale or lease to any end user. Application software to be included in Prime Systems purchased hereunder is listed in Exhibit B attached hereto and made a part hereof. Additions to and deletions from the Exhibit B list of application software may be made from time to time subject to the prior written consent of Prime, which consent shall not be unreasonably withheld. Dealer agrees that in no event shall Prime systems purchased/licensed hereunder be resold, leased, or otherwise transferred without said application software or the performance of services by the Dealer as aforesaid. "

contractual basis for rejecting the orders. The amendment, when signed by Cargile for AIMS in November of 1982 had an effective date of September 15, 1982. (Kirby Aff. Exhibit B; Cargile Aff. para. 10 and Exhibit 5; Plaintiff's Appendix 16). After signing, AIMS was thus bound by the terms of the amendment for the pending orders that Prime canceled on November 18, 1982.

Sherman Act Section I

AIMS argues that Prime's cancellation of orders pursuant to its policy against "hardware only" sales was a violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*. This statute proscribes concerted activity in restraint of trade. Prime has challenged this allegation in a motion for judgment on the pleadings and in a motion for summary judgment. At the hearing on pending motions on June 22, 1984, this Court granted AIMS ' motion to amend its pleadings to allege a conspiracy between Prime and its dealers. AIMS has based its *Section 1* claims **[**12]** almost exclusively upon this theory, although it raised another theory in opposing Prime's motion for judgment on the pleadings. [3]

In *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*, the Supreme Court held that ***HN1***[] a *Section 1* violation requires concerted action between the manufacturer and other distributors. Unilateral action of the manufacturer does not constitute a *Section 1* violation. *See also* *United States v. Colgate & Co., 250 U.S. 300, 307, 39* ***[**13]*** *S. Ct. 465, 63 L. Ed. 992 (1919)* (Manufacturer may independently refuse to deal with distributors who sell below manufacturer's resale price). The *Monsanto* Court held that ***HN2***[] concerted action is not established merely by proof of a manufacturer's termination of a distributorship in response to complaints by other dealers. Rather, "the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective. '" *104 S. Ct. at 1471, 79 L. Ed. 2d at 785-86* (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980))*.

In the present case, there is a fact issue regarding whether Prime was pressured into adopting its policy against hardware only sales. AIMS has presented evidence that Jack Kelly spoke of pressure from other dealers to prevent sales to hardware brokers, that the value added provision arose out of negotiations with the dealer ad hoc committee, that the dealer negotiators had spoken to AIMS of the need to prevent sales to hardware brokers, that other dealers may have informed Prime of AIMS' sales, **[**14]** and that Prime pressured AIMS to desist. Although Prime has submitted affidavits denying all such allegations of concerted activity, AIMS has clearly raised a factual issue of conspiracy that is inappropriate for summary judgment disposition. **[*83]** AIMS has not rested merely on dealer complaints.

AIMS has argued that Prime's practices are *per se* illegal price fixing, boycotting, and market division. Prime has argued that its practices are not *per se* *Section 1* violations, but practices which, analyzed under the rule of reason, are not unreasonably anticompetitive. In support of its price fixing argument, AIMS argues that the added value provision to which it was compelled to agree permits only the dealer who initially sold a computer system for Prime to sell add-on and upgrade hardware and equipment. This equipment, because of the compatibility of Prime's products, generally can be installed without reprogramming or other dealer services and is installed directly by Prime personnel. Moreover, upgrades do not ordinarily require new application software. The new amendment therefore locks in end users to deal only with the original dealer from whom the user purchased a system. **[**15]** AIMS argues that because this avoids price competition among dealers, it is *per se* unlawful concerted action to fix prices. Additionally, AIMS contends that the arrangement amounts to a boycott of discounters and a horizontal customer allocation among dealers, all *per se* violations of *Section 1* of the Sherman Act.

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[3] Aims defended its pleading by arguing that it could be supported by a theory of a conspiracy between Prime and AIMS itself, where Prime actively coerced AIMS into unwilling compliance with its demands. This theory is inadequate because AIMS ' cooperation was unnecessary for the success of Prime's marketing arrangement. *See* *Barnosky Oils Inc. v. Union Oil Co. of California, 665 F.2d 74, 77-79 (6th Cir. 1981)* (no *section 1* conspiracy where plaintiff did not show defendant needed plaintiff's acquiescence).

Prime argues that the arrangement is a non-price restriction which is judged under the rule of reason to determine whether the practice constitutes an unreasonable restraint of competition. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977). Prime argues under this standard that its practices are not unreasonable because they beneficially enhance interbrand competition. Specifically, Prime urges that allowing dealers to sell only complete systems and subsequent upgrades only to those same purchasers of complete systems allows Prime to penetrate markets it could not otherwise reach, to control the quality and reputation of the systems installed, and to prevent dealers from free-riding on Prime's marketing efforts.

Prime has not required that AIMS sell to end users at a specific price; it has reserved certain **[**16]** sales for itself and required end users who desire upgrades to deal only with their original Prime dealers. Prime contends that restricting "hardware only" sales encourages dealers to develop the market for users of complete computer systems, thus enhancing Prime's ability to compete with other brands of computers. This also limits interbrand retail price competition among dealers and direct sales staff for add-on and upgrade equipment. Vigorous competition still remains among dealers in the market for complete computer systems.

It is well settled that ***HN3***[] nonprice vertical restrictions are evaluated with lower scrutiny than price restrictions, which are *per se* illegal. *See* Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 n.18, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977). While the restrictions in this case reduce interbrand price competition and undoubtedly affect retail prices, they do not amount to retail price maintenance, which is illegal *per se* under Section 1. Preventing "hardware only" sales by dealers enhances Prime's access to end users of complete computer systems by ensuring that Prime dealers focus their sales on the full product market Prime employs them **[**17]** to reach. Hardware only sales diverted some dealers' attention from full-product sales, for which dealers receive discounts and training from Prime, and interfered with the sales efforts of Prime's direct sales force. Broad discounting by dealers could lead to dealers becoming clearinghouses for Prime equipment rather than maintainers of showrooms and promoters of full computer systems with Prime equipment and dealer application programs. This would weaken Prime's ability to compete interbrand.

Prime has also asserted interests in quality control and in avoiding the free-riding effect of having discounting dealers benefit from other dealers' and Prime's promotion service and marketing. AIMS contends this interest is illusory as far as service and **[*84]** quality control are concerned because Prime's field service personnel maintain the equipment regardless of who made the sale. Moreover, AIMS argues, dealer service under Prime's new system only becomes important *before* sales of systems; there is no incentive for the original dealers to provide services after the original sale because they will have the add-on and upgrade service on that account regardless of their subsequent **[**18]** efforts. AIMS also dismisses Prime's quality control interest as "makeweight." Because Prime routinely authorized the application software to be sold with its systems, and maintains all equipment itself, AIMS argues that Prime has no legitimate concern that end users will be supplied with quality control.

Although many of these contentions are meritorious and should be considered by a factfinder at trial evaluating the reasonableness of Prime's restrictions, Prime has established that its measures are not price maintenance treated always as *per se* illegal. Discounting Prime hardware and selling in bulk is a form of free-riding on other dealers who deal only in complete systems and promote the systems and maintain exhibits as required by their dealer agreements. Moreover, Prime's ability to control approval of application software to be sold with equipment does foster quality by ensuring compatibility with the computer system. Because the measures enhance interbrand competition in this way and foster penetration of the market for users of complete systems, the added value provision is not *per se* illegal price maintenance. Like many other nonprice restraints, it has a price **[**19]** effect. Because it allows Prime to compete more effectively with its vigorous competitors, it is not without redeeming qualities.

In Davis-Watkins Co. v. Service Merchandise, 500 F. Supp. 1244 (M.D. Tenn. 1980), *aff'd*, 686 F.2d 1190, 1196-97 (6th Cir. 1982), *cert. denied sub nom., Service Merchandise Co. v. Amana Refrigeration, Inc., 466 U.S. 931, 104 S. Ct. 1718, 80 L. Ed. 2d 190 (1984)*, the Sixth Circuit held that ***HN4***[] vertical restraints, actions originating as unilateral action from the manufacturer, should generally be analyzed under the rule of reason. ***HN5***[] To determine whether restrictions are imposed vertically or horizontally, the court held that one must examine the effect and purpose of the restrictions. Because the court found the challenged restrictions were in the manufacturer's own interest and consistent with its market strategy, and because it found insufficient evidence of coercion by dealers to act against the manufacturer's own interest, the court upheld this Court's summary judgment finding that the market allocations in question did not amount to a horizontal group boycott, *per se* unlawful under *Section 1*.

The *Davis-Watkins* court relied substantially **[**20]** on *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. The Court in *Sylvania* held that vertical restraints limiting the number of franchises authorized by a manufacturer must be analyzed under the rule of reason. Observing that ***HN6***[] the *per se* rule applies where practices have a destructive effect on competition without redeeming qualities, *id. at 50, 97 S. Ct. 2549, 53 L. Ed. 2d 568*, the Court emphasized that vertical restraints often benefit competition. Vertical restrictions, the Court held, "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." *Id. at 54, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. The Court stressed that limitations on distributors of a manufacturer's products induce retailers to promote the products and prevent the "free rider" effect of retailers providing products without services. *Id. at 55, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. Although the Court noted that some vertical restrictions might justify *per se* prohibition, it held that departures from the rule of reason must be based on demonstrated economic effect. *Id. at 58, **[**21]** 97 S. Ct. 2549, 53 L. Ed. 2d 568*. Thus, the Court established the rule of reason as the general rule for treatment of vertical restraints under *Section 1*.

As in *Davis-Watkins*, the evidence in this case does not establish a *per se* **[*85]** violation of *Section 1*. The flurry of papers and internal Prime memoranda indicate clearly that the prohibitions of "hardware only" sales originated with Prime. Although there is sufficient evidence of concerted activity to present the *Section 1* issue to a jury, AIMS has not presented the evidence required to indicate horizontal restraints, originating with dealers, to justify departure from the rule of reason. There is no evidence to establish dealer coercion causing Prime "to act otherwise than consistent with its marketing strategy." *Davis-Watkins*, 686 F.2d at 1199. Again, as in *Davis-Watkins*, ***HN7***[] evidence of complaints from dealers to the manufacturer alone would be insufficient to establish a horizontal restraint. *Id*. (citations omitted), *500 F. Supp. at 1249*.

The *Davis-Watkins* court supported its decision to apply the rule of reason with findings of potential benefits to interbrand competition in the form of attracting **[**22]** aggressive retailers and inducing them to promote the products actively, eliminating the free rider effect, creating an efficient market distribution system, and maintaining control over safety and quality of the product. *Id. at 1200-01* (quoting *Abadir & Co. v. First Mississippi Corp., 651 F.2d 422 (5th Cir. 1981))*. Finding these benefits, the court held the economic conditions that justify the *per se* rule were not present and therefore it did not apply. *Id. at 1201*. As found above in discussing whether the amendment is a price restraint, Prime's distribution system fosters interbrand competition in similar ways. It is appropriate for rule of reason analysis.

Prime has moved for summary judgment on the rule of reason issue, claiming that its actions do not have an unreasonable anticompetitive effect with reference to the overall effect on competition among all competitors in the relevant market. This motion must be denied. The data on Prime's ability to affect competition is inconclusive, but it is not insubstantial as a matter of law. Nor is it clear the Prime's policies have no effect on competition through retail prices. A trial on the merits is necessary to determine **[**23]** the reasonableness of Prime's system of distribution. *See Davis-Watkins, 500 F. Supp. at 1247*.

Sherman Act *Section 2*

AIMS has alleged that Prime took anticompetitive actions to monopolize trade and commerce in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*. The issues under this cause of action revolve around Prime's market share and the definition of the relevant market. AIMS has not phrased its claim as one for attempted monopolization.

However, even if it is considered as such, [4], AIMS would have to demonstrate that Prime will achieve a substantial market share through its "hardware-only" restriction. *See* Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., 614 F.2d 832, 841 (2d Cir. 1980) (affirming summary judgment holding that plaintiff did not show that defendant with market share of 48 to 33 percent had a dangerous probability of success in attempted monopolization). *See also* White & White, Inc. v. American Hospital Supply Corp., 723 F.2d 495, 507 (6th Cir. 1983) (attempt to monopolize requires evaluation of market power).

[24]** There is conflicting and inconclusive evidence regarding both market definition and market share. ***HN8***[] Although at trial, the plaintiff has the burden to show market definition, for summary judgment consideration, Prime, as movant, has the burden of establishing the issue in its own favor. Hayden Publishing Co. v. Cox Broadcasting Corp., 730 F.2d 64, 68 (2d Cir. 1984). AIMS, asserting that Prime's market share is not insufficient for a Section 2 cause of action as a matter of law, has produced data demonstrating that Prime has focused on specified market segments. AIMS seeks to demonstrate that Prime's market **[*86]** share in the area of "32 bit superminicomputers" is substantial and that Prime "has monopoly or near monopoly power in the market segments which it has pursued." Memorandum In Opposition to Defendant's Motion for Summary Judgment at 25.

AIMS produced evidence showing that the "32 bit superminicomputer" systems and the comparable mainframe systems, both of which perform distributed data processing functions, [5] are not reasonable substitutes for one another. (Schaider Declaration paras. 5, 6). Mainframe systems perform functions in a series, while superminicomputers **[**25]** allow for scattered workstations and tasks performed out of sequence. (*Id*. para. 6). In support of his conclusion that the data processing industry regards "32 bit superminicomputers" as a separate market, AIMS ' expert relies on an article printed in the June 7, 1984, issue of the *Wall Street Journal*. (Schaider Declaration Exhibit 1). Excluding mainframe systems in his market share calculations, Schaider produces market share data showing Prime had a 59.7 percent market share in 1979, 54.2 percent in 1980, and 45.8 percent in 1981. (*Id*. para. 7, Exhibit 2). The *Wall Street Journal* article stated that Prime's market share dropped from 33 percent in 1980 to 16 percent in 1983. AIMS has also produced a confidential Prime memorandum dated June 12, 1984, in response to the *Wall Street Journal* article. Included is a letter from the data company that supplied the figures for the article. The company explains that the 1983 figure should have ranged from 16 to 18 percent, and that the article should have based its figures on the dollar value of Prime systems rather than the unit shipment market share. This could have increased market share figures for Prime 3 to 7 percentage **[**26]** points. This would result in figures of a maximum of 40 percent market share in 1980 declining to a maximum market share of 25 percent in 1983. The data company also stated that Prime's market share erosion was halted in 1983.

Prime has produced evidence from another market data firm indicating that there is no separate market for "superminicomputers" and that other systems are reasonable substitutes. (Bushee Affidavit para. 3). Bushee concludes that Prime's market share has never exceeded 2.2 percent of the minicomputer market. Even considering a separate market for "superminicomputers," Bushee concludes Prime's market share did not exceed 3.7 percent of that market. (*Id*.). Because Prime is the party moving for summary judgment and there is a genuine, unreconciled dispute regarding market share, the evidence must be considered in the light most favorable to AIMS. Therefore, the Court will examine Prime's market share within **[**27]** the market segments identified by AIMS in Prime's advertising and planning documents. [6]

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[4] The Section 2 offense of monopolization requires, if anything, an even greater showing of market power than does attempted monopolization. *See generally* United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1264 (1956).

[5] According to AIMS, this is one of the submarket areas on which Prime has focused.

[6] The market for add-on and upgrade equipment on its own cannot be considered a relevant market. *See, e.g.,* Telex Corp. v. IBM Corp., 510 F.2d 894, (10th Cir.), *cert. dismissed*, ***423 U.S. 802, 96 S. Ct. 8, 46 L. Ed. 2d 244 (1975)*** (compatible computer peripherals do not constitute a relevant market).

HN9[] In determining whether Prime had monopoly power, the Court must examine the strength of competition, the probable development of the industry, customer demand, and the percentage of market share of the defendant. *Hayden Publishing Co., Inc. v. Cox Broadcasting Corp., 730 F.2d 64, 69 (2d Cir. 1984)*. *HN10*[] To determine whether Prime is liable for attempted monopolization under *Section 2*, the Court must determine whether Prime has a dangerous probability of success. This requires a showing that the defendant possesses "market strength that approaches monopoly power -- the ability to control prices and exclude competition." **[**28]** *White & White, Inc. v. American Hospital Supply Corp., 723 F.2d 495, 507 (6th Cir. 1983)* (quoting *Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F.2d 818, 826 (6th Cir. 1982))*.

This Court holds that AIMS *Section 2* claim must be dismissed. It is clear and **[*87]** beyond dispute that the computer industry is developing rapidly and that competition is very intense. This is reflected in the changing market share figures in the Bushee affidavit, the changing hardware and equipment available, the rapidly changing marketing strategies, the frequent changes of personnel between companies, and the large number of competing companies within the industry. (*See e.g*. Kaufman Aff. Exhibit 3, Plaintiff's Appendix 78). AIMS itself has acknowledged the rapid development of the industry in conjunction with its contract claims.

HN11[] Where there is strong competition in a rapidly developing industry, the Sixth Circuit concludes that a market share of roughly 25 percent cannot present a dangerous probability of monopoly power. *White & White, 723 F.2d at 508*; *Richter Concrete, 691 F.2d at 826* (30 percent share of market insufficient). *See also* *Lektro-Vend Corp. v. Vendo Co* ***[**29]*** *., 660 F.2d 255, 271 (7th Cir. 1981)*, *cert. denied*, *455 U.S. 921, 102 S. Ct. 1277, 71 L. Ed. 2d 461 (1982)* (and citations); *United States v. Empire Gas Corp., 537 F.2d 296, 305-07 (8th Cir. 1976)*, *cert. denied*, *429 U.S. 1122, 97 S. Ct. 1158, 51 L. Ed. 2d 572 (1977)*; *Terry's Floor Fashions v. Burlington Industries, 568 F. Supp. 205, 214 (E.D.N.C. 1983)*. [7]

Prime's maximum market share of 25 percent in 1983 had stabilized from the year before. Market figures were therefore the same in 1982 when the challenged practices occurred. Competition in the field shows no signs of abating. It is also significant in determining Prime's ability to monopolize that the actions challenged as antitrust denied products to dealers only for certain types of sales. Prime did not close off all of its products to all dealers. Thus, AIMS has demonstrated no significant probability of monopolization.

Contract [30] Claims**

AIMS has raised several contract claims against Prime. One of these concerns Prime's refusal to sell any model 9950 systems to independent dealers such as AIMS. Prime authorized sales of the model 9950 only through direct sales, and through the "Authorized Distributor Program." (Cargile Aff. Exhibit 8, Plaintiff's Appendix 23). AIMS claims that in negotiations for the dealer agreement, Prime gave assurances that its entire line of products would be available. AIMS also contends that Prime's failure to make all of its products available is contrary to Prime's good faith obligations and its obligation not to destroy or injure AIMS ' contract rights. *See* *Uproar Co. v. NBC, 81 F.2d 373, 376-77* (1st Cir.) (citations omitted), *cert. denied*, *298 U.S. 670, 56 S. Ct. 835, 80 L. Ed. 1393 (1936)*. [8]

There is a genuine dispute regarding whether Prime gave assurances that the entire line of products would be available. **[**31]** President Cargile of AIMS asserts that Prime's representative did give these assurances and stated that assurances that newly developed products would be available were "of central importance because of the rapid advances in computer technology." (Cargile Aff. para. 5, Plaintiff's Appendix 3). Prime's representative at the time denies this, claiming he told Cargile only the hardware Prime believed necessary for marketing application software would be available. (Finney Aff. paras. 11, 12; *see also* Davidson Aff. para. 14). The initial dealer agreement and its amendment never provided that all compatible hardware would be available, nor was all compatible hardware included on the original schedule. (Finney Aff. para. 11; Horne Aff. para. 3). It provided the dealer with discretion to add or delete hardware. Moreover, because the dealer agreement provides an integration

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[7] Prime's market figures, however, are significant enough for AIMS ' rule of reason case under *Section 1*.

[8] The dealer agreement provides that it shall be construed under the laws of Massachusetts.

clause, contemporaneous oral statements would constitute inadmissible parole evidence. (*See* Kirby Aff. Exhibit A P.23 para. 24.1) (integration clause).

[*88] AIMS ' contention regarding sales of the 9950 must therefore be dismissed. Prime has demonstrated that the hardware presently available to AIMS is not **[**32]** obsolete and insubstantial. Prime hardware available for sale to AIMS accounts for 70 percent of Prime's hardware sales in the first quarter of 1984. (Horne Aff. para. 4). Moreover, AIMS has been treated no differently from other dealers. The 9950 system is not available to any dealer. If AIMS had not declined to become an Authorized Distributor, it would have access to 9950 sales. AIMS has the same rights to hardware as all other dealers. The dealers have banded together to protect their rights before. AIMS is adequately protected from overreaching by paragraph 5.5 of the dealer agreement, which provides that Prime shall not use its powers to delete equipment to effect termination of the dealer. AIMS has not sought to invoke the protection of this provision.

AIMS ' remaining contract claims stand on firmer ground. These claims involve Prime's compliance with the added value restriction. *See supra* footnote 2. The first claim involves Prime's rejection of AIMS ' orders for computer systems because of the policy and the contract provision prohibiting "hardware-only" sales. AIMS claims that Prime rejected the orders without affording AIMS the opportunity to specify the application **[**33]** software or services being sold prior to or in conjunction with the hardware ordered. (*See* Cargile Supplemental Aff. paras. 21-26; Plaintiff's Appendix 28-29). Prime asserts that Prime's rejection of orders was due to AIMS ' refusal to specify its compliance with the dealer agreement. (*See* Kirby Aff. Ex. 3, Plaintiff's Appendix 148). As discussed *supra*, however, it is unclear whether Prime relied on the amendment in rejecting the earlier orders. AIMS subsequently specified application software to be sold along with Prime hardware. (*See* Cargile Aff. Exhibit 10, Plaintiff's Appendix 26). Prime requested further specifications on other orders. (Kaufman Aff. Exhibit 6, Plaintiff's Appendix 90). The issue of contract compliance on this issue is not clear enough for summary judgment disposition. Moreover, Prime's compliance with the provision of the new amendment may be relevant to the antitrust issues as well. Accordingly, Prime's motion for summary judgment on this issue is denied.

AIMS may also take to trial its claim that Prime unreasonably withheld authorization of application software to be sold along with Prime equipment. AIMS has argued that Prime's refusal to **[**34]** approve additional application software was contrary to Prime's contractual obligation not to withhold authorization of additional software unreasonably. (*See supra* footnote 2). Prime rejected AIMS ' proposed additions to Schedule 1 approved application software because it was "reluctant to expand the relationship between the parties under present circumstances." (Kaufman Aff. Exhibit 6, Plaintiff's Appendix 90). Cargile of AIMS asserts that Prime never previously requested documentation or other formal testing for approval of application software. (Supplemental Cargile Aff. para. 26, Plaintiff's Appendix 29). There is conflicting evidence regarding whether Prime had standards for evaluating proposed application software for approval. (*Compare* Schaider Declaration para. 4 *with* Horne Aff. paras. 5, 6). Therefore, this issue must proceed to trial.

Preliminary Injunction

For the following reasons, AIMS ' motion for a preliminary injunction is ***HN12***[] denied. In order to determine whether to grant a preliminary injunction pursuant to *Fed. R. Civ. P. 56(c)*, the Court must evaluate (1) the merits of plaintiff's claim for ultimate relief; (2) the harm facing plaintiff if interim **[**35]** relief is denied; (3) the harm facing defendant or others if interim relief is granted; and (4) the public interest in granting or denying interim relief. *E.g., Friendship Materials, Inc. v. Michigan Brick, Inc., 679 F.2d 100, 102-04 (6th Cir. 1982)*; *Roth v. Bank of the Commonwealth, 583 F.2d 527, 536-38 (6th Cir. 1978)*, *cert. dismissed per stipulation*, *442 U.S.* ***[*89]*** *925, 99 S. Ct. 2852, 61 L. Ed. 2d 292 (1979)*; *Mason County Medical Association v. Knebel, 563 F.2d 256, 260-62 (6th Cir. 1977)*. ***HN13***[] No single factor is determinative; all must be weighed equitably. *Roth, 583 F.2d at 537-38*. One of the considerations required is the probability that plaintiff will succeed on the merits. *Id*. (citations omitted). Additionally, plaintiff must demonstrate that in the absence of relief, plaintiff will be irreparably harmed. *Friendship Materials, 679 F.2d at 103* (citations omitted) (injunctive action for antitrust violations).

AIMS seeks a preliminary injunction to forbid Prime from enforcing the "added value" provision of the dealer agreement and from refusing to sell its entire line of compatible equipment to AIMS for resale. AIMS asserts that would be irreparably **[**36]** harmed without preliminary relief, citing cases holding that loss of a product line constitutes irreparable injury to a full-line dealer such as AIMS. *See* *Blackwelder Furniture Co. of Statesville Inc. v. Seilig Manufacturing Co., Inc., 550 F.2d 189, 196-97 (4th Cir. 1977)*; *Bergen Drug Co., Inc. v. Parke, Davis & Co., 307 F.2d 725, 728 (3d Cir. 1962)*. These cases do not apply here because they involved a manufacturer's refusal to supply its entire product line to a particular retailer, treatment which discriminated against that particular dealer. Here, Prime has not placed AIMS at a disadvantage to other dealers, for AIMS has access to the same equipment as other dealers. Moreover, Prime has not closed off its entire product line to all dealers, but only a portion of it. AIMS has not demonstrated that money damages would not adequately compensate its alleged loss of profits, nor that its business failure and entry into bankruptcy was caused by Prime's restrictions. Although AIMS argues that it will be unable to salvage its business without preliminary relief, plaintiff has not explained why other dealers in the same position have not been driven into bankruptcy. While preliminary **[**37]** relief would clearly aid AIMS reorganization, other equitable considerations require denial of the preliminary injunction.

AIMS insists that immediate action is necessary to protect its interests, yet it waited one and one-half years after cancellation of its orders to bring this action for an injunction. This delay belies AIMS ' claim to irreparable harm. *See* *Gianni Cereda Fabrics, Inc. v. Bazaar Fabrics, Inc., 335 F. Supp. 278, 280 (S.D.N.Y. 1971)* (quoting *Gillette Co. v. Ed Pinaud, Inc., 178 F. Supp. 618, 622 (S.D.N.Y. 1959))*. Moreover, injunctive relief would not preserve the status quo as much as it would expand AIMS ' position under the contract. *See* *Morgan v. Fletcher, 518 F.2d 236, 239 (5th Cir. 1975)* (citations omitted) (purpose of preliminary injunction is to preserve the status quo).

There are other reasons why the equities weigh against granting the injunction. Although Prime's viability would not be threatened by injunctive relief, its distribution system would be greatly disrupted. Its discount for sales of complete systems would be arguably misappropriated to allow a dealer to make large numbers of wholesale sales. AIMS has not demonstrated a sufficient **[**38]** likelihood of success to justify the harms that would result from the preliminary relief AIMS has requested. Nor would any public interest mandate granting the injunction.

Conclusion

For the reasons discussed above, the Court concludes: AIMS ' claim for violations of the Sherman Act, *Section 1* will proceed under the rule of reason; AIMS ' *Section 2* claim is dismissed; AIMS ' contract claims will proceed to trial as limited in this memorandum; and AIMS ' motion for a preliminary injunction is denied. The state unfair trade practices claims will also proceed to trial because they are not appropriate for summary judgment disposition.

Nat'l Bancard Corp. v. Visa

United States District Court for the Southern District of Florida

September 20, 1984, Decided ; September 20, 1984, Filed

CASE NO. 79-6355-Civ-Hoeveler

Reporter

596 F. Supp. 1231 *; 1984 U.S. Dist. LEXIS 23432 **; 1985-1 Trade Cas. (CCH) P66,456

NATIONAL BANCARD CORPORATION, Plaintiff, v. VISA, U.S.A., Defendant.

Core Terms

merchant, banks, card, issuer, cardholder, costs, interchange, rule of reason, antitrust, courts, treble damages, joint venture, merchant bank, transactions, effects, anticompetitive, member bank, cases, market power, bank credit, compete, relevant market, consumer, anti trust law, contracts, damages, credit card, methodology, proprietary, purchasers

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN1[] **Costs & Attorney Fees, Clayton Act**

Under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, any person injured in his business or property by reason of anything forbidden in the antitrust laws may recover treble damages plus costs and attorney fees. The U.S. Supreme Court has stated that § 4 on its face contains little in the way of restrictive language but has read the "by reason of" language as encompassing several separate and analytically distinct elements, each implying that the statute is not as broad as its words suggest.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN2[] Private Actions, Standing

Neither courts nor parties to antitrust actions have been scrupulous in their attempts to keep the various restrictions on a plaintiff's right to a treble damage action separate and distinct. All seem to agree that a plaintiff must initially establish the existence of a causal connection between defendant's antitrust violation and plaintiff's injury. Once the causal connection between plaintiff's injury and defendant's act is shown, however, the courts begin to differ about what additional elements a plaintiff must prove in order to successfully bring a treble damage action.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN3[] Private Actions, Remedies

The cases suggest there are at least two, perhaps three, requirements for standing in addition to causation to maintain a treble damage action. The first of these requirements takes many forms, as most courts vacillate between the two alternative techniques of (a) measuring the directness of the injury complained about and (b) asking whether the plaintiff falls within the target area of the violation. The second requirement, which some courts do not distinguish from the standing requirement, is that an antitrust plaintiff must prove he has suffered "antitrust injury," i.e., injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. Finally, some plaintiffs must also address the issue of defensive and offensive use of "pass-on" damages.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN4[] Private Actions, Standing

While no circuit continues to apply a strict "direct injury" test in determining standing, courts borrow from the language of that analysis to discourage or dismiss suits brought by plaintiffs whose injuries result from chains of events too speculative to justify treble damages.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN5[] Private Actions, Standing

The other test popular among courts for determining standing focuses on the nature of the antitrust violation and the plaintiff's relationship to the area of the economy claimed to have been injured by the defendant's conduct. Called the "target area" test, it requires the plaintiff to establish that he was within that section of the economy endangered by a breakdown of competitive conditions in a particular industry and that the illegal practices were aimed at him.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN6[] **Private Actions, Standing**

Problems in applying the "direct injury" and "target area" tests have led the Third Circuit, and to some extent the Eighth Circuit, to reject both tests in favor of a case-by-case approach called the "factual matrix" test. The Sixth Circuit has adopted for antitrust matters the test employed for determining standing in administrative law cases, i.e. requiring the plaintiff to show that its affected interests arguably are within the "zone of interests" protected by the antitrust statutes.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN7[] **Private Actions, Remedies**

At the heart of the Third Circuit's "factual matrix" test is a recognition of the reason for the existence of different requirements under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, i.e., the multifaceted problem of determining when a person is sufficiently injured in his business or property by reason of anything forbidden in the antitrust laws so as to be eligible to sue for treble damages.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

HN8[] **Private Actions, Standing**

Whether the issue is the definition of injury in § 4 of the Clayton Act, *15 U.S.C.S. § 15*,the use of pass-on theories, or the proper scope of the standing doctrine, the necessary line drawing is informed by an inquiry into what posture best effectuates the dual purposes of the treble damage remedy, that of compensating victims of antitrust violations for their injuries and deterring violators by depriving them threefold of the fruits of their illegality, while at the same time furthering the overriding goal of the antitrust laws, preserving competition. Aside from these basic objectives of antitrust enforcement, courts must address additional concerns by determining whether antitrust goals would be furthered by adopting a particular position. Among such concerns are whether a duplicative or ruinous recovery will result and whether resolution of the claim will unduly complicate trial by necessitating the pursuit of complex and conjectural economic lines of causation and effect.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Private Attorneys General

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN9[] **Private Actions, Standing**

As to the issue of "directness" of injury, the U.S. Supreme Court first identifies the chain of causation then highlights the importance of finding an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement and therefore diminish the justification for allowing a more remote party to perform the office of private attorney general.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN10[] Private Actions, Standing

The indirectness of an alleged injury also implicates the strong interest in keeping the scope of complex antitrust trials within practically manageable limits. Cases stress the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN11[] Regulated Practices, Trade Practices & Unfair Competition

The antitrust laws do not require a potential plaintiff to take extraordinary measures to avoid anticompetitive activity; in fact, this is one of the things the antitrust laws are designed to prevent.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN12[] Regulated Practices, Private Actions

The defense of pass-on damages is only applicable where there is an existing cost-plus contract or its functional equivalent; that is, this defense is appropriate only where there exists a contract in which the impact of the illegal overcharge is determined in advance of the actual overcharge without reference to the interactions of supply and demand and other market forces.

Antitrust & Trade Law > Clayton Act > General Overview

HN13[] Antitrust & Trade Law, Clayton Act

See *15 U.S.C.S. § 26*.

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > Remedies > Injunctions > General Overview

HN14[] Clayton Act, Claims

Most courts take a less constrained view of standing in suits involving injunctive relief than in those demanding treble damages. Even indirect purchasers can maintain actions for injunctive relief because the policy considerations underlying the pass-on rule are not implicated in claims for injunctive relief.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN15[] **Private Actions, Standing**

To achieve standing under *15 U.S.C.S. § 26*, all a plaintiff must prove is that it is threatened with loss or injury cognizable in equity proximately resulting from the antitrust violation. Some courts have interpreted this proximate cause standard as one no more rigorous than the general rule of standing.

Antitrust & Trade Law > Sherman Act > General Overview

HN16[] **Antitrust & Trade Law, Sherman Act**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN17[] **Regulated Practices, Price Fixing & Restraints of Trade**

The legality of an agreement or regulation cannot be determined by a simple 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.

Antitrust & Trade Law > Sherman Act > General Overview

HN18[] **Antitrust & Trade Law, Sherman Act**

Stated simply, the governing law has been that the Sherman Act, *15 U.S.C.S. § 1*, bans all concerted arrangements adopted for the purpose of reducing competition or that, regardless of purpose, have a significant tendency to reduce competition. However, arrangements that are adopted for and tend to achieve other legitimate purposes do not fall within the condemnation of the Sherman Act merely because of some incidental and inconsequential restraining effect on competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN19[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The per se doctrine and the rule of reason together tend to condemn arrangements having the purpose or effect of significantly restraining competition and to validate those that do not. The per se rule forecloses any analysis of the purpose of a restraint or the nature, extent, and degree of its market effect, thus avoiding the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable. Thus the per se rule is generally limited to those categories of restraints for which no elaborate study of an industry is needed to establish that their nature and effect is plainly or manifestly anticompetitive. To be manifestly anticompetitive, agreements or practices must have a pernicious effect on competition and lack any redeeming virtue.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Energy & Utilities Law > Pipelines & Transportation > Eminent Domain Proceedings

HN20[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The rule of reason is an all-embracing enumeration to make sure that no form of contract or combination by which undue restraint was achieved could escape condemnation. The function of "reason" in the analysis is to discriminate between restraints that are undue and those that are not. The rule of reason does not open the field of inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, the inquiry is limited to whether the restraint in question is one that promotes competition or one that suppresses competition.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Evidence > Burdens of Proof > Allocation

HN21[] **Regulated Practices, Price Fixing & Restraints of Trade**

The "facial unreasonableness test" is actually a two-part test that, unlike either the per se or rule of reason tests, shifts the burden of proof from the plaintiff to the defendant. Once the plaintiff has sustained its burden of proving that defendant's activities are a significant restriction affecting competition and that the defendant has significant market power, the burden then shifts to the defendant to show that the particular practice in question is justified by its competitive needs, that it is reasonably necessary to accomplish legitimate goals, and that it is narrowly tailored to that end.

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > General Overview

Business & Corporate Law > Joint Ventures > Formation

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > US Federal Energy Regulatory Commission

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Law > Joint Ventures > General Overview

Energy & Utilities Law > Regulators > US Federal Energy Regulatory Commission > Authorities & Powers

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

Mergers & Acquisitions Law > Antitrust > Joint Ventures

HN22[] **Exemptions & Immunities, Collectives & Cooperatives**

While joint ventures are not immune from antitrust scrutiny, the antitrust laws allow restraints necessary to accomplish pro-competitive objectives of joint ventures and similar organizations. When these restraints, sometimes called ancillary restraints are addressed, per se prohibitions are not applied because it cannot be said that in the aggregate, the gains from imposition of the per se rule will far outweigh the losses. As the U.S. Supreme Court has recognized, joint ventures are not usually unlawful, at least not as price fixing schemes, where the agreement on price is necessary to market the product at all. Accordingly, such agreements are analyzed under the rule of reason so that courts can weigh their pro-competitive effects.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN23[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In separating those price-fixing arrangements to which the per se rule is to be applied from those to be examined under a rule of reason analysis, courts are to assess whether facially the practice always or almost always tends to restrict output or whether it is likely to contribute to the creation of economic efficiency.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Business & Corporate Law > Joint Ventures > General Overview

Mergers & Acquisitions Law > Antitrust > Joint Ventures

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN24[] **Types of Contracts, Joint Contracts**

Courts are to compare the product of the joint venture to the individual offerings of the venture's members and determine whether the venture offers pro-competitive abilities that its members acting alone could not offer.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Immigration Law > Admission of Immigrants & Nonimmigrants > Visa Eligibility & Issuance > Issuance of Visas

HN25[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A practice is not unlawful per se where there is no legal, practical, or conspiratorial impediment to making alternate arrangements.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN26[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Under the rule of reason test, it is plaintiff's burden to establish that the practice complained of has an adverse impact on competition. In making this a determination, the relevant question is not whether the challenged practice is the most competitive device that can be imagined or the least restrictive but simply whether it is reasonable; i.e., not unduly restrictive of competition. So long as a practice is fairly necessary to achieve a legitimate purpose, it is not unlawful under the rule of reason. In applying this standard, the competitive benefits of the challenged practice are weighed against its alleged harmful effects and a violation of the Sherman Act, *15 U.S.C.S. § 1*, will be found only where the balance tips decidedly in favor of the latter.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN27[] Per Se Rule Tests, Manifestly Anticompetitive Effects

A plaintiff must shoulder the burden in the "rule of reason" analysis to demonstrate the balance tipping in plaintiff's favor. That is, the plaintiff must demonstrate that defendant's alleged anticompetitive effects outweigh the pro-competitive benefits of the practice. Moreover, in meeting its burden, a plaintiff must prove far more than that the practice it challenges has had an effect on its business. The existence or non-existence of market power in a relevant market is a critical consideration.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN28[] Regulated Practices, Market Definition

A relevant market or "area of competition" consists of two elements: products and geography. The former element is defined by reference to the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and the substitutes for it.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN29[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The burden of proof in a rule of reason case rests with the plaintiff. The rule of reason requires "a systematic comparison" of the negative effects of the restraint on competition, if any, with any alleged positive effects on interbrand competition stemming from the restraints.

Judges: [1]** Hoeveler

Opinion by: WILLIAM HOEVELER

Opinion

[*1235] *MEMORANDUM OPINION AND FINDINGS OF FACT AND CONCLUSIONS OF LAW*

INTRODUCTION

This case involves a claim by plaintiff, NaBanco that defendant, VISA has violated the Sherman Antitrust Act, causing plaintiff damages. Defendant issues the VISA card, used by many as a method of payment for goods and services, in connection with the transfer of transaction paper from a merchant through its bank to the **[*1236]** card issuing bank. VISA regulations call for payment of an interchange fee ("IRF") if its exchange system is used. The interchange fee is set by the VISA Board of Directors. plaintiff, among other things, asserts that the methods of setting and determining the interchange fee involves price fixing and are anti-competitive. Defendant asserts that the setting of the fee is reasonable, not only in method but in amount, and further that the VISA regulations encourage competition and are not in violation of the Act. The Court has determined that the plaintiff, NaBanco has failed to prove its case and that judgment shall be entered in favor of the defendant, VISA.

The last 150 years have witnessed the evolution of several distinct **[**2]** methods of payment for goods and services. Just as we once moved from an economy which relied heavily on barter as a primary means of exchange to an economy based on cash, so we now find ourselves increasingly becoming a "cashless" society. Today it is not unusual to find major sectors of the buying public foresaking cash in favor of credit cards [1] and, even more recently, debit cards. [2] Unlike consumer currency purchases, however, these newer payment forms leave a residue of paper credits and debits which must somehow be cleared in order to complete a particular consumer transaction.

[3]** Like any major economic transition, the movement from cash to cashless payment systems is not without growing pains. This case is itself evidence of the fact that social or economic change often leaves in its wake those who feel aggrieved by the process. National BanCard Corporation ("NaBanco") brought this action against VISA U.S.A., Inc. [3] and the members of the VISA Board of Directors (hereinafter referred to collectively as "VISA") for alleged violations of *Section 1* of the Sherman Act, *15 U.S.C. § 1*. In its complaint NaBanco alleged a continuing combination and conspiracy by VISA to fix and maintain the price paid for bank credit card "interchange" transactions. For this claimed offense NaBanco sought damages in excess of three million dollars, trebling of damages, injunctive relief, attorneys' fees, and costs. Jurisdiction of this court was invoked pursuant to Sections 4 and 15 of the Clayton Act, *15 U.S.C. § § 15* and *26*, and pursuant to *28 U.S.C. § 1337*.

[4]** The case was tried by the court without a jury. It began May 10, 1982. and, to accommodate the pressing criminal docket of the Southern District of Florida, continued in segments of one or more weeks until its conclusion in January of 1984. The total trial time was in excess of nine weeks during which the court reviewed thousands of pages of exhibits and heard in person or by deposition dozens of witnesses, experts and otherwise. Based upon

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[1] The term "credit card" is actually a misnomer. Not all so-called credit cards authorize the issuance of "credit," i.e., an opportunity to pay off amounts owed over an extended period of time at some rate of interest. To the extent that any credit card does not require a cardholder to pay for a purchase at the point of sale, however, a "free" or "convenience use" period is endemic to all credit card systems.

[2] A "debit" card typically accesses a cardholder's asset account at the card-issuing bank although a line of credit may be available as "overdraft" protection when the account balance reaches zero.

[3] VISA is a member of VISA International, which administers the VISA system worldwide. Through VISA International, the VISA card is honored in 120 countries and has 100 million cardholders and 3 1/2 million merchants worldwide. Cards issued by members of VISA are accepted internationally, and cards issued by members of VISA International outside the U.S. are accepted by merchants in the U.S. With the consent of the parties, the issues and discovery in this case were limited to activities in the United States. Russell TR. 5-6 1/16/84.

this record, and for the reasons enunciated below, the court finds that plaintiff NaBanco has failed to prove any of the alleged antitrust violations with which it has charged VISA.

THE BANK CREDIT CARD INDUSTRY

The issues raised in this case can best be defined and understood in the context of **[*1237]** the bank credit card industry and its history.

In the early 1800's, the two principal means of commercial transactions payment devices were bank notes issued by state banks and drafts. [4] These payment forms satisfied the needs of commerce at a time in history when consumers and merchants would usually reside and do business in the same geographical area. Accordingly, payment media rarely had to be sent beyond the local area. Bank notes, **[**5]** issued by the local bank or banks, circulated through the immediate region and were used to a far greater degree than currency is used today. In the larger local transaction, and also in the relatively infrequent long-distance transaction, the draft was the typical medium used. [5]

[6]** However, rapid technological changes in both transportation and communication in the mid-1800's, heightened the need for a medium of exchange which was acceptable to diverse and unknown persons across the country and which could travel easily and cheaply. The check was increasingly employed to meet these needs. [6]

Despite the check's utility, other payment devices arose to meet more specific consumer needs. About a century after the check gained common acceptance, the bank credit card was introduced. The chief antecedents of this card were the retail merchant's "open book" account **[**7]** [7] and the somewhat later-developed but more closely-analogous "travel and entertainment" cards. [8] Unlike either of its two predecessors, however, the bank credit card has come to play a much more versatile role in the universe of payment systems. The bank credit card provides many of the same services as the personal check, but, in addition, provides retailers of goods and services an extra measure of protection from the risk of default. Incident to the system, and in most cases, the banks, not the retailers, are responsible for seeking payment from the retailers' customers.

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[4] Wm. F. Baxter, Bank Interchange of Transactional Paper: Legal and Economic Perspectives, The Journal of Law & Economics, Vol. XXVI (3) Oct. 1983, p. 556.

[5] *Id.* at p. 557. If a consumer became indebted to a distant merchant, the consumer would execute payment by purchasing a draft from his local bank made payable to the merchant as payee. The draft would instruct the merchant's bank to make payment to the merchant in the amount of the indebtedness. For this, the consumer paid a substantial fee. If the consumer maintained a payments balance with the bank, this sum would be debited from the account. If not, the consumer's would be obligated physically to transport to the merchant bank a mutually acceptable form of currency.

[6] *Id.* at p. 560. The consumer would send the check to the distant merchant who presented it at his bank for collection. When the bank accepted the instrument for collection, it might credit the merchant's account immediately or await payment by the consumer's bank. The check itself was sent via a number of correspondent banks to the consumer's bank, where the consumer's account was debited that amount upon arrival of the check.

[7] *Id.*at p. 572. A form of short-term, interest fee credit to customers whose patronage is highly valued. These customers tend to be persons whose time costs are high, who shop regularly at a particular retail outlet in high volumes, often buying more higher priced items.

[8] *Id.* at 572-73. Travel and Entertainment cards. ("T & E Cards") Developed as an answer to an increasingly mobile post-WWII society. The issuing organization (notably American Express and Diners Club) signs up merchants across the country of the type frequently patronized by travelers: hotels, resorts, restaurants, and a small number of prestigious retail outlets. Annual fees are normally much higher than those charged for the VISA or MasterCard and the system as a whole tends to cater to more "upscale" clientele.

[8]** As in the case of the check, the bank credit card system is principally a four-party payment arrangement. It involves: (1) cardholders who use bank credit cards to purchase goods and services; (2) merchants who accept bank credit cards in exchange for goods and services; (3) financial institutions (issuer banks) which issue cards to, and contract with, cardholders; and (4) financial institutions (merchant banks) which contract with merchants to accept the bank credit card and thereafter manage the bank credit card accounts of these merchant clients.

[*1238] A typical transaction can be most simply described as follows: Once a potential consumer has opened a bank credit card account with a particular issuing bank, he or she may use that bank credit card in lieu of cash to purchase goods and services from any merchant participating in that particular bank credit card system. The merchant, after a sale, then transmits the consumer/cardholder's draft evidencing this transaction (referred to in the parlance of the industry as "paper") to its merchant bank, this sum being immediately credited to the merchant's account minus a small charge agreed upon earlier by contract (called the **[**9]** "merchant discount"). If the merchant bank happens to be the same bank which issued the card, the consumer/cardholder's account in the bank will be processed "in-house" in what has been described as an "on-us" transaction. When the issuer bank differs from the merchant bank, the process becomes more complicated. First, the merchant bank sends the transactional paper to the issuer bank. The issuer bank then will either send the merchant bank the requisite sums due and owing from its cardholder, or will directly credit the merchant bank's account at the issuer bank, if the merchant bank has such an account. In either case, the issuer bank is ultimately responsible for the sums due and owing from its cardholders, and thus, absent a breach of agreed procedure by the merchant or merchant bank, the issuing bank bears the risk of default by the cardholder.

The process by which transactional paper is moved from the merchant bank to the issuer bank involves certain costs. In the system at issue here, the issuer bank withholds a small amount (called the "interchange fee") from the monies due and owing the merchant bank to cover the costs of this processing. Even more simply stated, the merchant **[**10]** bank (if not the issuer of the card used in a sale) must process the paper generated by the sale to realize both the small profit hopefully provided in the merchant's discount charge to the retailer and reimbursement for the sale amount credited to the account of the retail merchant. The paper then goes to the issuer bank which reimburses the merchant bank but only after the deduction of the interchange fee. This interchange fee is the subject of the dispute in this case.

THE PARTIES

The VISA System: Its History and Its Product

One of the most successful three-party bank cards was the California-based Bank of America's ("BA's") local prototype credit card program, the BankAmericard. This program expanded in 1960 to a statewide system to take advantage of the ever-increasing pool of people amenable to credit card use within the state. This expansion increased the base over which the costs of the system could be spread. Still, the nationwide expansion of its principal competitors' operations (travel and entertainment cards) in conjunction with dramatic technological changes in data-processing and electronic communications soon led BA to develop its own national credit card **[**11]** program in 1966.

The BA network was achieved by means of a franchise program which permitted BA-licensed local banks across the country to issue credit cards bearing the BankAmericard name. The licensee banks actually owned the credit cards they issued, and created their own receivables by signing up local merchants who would accept the card. Licensees were also encouraged to engage other non-issuer banks as their agents to expand the merchant base still further.

With the advent of the BankAmericard licensing program came the concept of the interchange fee, referred to earlier as a means of paying for costs associated with transferring transactional paper. Included in the licensing agreement was a provision indicating the sum or "fee" licensees were entitled to receive when purchasing their cardholders' paper in interchange. The agreement provided that the merchant-servicing licensee had to send to the card-issuing licensee either the actual merchant discount earned in each interchange transaction, **[*1239]** or the merchant bank's "average" merchant discount. (Emerson. TR. at 54. 1/13/84); Russell. TR. at 15. (1/16/84); Exh. 2007.

Between 1966 and early 1970, many of the BA licensees **[**12]** grew in size and expertise and accordingly moved for the creation of a system which could more accurately reflect their individual interests and concerns, as well as address some of the more pressing problems facing the licensee system. (Larkin, TR. 232-33; (1/11/83). These concerns led to the formation of NBI, a for-profit, non-stock-membership corporation which was established in 1970.

Along with the formation of NBI came a new conceptual model for the interchange fee. The new fee was adopted by the NBI Board of Directors in 1971, in response to serious problems of uncertainty and instability which the old fee system could not resolve since it was based upon each merchant bank's interpretation of how much was due and owing to issuer banks. The new, uniform fee was based upon a cost-reimbursement methodology developed in conjunction with Arthur Anderson and Co., the national accounting firm, and was called the "Issuer's Reimbursement Fee" (hereinafter referred to as "IRF"). This fee or charge reflected the concept of calculated reimbursement.

In 1977, NBI changed its name to VISA and exclusive rights to the name "BankAmericard" reverted to BA. To become a VISA member, of which there **[**13]** were approximately 13,400 in 1983, a financial institution must be eligible for federal deposit insurance. Upon proper application, any eligible institution can serve either as a proprietary member or as an agent of a proprietary member. There were 1866 proprietary members in 1983. Each can perform the function of issuing cards to cardholders and of signing merchants to participate in the VISA system. Proprietary members also elect VISA's governing Board of Directors which makes the rules under which the system operates. Agent members, 11,537 strong in 1983, elect only to contract with merchants on behalf of proprietary members; they are not eligible to vote for Board members and therefore do not play as significant a role as proprietary members in determining VISA policy.

It is important to understand that at all times material to the claims in this case, VISA did not require its participating members to interchange paper through the VISA system. Rather, members could elect to exchange transactional paper pursuant to separately negotiated agreements with other members without the imposition of an exchange fee by the VISA system. If, however, members choose instead to interchange **[**14]** their paper through VISA, the data on the paper will be sent in electronic form by the merchant bank (or its processing agent) through what is known as the VISA Base II computer system to the issuer bank (or its processing agent). It is only when members use BASE II to interchange their paper that interchange will be governed by the highly complex set of VISA Operating Regulations, which includes the IRF and other rules governing the conditions under which issuer banks are required to "purchase" transactional paper from merchant banks.

NaBanco

Plaintiff, NaBanco, formed under the name Southern Bankcard Corporation in 1974, is neither a proprietary nor an agent member of VISA. It is not eligible for VISA membership because it is not a financial institution eligible for federal deposit insurance. It participates in the VISA bank credit card business by contracting with various VISA members to serve as their processing agent, thereby obtaining access to the VISA Base II system.

In its capacity as an agent for a VISA member, NaBanco typically performs activities similar to those performed by merchant banks, such as providing authorization services and services relating to the processing **[**15]** of merchant transactions. [9] The **[*1240]** majority of NaBanco's business is with VISA members who have already negotiated and contracted with particular merchants. Bull TR. 670-72 (5/13/82). NaBanco then provides its services pursuant to the contract it has with the VISA member, ordinarily electing not to be paid a transaction fee for such

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9 In a few instances, NaBanco has also served as an agent of a VISA member on the card issuing side. As a result, NaBanco "receives" IRF in the same sense that it sends it out; re, under the contract it negotiated with the VISA member. Exh. 515. Bull Tr. 752-56 (5/13/82).

services but to receive instead most or all of the merchant discount revenues that merchants would otherwise remit to the VISA member. In return for these merchant discount receipts, NaBanco agrees to discharge the VISA member's obligation to pay the IRF whenever sending data in interchange through VISA's Base II system. Bull Tr. 336 (5/11/82) Exh. 6. Nevertheless, under VISA's rules, the VISA member continues to remain legally liable to VISA for payment of the interchange fee on all such transactions.

[16]** In a minority of cases, NaBanco, on behalf of VISA members, negotiates directly with merchants regarding merchant discount rates and other terms of the services to be provided to them. In this capacity, NaBanco competes with nearly all of the VISA members, and testimony both from merchants and from VISA members indicates that NaBanco is one of the leading contenders for the business of major retailers nationwide. [10]

THE NATURE OF THIS ACTION

Among other bases for plaintiffs charges of antitrust violations by defendant, plaintiff contends **[**17]** that the interchange fee requirement (when processing through BASE II) diminishes its ability to compete for merchant business on an equal basis with VISA member banks which do both issuing and merchant business. The "on-us" transaction (where the card issuing bank and the merchant contracting bank are the same) does not present the need for interbank exchange. Thus, says NaBanco, these proprietary members of VISA -- who have cooperated in mandating the interchange fee in non "on-us" transactions, have curtailed its ability to compete.

"On-us" transactions occur with the greatest frequency in the immediate geographic vicinity of a VISA member bank (especially where that member is a large card issuer) since it is in this area that a local merchant is most likely to have an account with the same bank as an area resident/cardholder.

NaBanco argues that in order to compete effectively with VISA member banks, it has had to develop relationships with merchants outside its immediate geographic market and find retailers with sufficient locations, or a broad enough customer base, so that the effects of "on-us" transactions are eliminated or at least minimized. Bull. TR. 249 (5/11/82). NaBanco **[**18]** also claimed it has found it necessary to sign up merchants in the United States who cater to tourists whose cards have been issued outside the United States. Alternatively, NaBanco argued it has had to establish agency relationships with banks outside the United States since the interchange fee charged on international transactions has traditionally been less than that charged for domestic exchanges. Bull. TR. 275-277 (5/11/82).

Nonetheless, NaBanco has claimed it can cite numerous examples of its inability to compete with VISA member banks for merchant contracts due to the competitive advantage these banks enjoy from "on us" transactions. Given the fact that both "on-us" and IRF transactions involve many of the same types of processing costs whether they occur "in-house" or not, NaBanco has **[*1241]** questioned the intent of VISA in setting particular IRF levels. Specifically, NaBanco has contended that IRF is not cost-related and, therefore, is either unnecessary or set intentionally high so as to discourage competitors such as NaBanco.

In the NaBanco scenario, individual merchant banks compete with it to sign up and serve merchants but unfairly so when they are also in the **[**19]** position of issuer banks because in this latter sense they act like a group of competitors who have conspired to sell goods to one another (actually to themselves) at a lower rate than the one offered NaBanco as a non-issuer bank thus affecting the price at which NaBanco can offer its merchants services. Since NaBanco believes that individual issuer and merchant banks can and should negotiate with one another over the price to be paid for transactional paper, VISA member banks, says NaBanco, are nothing more than a group of competitors whose setting of IRF is akin to horizontal price-fixing for transactional paper and, therefore, such conduct is absolutely proscribed by *Section 1* of the Sherman Act.

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[10] NaBanco describes itself as the "premier nonbank third party credit clearinghouse." Ex. 361. During 1976-1980, NaBanco's revenues went from $ 1 million to $ 9 million. In that same period, its earnings increased from $ 69,000 to $ 565,000. Among the major merchants for whom NaBanco is the processor are County Seat Stores, Eckerd Drugs, Waldenbooks, and Petrie Stores, and many major department stores, including Burdines' and Rich's. Bull TR. 1052-61 (9/13/82) Exh. 2199.

In terms of remedies, NaBanco has asked that this court enjoin VISA from setting IRF at any level other than "par" (zero) so that financial institutions with large numbers of "on-us" transactions will have no competitive edge over entities like NaBanco which have few or none. Essentially, NaBanco has asked the court to "fix" its own price for IRF but in accordance with terms NaBanco considers fair. Alternatively, NaBanco has asked the court to enjoin VISA from setting any particular IRF, **[**20]** thus permitting each merchant bank (or NaBanco) to establish individually-negotiated "IRFs" with issuer banks. In addition, NaBanco has sought over three million dollars in damages, trebled, to compensate it for the several years during which it paid IRF to its alleged detriment.

STANDING TO SUE

Before reaching any of NaBanco's antitrust arguments, it is necessary to address defendant VISA's argument that NaBanco lacks standing under the antitrust laws to bring its action. Since NaBanco brought this action seeking both damages and injunctive relief, and since the standards for standing differ as to each, two separate but related standing analyses follow.

Standing to Bring The Treble Damages Claim

HN1[] Under Section 4 of the Clayton Act, "any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws" may recover treble damages plus costs and attorney's fees. *15 U.S.C. § 15*. [11] The Supreme Court has stated that § 4 on its face contains little in the way of restrictive language, but has read the "by reason of" language cited above as encompassing several separate and analytically distinct elements, each implying that the statute is **[**21]** not as broad as its words suggest.

HN2[] Neither courts nor parties to antitrust actions have been scrupulous in their attempts to keep the various restrictions on a plaintiff's right to a treble damage action separate and distinct. All seem to agree that a plaintiff must initially establish the existence of a causal connection between defendant's antitrust violation and plaintiff's injury. *McClure v. Undersea Indus., Inc., 671 F.2d 1287, 1289* (11th Cir. 982), *cert. denied, 103 S. Ct. 1427 (1983)* ("The term 'fact of damage' refers to causation and simply means 'that the antitrust violation cause injury to the antitrust plaintiff.'" (quoting *Alabama v. Blue Bird Body Co., Inc., 573 F.2d 309, 317 (5th Cir. 1978)*.)). Once the causal connection between plaintiff's injury and defendant's act is shown, however, the courts begin **[**22]** to differ about what additional elements a plaintiff must prove in order to successfully bring a treble damage action.

HN3[] The cases suggest there are at least two, perhaps three, additional requirements for **[*1242]** standing to maintain a treble damage action. The first of these requirements takes many forms, as most courts vacillate between the two alternative techniques of (a) measuring the directness of the injury complained about and (b) asking whether the plaintiff falls within the target area of the violation. The second requirement, which some courts do not distinguish from the standing requirement, is that an antitrust plaintiff must prove he has suffered "antitrust injury," as defined in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1983)*; i.e., injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. [12] Finally, some plaintiffs must also address the issue of defensive and offensive use of "pass-on" damages, considered by the Supreme Court in *Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)* and *Illinois* **[**23]** *Brick Co. v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. For the most part, courts deal with this last issue in conjunction with their discussions of the

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[11] There is also a "*commerce clause*" requirement under Section 4; however, the parties have already stipulated to the fact that the practices examined in this case affect commerce.

[12] "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.'" *429 U.S. at 489* (emphasis in original) (quoting *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 125, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969))*.

standing argument, perhaps because of a dearth of Supreme Court opinions delineating the standing requirement; however, it is important to note that neither *Hanover Shoe* nor *Illinois Brick* are "standing" cases per se. Therefore, to the extent the policies these cases promote are relevant to a discussion of a plaintiff's right to bring a treble damage action and are not addressed in a court's discussion of a plaintiff's "standing" to bring such an action, they must be separately considered.

[24]** *Tests for Standing*

Lower federal courts have adopted various tests for antitrust "standing" to preclude suits by plaintiffs considered too remote from the alleged violation to be entitled to recover damages. Some cases have applied a "direct injury" test of standing which focuses on the relationship between the plaintiff and the alleged antitrust violator. *Repp v. F.E.L. Publications, Ltd., 688 F.2d 441, 444-45 (7th Cir. 1982)*; *Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1149 (6th Cir. 1975)*; *In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122, 127 (9th Cir. 1973)*, *cert. denied, 414 U.S. 1045 (1973)*. Generally, a plaintiff separated from the violator by one or more intermediate tiers of victims lacks standing under the direct injury test because, by analogy to tort law, the injury received is too remote to be fairly characterized as proximately resulting from the defendant's antitrust violation. ***HN4***[] Today, no circuit continues to apply a strict "direct injury" test. Instead, courts borrow from the language of that analysis, as well as from that of *Hanover Shoe* and *Illinois Brick,* to discourage or dismiss suits brought by plaintiffs whose **[**25]** injuries result from chains of events too speculative to justify treble damages. In essence, this is the position taken by VISA in arguing that NaBanco is not a "direct purchaser" of IRF and is therefore not eligible to recover overcharging damages. Only the merchant banks with which NaBanco contracts or, alternatively, the merchants themselves, are direct enough purchasers of IRF to be eligible to sue under Section 4 according to VISA. There is some support for VISA's position in cases which have held, based in part on the policies underlying *Illinois Brick,* that a plaintiff who purchased from a non-conspiring competitor of horizontal price-fixing defendants may not recover damages on the theory that the company from which it purchased charged an artificially inflated price under the "umbrella" of the defendant's price-fixing conspiracy. *Mid-West Paper Prods., supra,* at 587; *In re Folding Carton Antitrust Litigation, 88 F.R.D. 211, 219-20 (N.D. Ill. 1980)*; *In re Petroleum Prods. Antitrust Litigation, **[*1243]** 497 F. Supp. 218, 227-228 (C.D. Cal. 1980)*, *aff'd on other grounds*, *691 F.2d 1335 (9th Cir. 1982)*; *Liang v. Hunt, 477 F. Supp. 891, 896-97 (N.D. Ill. **[**26]** 1979)*; *cf.* *In re Petroleum Prods. Antitrust Litigation, 691 F.2d 1335, 1341 (9th Cir. 1982)* *(Illinois Brick* bars umbrella claim in the context of a multi-tiered distribution chain).

HN5[] The other test popular among courts and, as NaBanco is quick to point out, routinely employed in this Circuit, focuses on the nature of the antitrust violation and the plaintiff's relationship to the area of the economy claimed to have been injured by the defendant's conduct. *Const. Aggregate Transport v. Florida Rock Ind., 710 F.2d 752 (11th Cir. 1983)*; *Litton Sys., Inc., v. American Tel. & Tel. Co., 700 F.2d 785, 821 (2d Cir. 1983)*; *Aurora Enters., Inc. v. National Broadcasting Co., 688 F.2d 689, 692-93 (9th Cir. 1982)*; *In re Municipal Bond Reporting Antitrust Litigation, 672 F.2d 433, 435-36 (5th Cir. 1982)*; *Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 12-15 (1st Cir. 1979)*, *cert. denied, 446 U.S. 983, 64 L. Ed. 2d 839, 100 S. Ct. 2964 (1980)*; *see also* *Cleary v. Chalk, 159 U.S. App. D.C. 415, 488 F.2d 1315, 1319 n.17 (D.C. Cir. 1973)*, *cert. denied, 416 U.S. 938, 40 L. Ed. 2d 289, 94 S. Ct. 1940 (1974)* (citing decisions under the target area standard **[**27]** without expressly adopting that test). Called the "target area" test, it requires the plaintiff to establish that he was "within that section of the economy . . . endangered by a break-down of competitive conditions in a particular industry" and that the illegal practices were aimed at him. *Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975)*. *See also* *Yoder Bros., Inc. v. California-Florida Plant Corp., 537 F.2d 1347 (5th Cir. 1976)*; *see also* *Southern Concrete Co. v. United States Steel Corp., 535 F.2d 313 (5th Cir. 1976)*; *Buckley Towers Condominium, Inc. v. Buchwald, 533 F.2d 934 (5th Cir. 1976)*.

Unfortunately, courts which have used a target area analysis to determine antitrust standing have never agreed on the general requirements of the test, sometimes resulting in apparently inconsistent conclusions. This situation led the Court in *Yoder Bros., supra, 1360*, to comment: "A test focusing on the sector of the economy is more stated than applied." ***HN6***[] Similar kinds of problems in applying the "direct injury" test have led the Third Circuit, as well, (and to some extent the Eighth Circuit; *Paschall v. Kansas City Star Corp., 605 F.2d 403, 409-10 (8th **[**28]***

Cir. 1979)) to reject both tests in favor of a case-by-case approach called the "factual matrix" test. Cromar Co. v. Nuclear Materials & Equipment Corp., 543 F.2d 501 (3d Cir. 1976). The Sixth Circuit has adopted for antitrust matters the test employed for determining standing in administrative law cases, i.e. requiring the plaintiff to show that its affected interests arguably are within the "zone of interests" protected by the antitrust statutes. Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1148 (6th Cir. 1975); *see also* Chrysler Corp. v. Fedders Corp., 643 F.2d 1229, 1234 (6th Cir. 1981), *cert. denied, 454 U.S. 893, 70 L. Ed. 2d 207, 102 S. Ct. 388 (1981)*.

HN7[] At the heart of the Third Circuit's "factual matrix" test is a recognition of the reason for the existence of different Section 4 requirements; i.e., the multifaceted problem of determining when a person is sufficiently "injured in his business or property by reason of anything forbidden in the antitrust laws" so as to be eligible to sue for treble damages. Thus, the *Mid-West Paper Prods.* court concluded that only together do the separate Section 4 requirements "constitute the judicial gloss upon the words **[**29]** of § 4 by which the courts have patrolled the portals to a treble damage action." *Mid-West Paper Prods.,* supra, 582. Citing the observation of the Supreme Court in *Hawaii v. Standard Oil Co., 405 U.S. 251, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972)*, that underlying the precepts that guard access to Section 4 is the recognition that the treble damage action represents a congressional determination that the antitrust laws be enforced in large measure by "private attorneys general" who are encouraged to sue by the prospect of recovering three times their actual damages, the Third Circuit went on to say:

> **[*1244]** ***HN8***[] Accordingly, whether the issue is the definition of injury in § 4, or the use of pass-on theories, or the proper scope of the standing doctrine, the line drawing that necessarily takes place is informed by an inquiry into what posture best effectuates the dual purposes of the treble damage remedy, namely, compensating victims of antitrust violations for their injuries and deterring violators by depriving them threefold of "the fruits of their illegality," while at the same time furthering the overriding goal of the the antitrust laws - preserving competition. **[**30]** *Mid-West Paper Prods.* at 583 (quoting *Hawaii v. Standard Oil Co., 405 U.S. 251, 262, 92 S. Ct. 885, 891, 31 L. Ed. 2d 184 (1972))*. Aside from these basic objectives of antitrust enforcement, . . . additional concerns must be addressed in determining whether antitrust goals would be furthered by adopting a particular position. Among such concerns are whether a duplicative or ruinous recovery will result and whether resolution of the claim will unduly complicate the trial by necessitating the pursuing of complex and conjectural economic lines of causation and effect." (citations omitted).

This court could certainly do worse than to adopt these principles as its own in deciding whether or not NaBanco has standing to bring its treble damage action. This is not to say this court adopts the "factual matrix" test used by the Third Circuit. Neither, however, does the court feel bound by the dictates of the target area test as NaBanco urges. The Eleventh Circuit in *Construction Aggregate Transport (supra)* may have been correct in characterizing the Supreme Court's decision in *Blue Shield of Virginia v. McCready, 457 U.S. 465, 102 S. Ct. 2540, 73 L. Ed. 2d 149 (1982)* as implicitly **[**31]** sanctioning continued, flexible use of the target area test. The two recent Supreme Court decisions which have even addressed the standing issue, *Blue Shield* and *Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, while never going so far as to adopt any particular test, have acknowledged their existence as tools to be employed by courts to determine standing, as such tests are useful.

Nevertheless, the *Associated Gen. Contractors* case, following on the heels of *Blue Shield,* seems to have gone further than *Blue Shield* in not only refusing to adopt any of the particular tests used by various circuit courts but in actually delineating the skeleton of a new standing test for treble damage actions. The Supreme Court observed, in reference to different standing tests, that "these labels may lead to contradictory and inconsistent results." *Associated Gen. Contractors, supra.* Likening the task of federal judges to articulate a precise test to determine antitrust standing in treble damage actions to the struggle of common-law judges to announce a precise definition of the concept of "proximate **[**32]** cause," the Supreme Court emphasized the virtual impossibility of announcing a "black-letter rule that will dictate the result in every case," in light of the infinite variety of claims that can arise in the antitrust context. *Id. at 737*. Instead, the Supreme Court suggested that courts "analyze each situation in light of the factors set forth" in its analysis of the plaintiff's standing position in the case before it. *Id. at 908 n.33*.

In light of its opinion in *Associated Gen. Contractors,* the Supreme Court vacated and remanded two appeals court decisions for further consideration, [13] and, following that lead, several courts have concluded that the *Associated Gen. Contractors* opinion requires rejection of standing tests previously adopted by the courts of appeals. See *Southaven Land Co. v. Malone & Hyde, Inc., 715 F.2d 1079 (6th Cir. 1983)*; **[*1245]** see also *Meyer Goldberg, Inc. v. Goldberg, 717 F.2d 290 (6th Cir. 1983)*; *Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958 (3rd Cir. 1983)*; *Indium Corp. of Am. v. Semi-Alloys, Inc., 566 F. Supp. 1344 (N.D.N.Y. 1983)*; *Chelson v. Oregonian Publishing Co., 715 F.2d 1368 (9th Cir. 1983)*. The Eleventh **[**33]** Circuit in *Construction Aggreg., (supra)* while citing the Supreme Court's *Associated Gen. Contractors* decision, did not expressly consider the effect of that decision on the continued validity of the target area analysis. Thus, the scope of *Construction Aggreg.* as it relates to this question limits its application to the facts of this case. *Associated General Contractors, supra, at 908 n. 33*.

Whether or not *Associated General Contractors* truly represents a new standard for antitrust "standing," or is rather a purely semantical argument, this court adopts its language as the most thorough pronouncement of the Supreme Court to date on the standing issue in treble damage actions. At its core, *Associated General Contractors* **[**34]** admonishes us "to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them" in the context of common-law damages litigation in 1890. *74 L. Ed. 2d 723, 736*. As guideposts for this evaluation the Court pointed to "previously decided cases [which] identify factors that circumscribe and guide the exercise of judgment in deciding whether the law affords a remedy in specific circumstances." *74 L. Ed. 2d at 737*. In light of the facts before it the Supreme Court found at least two factors favoring judicial recognition of the plaintiff's antitrust claim: (1) a causal connection and (2) intent to harm, although as to this latter factor the Supreme Court reiterated its *Blue Shield* holding that "the availabliity of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators." *74 L. Ed. 2d 738*, (quoting *Blue Shield, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540*.) Factors favoring the defendants and which the Supreme Court concluded were controlling in *Associated Gen. Contractors* included: (1) "the nature of the plaintiff's alleged injury," (citing *Brunswick v. Pueblo Bowl-O-Mat)* **[**35]** 738 and (2) "the directness or indirectness of their asserted injury." 739. ***HN9***[] As to the issue of "directness" the Supreme Court first identified the chain of causation then highlighted the importance of finding an

> "identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement . . . [and therefore] diminish the justification for allowing a more remote party to perform the office of private attorney general." (p. 741).

As part of its discussion of the "directness or indirectness" of the plaintiff's harm, the Supreme Court also raised its concerns about highly speculative damage claims, saying:

> ***HN10***[] "The indirectness of the alleged injury also implicates the strong interest, identified in our prior cases, in keeping the scope of complex antitrust trials within practically manageable limits. These cases have stressed the importance of avoiding either the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." 741-42.

Turning now to the case at hand, the court first points out that a plaintiff's "standing to sue" is a preliminary matter **[**36]** to be evaluated in this circuit upon the pleadings alone. *Const. Aggregate Transport at 763*; *Yoder Bros. at 1359* (standing to sue is a preliminary matter to be evaluated upon the allegations of the complaint). NaBanco's allegations that it has been unable to compete against VISA member banks for merchant contracts due to the competitive advantage these banks enjoy from "on-us" transactions seem sufficient on their face to suggest a harm causally related to VISA's setting of an IRF. **[*1246]** VISA's argument that NaBanco's own conduct severs the chain of causation because it has had realistic alternatives available to it to avoid paying IRF misses the mark. ***HN11***[] The antitrust laws do not require a potential plaintiff to take extraordinary measures to avoid anticompetitive activity; in fact, this is one of the things the antitrust laws are designed to prevent. *Simpson v. Union Oil Co., 377 U.S. 13, 17, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)*; *Columbia Broadcasting System, Inc., v. ASCAP, 562 F.2d 130, 136 (2d Cir. 1977)*, *rev'd on other grounds, 441 U.S. 1 (1979)*.

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[13] *See, Industrial Inv. Dev. Corp. v. Mitsui & Co., 671 F.2d 876 (5th Cir. 1982), vacated,* ***103 S. Ct. 1244 (1983)****, on remand, 704 F.2d 785 (5th Cir. 1983)*; *Ostrofe v. H.S. Crocker Co., 670 F.2d 1378 (9th Cir. 1982), vacated,* ***103 S. Ct. 1244 (1983)****.*

Further, the court finds that, under any characterization of antitrust standing currently urged upon us, **[**37]** NaBanco is a technically proper party to bring suit for treble damages. Using the methodology developed by the Supreme Court in *Associated Gen Contractors,* the court does not find that plaintiff has alleged or proved any specific intent on the part of VISA to harm NaBanco or those who stand in NaBanco's shoes but neither is such intent a necessary prerequisite to Section 4 standing. Plaintiff's alleged injuries are of the type Congress sought to remedy in providing a private remedy for violations of the antitrust laws. This is not a case, like *Brunswick,* in which plaintiff argues that the anticompetitive behavior by defendant (here, the setting of IRF) led to loss of profits due to increased competition in the market. Rather, NaBanco complains that it has been unable to compete effectively with some VISA merchant banks due to price-fixing by VISA. NaBanco not only argues the potential for current competitive losses, but argues that innovative technological changes are being discouraged by VISA's anticompetitive activities. To the extent that such changes also present the possibility for increased competition in the future, NaBanco seems to have more than sufficiently met the **[**38]** requirement of Section 4 standing to bring its challenge to VISA's Interchange Fee Arrangement.

Finally, the court does not find that NaBanco's alleged harm is either too remote or indirect to prohibit it from bringing its treble damage action. In this case, the "chain of causation" between plaintiff's claimed injury and the alleged restraint promoted by VISA seems "direct" enough to sustain plaintiff's standing. To argue, as VISA does, that the more appropriate plaintiffs are the merchant banks because they alone are in privity with VISA is to ignore the economic reality. While it is true that VISA merchant banks remain ultimately responsible for IRF, they are not primarily liable for its payment in all cases. Primary liability also lies with NaBanco as the merchant banks's functional equivalent in those cases in which VISA merchant banks (in contract with NaBanco) choose not to process transactional paper generated by VISA card purchases. In this way NaBanco aids the smooth functioning of the VISA system, a role which VISA should be reluctant to attentuate inasmuch as some of its participating merchant banks evidently do not find it cost-effective to perform the processing function **[**39]** themselves. Further NaBanco points to significant technological changes which it has made to accommodate changes in VISA's processing methodology. Bull TR. 593 (5/12/82) P. Ex. 1172; D. Ex. 1180. Insofar as these are changes which have not had to be made by VISA merchant banks which use NaBanco or NaBanco-like institutions to process transactional paper, VISA member banks are hardly in a position to say that they are more directly affected by the setting of IRF than NaBanco.

Similarly, VISA's argument that *Illinois Brick* outlaws treble damages for "functional equivalents" is misplaced. *Associated Gen. Contractors* demonstrates that, to the extent that *Illinois Brick* is relevant to antitrust standing, it is so in how the policies identified and promoted by that decision relate to the standing issues presented in this case. The *Illinois Brick* Court was primarily concerned with problems of dual recovery and the possibility of having to calculate the variable incidence of harm experienced by different antitrust victims where offensive use of pass-on **[*1247]** damages was alleged. Arguably, these are problems which also arise in the context of this case. For instance, **[**40]** it is possible, as VISA points out, that some of the merchant banks with which NaBanco contracts actually absorb some of the costs and economic consequences associated with IRF in their individual contracts with NaBanco. This would, of course, cause problems for the court in calculating the extent of damage borne by NaBanco versus that borne by the merchant banks with which NaBanco contracts. But identifying the merchant banks as the more appropriate plaintiffs to bring this action does not eliminate our problems regarding the calculation of damages. In fact, it compounds them. At least when NaBanco pays IRF we can assume, even if not with complete accuracy, that it bears the full economic cost of that payment without having to examine its individual contracts with merchant banks. It becomes harder for us to make that assumption in the case of merchant banks which use NaBanco since these banks do not pay IRF directly but only by virtue of whatever amount their contracts with NaBanco suggest they pay. We have similar problems with VISA's alternative argument that merchants, not merchant banks, are more appropriate plaintiffs than NaBanco to bring this suit. If what VISA is really arguing **[**41]** is ***HN12***[] the defense of pass-on damages, the court notes that this defense is only applicable where there is an existing cost-plus contract or its functional equivalent; i.e., a contract in which the impact of the illegal overcharge is determined in advance of the actual overcharge without reference to the interactions of supply and demand and other market forces. *Hanover Shoe, 392 U.S. at 494* (supra); *In Re Plywood Antitrust Litigation 655 F.2d 627 (5th Cir. 1981)*.

An argument that NaBanco's contracts were really cost plus or a legal equivalent is, at least, superficially persuasive. However, NaBanco's response to what it perceived to be the IRF problem was varied and thus, presents a set of facts in which the "cost plus" assertion appears wanting.

Further, VISA's standing agreement suffers from a consideration of the second of the dual concerns of the *Illinois Brick* Court, the impairment of anti-trust enforcement by a reduced incentive to sue. In *Illinois Brick* and *Hanover Shoe* the Supreme Court voiced this particular argument in terms of the diffusion of benefits to each plaintiff when potential recoveries had to be divided among a large group of plaintiffs down **[**42]** the line of economic causation, saying: "Added to the uncertainty of how much of an overcharge could be established at trial would be the uncertainty of how that overcharge would be apportioned among the various plaintiffs." *Illinois Brick at 725*. By allowing enforcement only by those who actually pay IRF, we limit the pool of potential plaintiffs. Thus, the concern for reducing the effects of treble damage suits brought by indirect purchasers with a smaller stake in the outcome is alleviated. *Illinois Brick at 724*.

Even more importantly, however, we assure ourselves of a potential plaintiff at the very least. NaBanco does fall prey to some of the same conflicts of interest which beset many VISA member banks which both issue cards and serve merchants, raising questions about its ability to pursue vigorously any cause of action against VISA; however, in arguing that only merchant banks have standing to sue it, VISA essentially invites its members to sue themselves for antitrust violations from which they in fact may benefit. While the possibility of suit by VISA member banks does exist, it is also more reasonable to conclude that member banks will attempt to ameliorate any **[**43]** problems they have with the IRF via their more direct access to the VISA Board of Directors. This opportunity is less available to NaBanco as a VISA non-member.

Injunctive Relief

Aside from seeking treble damages, NaBanco asks the court to enjoin VISA from continuing to conspire to fix prices. This request is based on § 16 of the Clayton **[*1248]** Act, *15 U.S.C. § 26*, which states in relevant part:

> ***HN13***[] 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. . . .

Given the fact the court has already recognized NaBanco's standing under § 4 of the Clayton Act, an elaborate discussion of NaBanco's standing under § 16 is unnecessary. ***HN14***[] Most "courts take a less constrained view of standing in suits involving injunctive relief than in those demanding treble damages . . . ." *Jeffrey v. Southwestern Bell, supra, at 1132*. **[**44]** Even indirect purchasers can maintain actions for injunctive relief. *In re Beef Indus. Antitrust Litigation, 600 F.2d 1148, 1167 (5th Cir. 1979)*, *cert. denied, 449 U.S. 905 (1980)*. This is because "the policy considerations underlying the pass-on rule are not implicated in claims for injunctive relief." *Id.* Neither the risk of exposure to multiple liability or the difficulty in tracing the allocation of the overcharging among different levels of purchasers is related to the issue whether a party should be entitled to sue for injunctive relief. Nor does the position taken in *Illinois Brick* that effective enforcement of the antitrust laws requires that only direct purchasers be permitted to sue for treble damages have validity in the context of § 16.

HN15[] To achieve standing under § 16 then, all NaBanco must prove is that it is threatened with loss or injury cognizable in equity proximately resulting from the antitrust violation. *Mid-West Paper Products* at 591. Some courts have interpreted this proximate cause standard as one "no more rigorous than the general rule of standing." *Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1174 (5th Cir. 1976)*. Even if this **[**45]** were not the case, and the line drawing for proximate causation was necessarily to be drawn somewhere between the general rule of standing and standing for treble damage actions, that need not concern us here. This is not a case involving facts making it necessary to "measure the outer range of standing to sue under § 16. *Mid-West Paper Products* at 593. NaBanco is not like "potential plaintiffs . . . who may only be remotely affected by the ripples caused by the conspirators' tampering with the supply and demand curve." *Id.* NaBanco contends " . . . that under all circumstances prevalent in the real economic world, money is passing from [its] hands into the pockets of [VISA member banks] as a result of [IRF]. . . ." *Mid-West Paper Products* at 593. In order to participate in the system, NaBanco must pay IRF or it cannot access issuer banks to complete payment transactions. These facts seem sufficient in light of the policies behind § 16 to give NaBanco standing.

PER SE VERSUS RULE OF REASON

Section 1 of the Sherman Act reads in pertinent part as follows:

> § 1 **HN16**[] Trusts, etc. in restraint of trade illegal; penalty
>
> Every contract, combination in the form **[**46]** 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 enacting Section 1, Congress condemned in broad language concerted conduct which restrains trade. With such guidance as might be found in the common law cases, it left to the courts the scope and meaning of this mandate. As has been the case with Section 16 of the Clayton Act, the very breadth of the condemnation unavoidably gives rise to ambiguity, leading courts long ago to conclude that Congress could not have literally meant to ban every contract which in any sense restrains trade. As Justice Brandeis pointed out in *Board of Trade of the City of Chicago v. United **[*1249]** States, 246 U.S. 231, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*:

> **HN17**[] 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 **[**47]** or whether it is such as may suppress or even destroy competition. *Id. at 238*.

In the years since the adoption of the Sherman Act in 1890, a number of competing views have been put forward as to its meaning. **HN18**[] Stated simply, however, the governing law has been that the Sherman Act bans all concerted arrangements which are adopted for the purpose of reducing competition, or which, regardless of purpose, have a significant tendency to reduce competition. However, arrangements which are adopted for and tend to to achieve other legitimate purposes do not fall within the condemnation of the Act merely because of some incidental and inconsequential restraining effect on competition.

This general position has been reached, not directly, but through two subsidiary rules, **HN19**[] the per se doctrine and the rule of reason, which taken together tend to condemn arrangements which have the purpose or effect of significantly restraining competition and to validate those which do not. The per se rule forecloses any analysis of the purpose of a restraint or the nature, extent and degree of its market effect, thus avoiding "the necessity for an incredibly complicated and prolonged economic investigation **[**48]** into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable." *United States v. Northern Pacific Ry., 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. Thus the per se rule is generally limited to those categories of restraints for which no elaborate study of an industry is needed to establish that their nature and effect is "plainly" or "manifestly" anticompetitive. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 8, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*; *Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 646, 64 L. Ed. 2d 580, 100 S. Ct. 1925 (1980)*; *National Society of Professional Engineers v. United States, 435 U.S. 679, 692, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*; *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. To be manifestly anticompetitive, agreements or practices must have a "pernicious effect on competition and lack . . . any redeeming virtue." *United States v. Northern Pac. Ry., 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514* (quoted in *Sylvania, 433 U.S.* ***[**49]*** *at 58*).

HN20[] The classic definition of the rule of reason was enunciated in *Standard Oil, supra,* if asserted in its embryonic form in *United States v. Joint Traffic Ass'n, 166 U.S. 290, 17 S. Ct. 540, 41 L. Ed. 1007 (1897)*. As construed in *Standard Oil,* Section 1 of the Sherman Act was an "all-embracing enumeration to make sure that no form of contract or combination" by which undue restraint was achieved "could escape condemnation." *221 U.S. 1, 58-60*. The function of "reason" in the analysis is to discriminate between restraints which are "undue" and those which are not. In *Professional Engineers* the Supreme Court indicated that, contrary to its name and the suggestion of Mr. Justice White in *United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540 (1898)*, the rule of reason "does not open the field of inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason." *Professional Engineers, 435 U.S. at 688*. Instead, the basic inquiry is limited to whether the restraint in question "is one that promotes competition or one that suppresses competition." *Id. at 691*. The opinion stressed that **[**50]** such an inquiry "is **[*1250]** confined to a consideration of impact on competitive conditions" and that the function of the court is "to form a judgment about the competitive significance of the restraint." *Id. at 690, 692*. Because the inquiry is limited to determining the "market impact" on competition, defenses "based on the assumption that competition itself is unreasonable" or upon considerations unrelated to the effect of the restraint on competition are irrelevant. *Id. at 696*.

NaBanco's Per Se Argument

At least twice before, [14] this court has considered and rejected NaBanco's argument that the action of the VISA Board of Director's in establishing and setting a fixed fee for interchange transactions is a "per se" violation of *15 U.S.C. § 1*. Despite this court's previous rulings on the matter, NaBanco has pressed the argument that the relevant market in this case is the market consisting of the five major general purpose credit cards. NaBanco argues further that the proper analytical framework within which to analyze whether VISA's activities have any competitive impact is one which consists of three separate and distinct "markets": one for card-issuing services; **[**51]** the second for merchant-servicing banks; the third for "IRF-like" interchange services. The card-issuing market consists of banks and other institutions which offer consumers various credit card services having a multiplicity of characteristics. Included among these characteristics are credit options and other money management capabilities, varying degrees of card recognition and/or acceptance rates, different convenience qualities, etc. The traits associated with the market for merchant banks are two-fold, including what NaBanco calls a "factoring service" and an "account carrying" or "clearinghouse" service. By "factoring service", NaBanco means the initial contract by which a merchant bank or a "NaBanco-like" institution agrees to "purchase" merchant receivable items created by consumer bank credit card use; NaBanco uses the second two terms to identify the mechanics of processing claims and paying accounts.

[52]** Each of these separate and distinct markets are national in scope according to NaBanco [Bull TR. 640-41 5/12/82], the competitors in the card-issuing market allegedly including not only VISA and Mastercard but also the traditional T&E cards (American Express, Carte Blanche, Diner's Club), certain debit cards, and bank ATM cards. NaBanco's description of the competitive actors in the merchant-servicing market includes those banks which act as merchant-servicing banks, as well as other entities such as NaBanco which provide the same kinds of general services to merchants, with varying degrees of emphasis, facilities, and expertise.

As mentioned earlier, NaBanco has taken the position that merchant banks are selling receivables to issuer banks, and the issuer banks, through the control of the VISA Board of Directors, are directly fixing the discounted price of those sales by means of the Base II exchange fee imposed on those members which elect to use Base II.

The Facial Unreasonableness Test

Alternatively, NaBanco argues that should the court determine the IRF is not per se illegal the test the court should apply in determining IRF's legality under the antitrust laws is ***HN21***[] the **[**53]** "facial unreasonableness test." This test, first enunciated in *United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980)* is actually a two-

[14] NaBanco has raised the issue of per se validity several times: (1) two motions for preliminary injunction; (2) two motions for partial summary judgment; (3) trial brief; and (4) at trial. By order dated September 15, 1980, this Court denied NaBanco's various summary judgment motions.

part test which, unlike either the per se or rule of reason tests, shifts the burden of proof from the plaintiff to the defendant; i.e., once the plaintiff has sustained its **[*1251]** burden of proving that a defendant's activities are a "significant restriction" affecting competition and that the defendant has significant market power, the burden then shifts to the defendant to show that the particular practice in question is "justified by the competitive needs" of the defendant and also both "reasonably necessary to the accomplishment of the [defendant's] legitimate goals" as well as narrowly tailored to that end. *Id. at 1370*.

VISA's Answer to NaBanco's Per Se Argument

NaBanco buttresses its per se argument by pointing to a long line of cases, beginning with *United States v. Trenton Potteries Co., 273 U.S. 392, 71 L. Ed. 700, 47 S. Ct. 377 (1927)*, in which price fixing, as a concerted activity among competitors, is treated as a "naked" price constraint. *(See also Joint-Traffic Ass'n, supra, 568*.) This is **[**54]** true whether the price "fixed" is the ultimate price of a good or service or simply a component of the ultimate price. *Catalano, 446 U.S. 643, 645, 64 L. Ed. 2d 580, 100 S. Ct. 1925 (1980)*. Further, a price-fixing agreement that establishes maximum prices is considered to be as illegal as one establishing minimum prices. *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*; *see also Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259 (1951)*.

This jurisprudence of per se price fixing validity exists because, for the most part, it has been difficult for courts to conceive of any example in which consequent enhancement of competition arises in the context of price fixing or, even if such enhancement occurred, that it could be so great as to render the restraint insignificant in accordance with the dictates of the rule of reason. *Lawrence Sullivan Antitrust,* W. Publishing Co., St. Paul, Minn. (1977) p. 196. Almost all the cases upon which NaBanco relies, however, display three unifying characteristics: (1) the practices examined were related to the market in such a way that if they **[**55]** were to have any effect at all it would be on price formation, (2) the practices lacked any significant degree of integration of functions among the competitors, and (3) the arrangements were not ones which helped to make or improve a market by facilitating trading, exchanging information, standardizing product or the like. Since price formation was affected, if there was any consequence at all, it is entirely fair and functionally accurate for courts to treat arrangements like these as naked restraints.

VISA, however, has successfully opposed NaBanco's arguments in prior proceedings in this case on the grounds that NaBanco's per se price fixing theory is simply inapposite to the economically complex practices at issue in this case. While acknowledging high levels of vigorous competition at both the card-issuing and merchant-servicing ends of its bank credit card system, VISA challenges NaBanco's "tri-market theory." First it contends that "issuer" banks and "merchant" banks are not two separately competing sets of VISA members. The terms are useful only as indicators of a member's role in any single interchange transaction. Nor is it accurate, says VISA, to speak of issuing and merchant **[**56]** banks as members with adverse interests. VISA further contends that it is meaningless to speak of a "product" offered at either the card-issuing or merchant-servicing end separated from its counterpart at the other. Bank credit cards, VISA argues, are useful only to the extent they provide the cardholder with purchasing options. All the characteristics which NaBanco asserts are so important to credit card differentiation, therefore, are only important to the extent they enhance any particular credit cardholder's purchasing options by increasing the numbers and kinds of participating merchants. Concomitantly, the numbers and kinds of participating merchants depends to a great extent on the numbers and kinds of consumer cardholders, as well as characteristics of individual merchant-servicing banks. In fact, (VISA asserts) the particular demand for merchant banks suggested by NaBanco would not exist but for **[*1252]** the demand by consumers for purchasing options. Viewed from the perspective of the participants, for the VISA service to exist at all there must be members willing to issue cards and members willing to sign merchants.

Thus, argues VISA further, the relevant market in this **[**57]** case is the market consisting of all nationwide payment services used in retail sales, including VISA, Mastercard, T&E cards, merchants' proprietary cards, merchants' open book credit, cash, travelers cheques, ATM cards, personal checks and check guarantee cards, rather than the market for the Interchange Fee which VISA contends is either non-existent or at most an example of market failure at its most extreme since only one buyer (the cardholder's issuer bank) reasonably exists for each piece of transactional paper. In making its argument then, VISA likens itself to a joint venture. The setting of IRF, far from being a naked restraint of trade as NaBanco asserts, rather becomes a device for sharing costs within the VISA system. This device, which, VISA argues is necessary in order to produce the VISA product, thereby enhances "interbrand" competition which VISA argues "is the primary concern of the ***antitrust law***." *Sylvania, 433 U.S. 36, 52 n.19, 53 L. Ed. 2d 568, 97 S. Ct. 2549*. Even if IRF were not necessary to market the VISA product, VISA argues it should be analyzed under the rule of reason because it is an agreement internal to a joint venture which yields efficiencies beneficial **[**58]** to competition, that its members, acting alone, could not offer, and which allows the venture to offer a product which is different from, and greater than, the sum of the individual products of its members. *Broadcast Music Inc., v. CBS, 441 U.S. 1, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*; *United States v. Multi-Realty, (supra).*

Rejection of the Per Se Rule

Previous discussions have consistently recognized the pro-competitive or efficiency creating potential of joint ventures and other cooperative organizations. ***HN22***[] While joint ventures are not immune from antitrust scrutiny, the anti-trust laws allow restraints necessary to accomplish pro-competitive objectives of joint ventures and similar organizations. *See, e.g., United States v. Realty-Multi List, Inc., 629 F.2d 1351, 1368 (5th Cir. 1980)*; *Central Iowa Power & Federal Energy Regulatory Commission, 196 U.S. App. D.C. 249, 606 F.2d 1156, 1163 (D.C. Cir. 1979)*. When these restraints, sometimes called "ancillary restraints" are addressed, per se prohibitions are not applied because it cannot be said that in the aggregate, the gains from imposition of the per se rule will far outweigh the losses. *Board of Regents of* **[**59]** *the University of Oklahoma v. National Collegiate Athletic Ass'n., 707 F.2d 1147, 1153 n.6 (10th Cir. 1983), cert granted; 104 S. Ct. 272 (1983)*. As the Supreme Court recognized in *Broadcast Music Inc., v. CBS, 441 U.S. 1, 23, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*, joint ventures "are not usually unlawful, at least not as price fixing schemes, where the agreement on price is necessary to market the product at all." *Accord, Arizona v. Maricopa County Medical Society, 457 U.S. 332, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*. Accordingly, such agreements are analyzed under the rule of reason so that courts can weigh their pro-competitive effects. *See, e.g., North American Soccer League v. Nat'l Football League, 670 F.2d 1249, 1259 (2d Cir. 1982)*, *Los Angeles Memorial Coliseum Commission v. National Football League, 468 F. Supp. 154 (C.D. Cal. 1979)*, reversed on other grounds *634 F.2d 1197 (9th Cir. 1980)*; *Northern Bank & Trust Co. v. National Bankamericard, Inc., 485 F.2d 119 (8th Cir. 1973) cert denied, 415 U.S. 918, 39 L. Ed. 2d 473, 94 S. Ct. 1417 (1974)*; *Smith v. Pro Football, Inc., 193 U.S. App. D.C. 19, 593 F.2d 1173 (D.C. Cir. 1978)*; *National Bank* **[**60]** *of Canada v. Interbank Card Ass'n, 507 F. Supp. 1113, 1122 (S.D.N.Y. 1980)* aff'd, *666 F.2d 6 (2d Cir. 1981)*; *Broadcast Music, Inc., v. Moor-Law, Inc., 527 F. Supp. 758, 765 (D. Del. 1981) aff'd 691 F.2d 490 (3d Cir. 1982)*; *Palmer v. Roosevelt Lake Log Owners Ass'n, 551 F. Supp. 486 (E.D. Wash. 1982)*.

[*1253] Given this background of jurisprudence, the Court concludes that IRF should be analyzed under the rule of reason because it is an agreement on the terms of interchange necessary for VISA to market its product and be an effective competitor. *Broadcast Music Inc., v. CBS 441 U.S. 1, 23, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*. The *Broadcast Music* case teaches that ***HN23***[] in separating those price-fixing arrangements to which the per se rule is to be applied from those to be examined under a rule of reason analysis, the Court is to assess whether "facially" the practice "always or almost always" tends to restrict output, or whether "facially" it is likely to contribute to the creation of "economic efficiency." Other than the testimony of one of NaBanco's experts, Louis A. Guth, plaintiff has failed to produce any evidence suggesting the existence of separate and **[**61]** independent card-issuing and merchant-servicing markets. All the evidence presented at trial has pointed to a complex set of inter-relationships between cardholder and merchant demands for the VISA service suggestive of a joint venture -- even if VISA cannot be properly characterized as one in the strictest sense of the word.

In VISA's case, profits and losses are not specifically shared among the various VISA members, nor is there any commingling of management functions. Furthermore, to the extent possible, each member engages as an independent unit in economic competition with other VISA members with respect to various aspects of their common venture. For example, merchant banks compete with issuer banks to sign up card-holders and, to the extent that certain banks perform both functions, VISA members compete with each and every one of their fellow affiliates.

Nevertheless, while considerations such as these may be important to courts considering joint venture labels, there is no requirement, for example, that a joint venture-like entity integrate or share costs in some prescribed fashion in order to survive per se scrutiny. See Louis, *"Restraint Ancillary to Joint Ventures and* **[**62]** *Licensing Agreements: Do Early and Topco Logically Survive Sylvania and Broadcast Music?"* 66 Va.L.Rev. 879, 896 n.114 (1980); *Los Angeles Memorial Coliseum Commission v. National Football League, 468 F. Supp. 154, 163 (C.D. Cal. 1979)* (applies rule of reason even though "profits and losses are not shared.)"

The fact that VISA members have integrated to the extent of agreeing on the terms of interchange, but have not fully integrated and still compete for cardholders and merchants, is typical of pro-competitive joint ventures and serves to maximize VISA's competitive potential. The fact of the matter is that even NaBanco does not go so far as to challenge the whole plethora of ancillary regulations attendant to the VISA structure, including, for example, the obligation of all issuer banks to reimburse the merchant banks (and thus the "NaBancos" in the system) for processing the transactional paper generated by their cardholders' use of their VISA cards. [15] It is, perhaps, appropriate to note parenthetically that so long as there are benefits to be parlayed into profits, NaBanco has elected to remain in VISA's beneficial ambit. Even if the Court were to conclude that VISA **[**63]** is not akin to a "joint venture;" we could not ignore NaBanco's reluctance to "throw the baby out with the bath water."

In any event, IRF serves to share substantial costs and risks between VISA members, and interchange transactions are an integration because in such transactions two different members combine their activities in order to offer a service to a cardholder and a merchant.

Thus, VISA is a joint venture in that terms most meaningful sense, i.e., whether or not the composite entities compete with one another in any meaningful sense in the marketplace under examination. Unwarranted emphasis upon formalistic aspects of the relationship of VISA and its member institutions ignores the subtle but more **[*1254]** significant interdependency of the members and their indivisibility with VISA. Assuming that VISA cardholders want unplanned **[**64]** and rapid access to merchants anywhere, regardless of whether their own bank signed a particular merchant, and that VISA merchants want unplanned and rapid access to each cardholder who enters their shop, regardless of whether the merchant's bank signed the cardholder, then some before-the-fact agreements must be made. The principal purpose of these agreements with member banks does not appear to be to improperly fix prices as NaBanco asserts but rather to provide a service which each member bank could not alone provide, namely, universal payments service which ensures that a VISA card will be honored by any merchant regardless of which bank issued it so long as that merchant displays the VISA logo on its door. Given past and current interstate banking regulations which once flatly proscribed and continues to inhibit the growth of single bank entities which cross state lines, it is hard to conclude otherwise. Even assuming that each VISA member could afford to issue its own card, there would be no assurances of universality since issuer banks and merchant banks might still differ as to exchange rates. Cardholders would either have to carry a suitcase full of cards representing the **[**65]** different banks which have contracts with particular merchants or suffer the disappointment of being unable to transact certain purchases with merchants whose merchant banks refused for some reason to contract with the cardholders' bank; to say nothing of the inconvenience and dissatisfaction of the merchant who must check each card out with its merchant bank even if it may mean that he will lose a sale. Prohibiting IRF would thus undermine "interbrand" competition, "which is the primary concern of the ***antitrust law***." *Continental T.V. Inc., v. GTE Sylvania, Inc., 433 U.S. 36, 52 n.19, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*.

Even if IRF were not necessary to market a payment services product of the type in question, it should be analyzed under the rule of reason because it is an agreement internal to a joint venture which yields efficiencies beneficial to competition. VISA's members, acting alone, could not offer such efficiencies which indeed allow the venture to offer

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[15] As a further example, merchants in the VISA system are required to honor proper customer requests to use the card, and, of course, to abide by other system regulations.

a product which is different from, and greater than, the sum of the individual products of its members. *Broadcast Music, supra*; *Realty Multi List, Inc., supra.*

Broadcast Music and *Maricopa* do not **[**66]** require the court, as NaBanco contends, to make a subjective judgment as to whether a joint ventures product is "unique." Rather, they call for ***HN24***[] the court to compare the product of the venture to the individual offerings of the venture's members and determine whether the venture offers pro-competitive abilities which its members acting alone could not offer. *Broadcast Music, 441 U.S. at 21-23*; *United States v. Columbia Pictures Industries, 507* F. Supp*. 412, 430 (S.D.N.Y. 1980).* Thus the agreement to market compositions in *Broadcast Music* survived the per se test even though the individual composers could market their compositions on their own. *441 U.S. at 23-24*. The consolidation of thousands of what would otherwise be balkanized local cards into one internationally accepted card makes the VISA system a viable and competitive whole which is "truly greater than the sum of its parts." *Broadcast Music, 441 U.S. at 21-22*. A similar agreement (governing a cost sharing arrangement reimbursing one airline which provides credit card services to a passenger who flies on a different airline) accordingly was analyzed under the rule of reason and ultimately upheld by the Civil **[**67]** Aeronautics Board in *In Re UATP - 1976 Agreements,* 85- 11 C.A.B. 2481 (1980).

Further, IRF is properly analyzed under the rule of reason because it is not mandatory. Acting on behalf of its principals, NaBanco is and always has been free to negotiate different terms of interchange, (not using Base II) and some VISA issuers have been willing to make alternate arrangements. ***HN25***[] A practice is not unlawful **[*1255]** per se where as in this case, there is no legal, practical or conspiratorial impediment to making alternate arrangements. *Broadcast Music, Inc., v. CBS, 441 U.S. 1, 24, 60 L. Ed. 2d 1*, *99 S. Ct. 1551 (1977); In Re ATP-1976 Agreements,* 85-11 C.A.B. 2481 (1980).

The Supreme Court's decision in *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)* confirms this analysis. The agreement in *Maricopa* was held to be illegal per se because, unlike IRF, it fixed the prices charged to third parties by individual doctors for their own services. *102 S. Ct. at 2480*. Moreover, and also in contrast with the IRF arrangement, the *Maricopa* court granted summary judgment only after reporting six separate times -- that nothing **[**68]** in the record even arguably supported the defendants' assertion that agreement on a fee was necessary to market the product. *102 S. Ct. at 2477, 2477-78 n.26, 2478, 2479 n.33*. At the same time, the court in *Maricopa* confirmed the approach set forth in BMI and emphasized that agreements on price which are inherent in the structure and successful operation of a bona fide joint venture can be "perfectly proper." *102 S. Ct. at 2480*.

In *Northern Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119 (8th Cir. 1973)*, *cert denied, 415 U.S. 918, 39 L. Ed. 2d 473, 94 S. Ct. 1417 (1974)*, the Court refused to apply the per se rule because of lack of experience with the economics of a fledgling industry. In discussing a different by-law of VISA's predecessor NBI, the Court said:

> The bank card industry is a relatively new one and, with over eight billion dollars in annual business, a very large and important segment of our economy. Considering the importance of the industry and the lack of definitive information relating to competition therein, it would be a mistake to determine this case of first impression on a per se basis. This is especially true where it may result **[**69]** in the dilution of competition or the elimination of one of the two competitors, where this is not an aggregate of illegal restraints such as price fixing or exclusive territorial allocations and where the initial purpose in forming the joint venture, to produce a national credit card, is obviously not illegal. *485 F.2d 119, 129-130*.

Courts have been reluctant to apply the per se rule in cases involving whole markets which do not readily fit into the antitrust context. Prime examples of this type of situation are those cases involving challenges to the rules of sports associations. There is no compelling reason why many of the characteristics the courts have found to be fundamental to those organizations should not be found to be equally important to the functioning of the VISA system. Like the sports association, the VISA system is an example of an association where cooperation is as much a necessary part of the "game" as competition. Just as there is a need to establish some "rules of the game," affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, [16] in order for there to **[**70]** be sports contests at all, so too there must be "rules" to enable the efficient coordination of the otherwise disparate operations of VISA members. Furthermore, just as the establishment of game rules by professional organizations does not mean that individual member clubs do not compete for players and fans or between each other on the playing field, the creation of VISA by-laws has not precluded competition among individual VISA members. In this way, cooperation and competition have made for the best of all possible worlds, a world which would probably not exist but for this particular combination. In *NCAA v. Board of Regents, (supra)*, the Supreme Court, while finding the television plan inquestion violative of the Sherman Act (because of its clear restraints), refused to apply the per se rule in a setting which (absent similar restraints) lends itself to comparison with the functional needs of the VISA system.

[71] [*1256]** In choosing to apply the rule of reason analysis to this case, the court also rejects the applicability of the so-called "facial unreasonableness" theory set forth in *Broadcast Music* and applied in *Realty Multi List.* First, it should be noted that *Realty Multi List* is a group boycott case, and not a case of alleged horizontal price fixing as is this case. In any event, if we assume that *Realty Multi List* applies to the facts of this case, it presents only a poor variation of the rule of reason test appropriate here in light of the "joint venture" nature of the VISA system. The *Realty Multi List* court suggests as much when it says: "This argument is, of course, a version of the rule of reason." *Id. at 1369*.

The facial unreasonableness theory can properly be invoked only where the practice at issue constitutes a "significantly restrictive rule of a combination or trade association with significant market power, which lacks competitive justification or whose reach clearly exceeds the combination's legitimate needs." *Id. at 1370*. Membership rules, such as those at issue in *Realty Multi List,* present viable candidates for invalidation as "significantly **[**72]** restrictive" under this test since they presumptively preclude competitors from participating in an essential market. But cost sharing arrangements among partners or venturers are not patently "restrictive" for the reasons addressed by this court in rejecting per se treatment.

Moreover, even if IRF appeared to be sufficiently "restrictive" to invoke the facial unreasonableness theory, a rule of reason analysis could be avoided only if plaintiff demonstrated that VISA possessed "significant market power" since it is, of course, unlikely that serious anticompetitive effect will result from exclusion from membership [or restrictive practices]" if such power is lacking. *Id. at 1372* at n.40. In this respect, the contrast between the VISA situation and the multiple listing service in *Realty Multi-List, Inc.,* is striking. Multiple listing services involving local markets and exclusionary membership rules almost invariably possess the requisite degree of market preclusion. Indeed, in *Realty Multi List,* the issue was hardly disputed, and there the issue was reserved for trial. *Id at 1372 n.39*. Here consideration of the relevant market reveals that VISA has no significant **[**73]** market power, notwithstanding plaintiff's suggestion that the court need not undertake a proper inquiry into demand cross-elasticities.

Furthermore, if we assume NaBanco could cross the "market power" threshold, the facts adduced at trial demonstrate sufficient pro-competitive justification to require that a full rule of reason inquiry be undertaken. The need for a cost-sharing mechanism within the VISA joint venture is itself sufficient justification as *Broadcast Music* indicates. This Court has already recognized, for example, that the question whether IRF could be replaced by "competition" at least presents an issue of fact, if we indulge the assumption that a negative answer to that question is not obvious.

In sum, care must be taken to avoid "easy labels," whether appearing in Latin (per se rules) or convenient shorthands ("facial unreasonableness"). The critical inquiry under the Sherman Act must be whether a challenged practice is anti-competitive in its economic effects. The explanation this court includes below of why IRF is highly competitive and thus lawful under the rule of reason confirms the conclusion that condemning the fee out of hand, as either per se unlawful **[**74]** or "facially unreasonable," would be a mistake.

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[16] *NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 82 L. Ed. 2d 70, 104 S. Ct. 2948*.

RULE OF REASON ANALYSIS

Having, hopefully, illuminated the passage to a consideration of the reasonableness of VISA's fee plan, the court now turns to an analysis of the competitive effects of IRF as an agreement ancillary to a type of "joint venture." **HN26**[] Under the rule of reason test it is plaintiff's burden to establish that the practice complained of has an adverse impact on competition. *Graphic Products Distributors, Inc., v. Itek Corp. 717 F.2d 1560, 1573 (11th Cir. 1983)*. It should be stressed, however, that **[*1257]** in making this a determination, the relevant question is not whether the challenged practice is the *most* competitive device that can be imagined, or the "least restrictive," but simply whether it is reasonable; i.e., not "unduly" restrictive of competition. *GTE Sylvania, Inc., supra, 49*; *National Auto Brokers Corp. v. General Motors Corp., 572 F.2d 953, 960 (2d Cir. 1978)*, *cert. denied, 439 U.S. 1072, 59 L. Ed. 2d 38, 99 S. Ct. 844 (1979)*. So long as a practice is "fairly necessary" to achieve a legitimate purpose, it is not unlawful under the rule of reason. *Broadcast Music, Inc. v. Moor-Law, **[**75]** Inc., 527 F. Supp. 758, 769 (D. Del. 1981)*, quoting *American Motor* *Inns v. Holiday Inns, Inc., 521 F.2d 1230, 1248-49 (3d Cir. 1975)*. In applying this standard, the competitive benefits of the challenged practice are weighed against its alleged harmful effects and a violation of the Sherman Act will be found only where the balance tips decidedly in favor of the latter. *Columbia Broadcasting System, Inc. v. American Soc. of Composers, Authors and Producers, 620 F.2d 930, 934* (2d Cir.), *cert. denied, 450 U.S. 970, 67 L. Ed. 2d 621, 101 S. Ct. 1491 (1981)*; *National Bank of Canada v. Interbank Card Ass'n., 507 F. Supp. 1113, 1122 (S.D.N.Y. 1980)*.

As suggested above, **HN27**[] plaintiff must shoulder the burden, in "rule of reason" presentation to demonstrate the balance tipping in plaintiff's favor; that is, demonstrating that alleged "anticompetitive effects of the setting of an IRF decidedly outweigh the pro-competitive benefits of the practice. *See, e.g., Red Diamond Supply Inc., v. Liquid Carbonic Corp. 637 F.2d 1001, 1005, 1007* (5th Cir.; *cert denied, 70 L. Ed. 2d 102 (1981)*; *Continental TV, Inc., v. GTE Sylvania Inc., 433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 **[**76]** S. Ct. 2549*, *Columbia Broadcasting System, Inc., v. A.S.C.A.P., 620 F.2d 930, 934* (2nd Cir., *cert. denied, 450 U.S. 970, 67 L. Ed. 2d 621, 101 S. Ct. 1491 (1981)*. Moreover, in meeting its burden, NaBanco must prove far more than that the practice it challenges has had an effect on its business. *See, e.g., Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 133-34 (2d Cir. 1978)*: *Balogh's of Coral Gables, Inc., vs. Getz, 510 F. Supp. 741, 748 (S.D. Fla. 1981)*; *JBL Enterprises, Inc., v. Jhirmack Enterprises, Inc., 509 F. Supp. 357, 366 (N.D. Cal. 1981)*. The existence or non-existence of market power in a relevant market is a critical consideration. *Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 277 (5th Cir. 1978)* *cert. denied 440 U.S. 939, 59 L. Ed. 2d 499, 99 S. Ct. 1289 (1979)*.

HN28[] A relevant market, or "area of competition," consists of two elements - products and geography. *Brown Shoe Co. v. United States, 370 U.S. 294, 324, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*. As for the former element, the Supreme Court has held that it is defined by reference to "the reasonable interchangability of use or the cross-elasticity of demand between the product **[**77]** itself and the substitutes for it." *Id. at 325*. *See also* *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394-96, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)*.

There is a defect in NaBanco's argument which can only be successfully dealt with by accepting VISA's argument that the sale of receivables makes no sense except in its connection with a payment service system. It is, perhaps, appropriate to point out parenthetically that NaBanco would not exist but for the payment systems. The court finds that the relevant market in this case consists of the market for payment systems as VISA contends. Not only did the testimony at trial suggest that VISA developed as the result of Bank of America's determination to provide and promote a payment system of nationwide proportions to compete with other payment systems then in existence, the evidence also indicated considerable success. The cross-elasticity of both demand for and supply of VISA and other payment devices is quite high. Both cardholders and merchants who testified at trial considered the VISA services equivalent or sufficiently close to a variety of payment systems used in retail **[*1258]** sales, including other **[**78]** credit cards, travelers cheques, cash, ATM cards, personal checks, and check guarantee cards. Edwards. TR. 110-124 (6/2/83); Baxter. TR. 24-35 (2/13/83); Phillips. TR. 144-151 (6/6/83); Emerson. TR. 20 (1/13/84). While each of these different payment service devices was not considered to be a close substitute for a VISA card for purchases of every possible product at every possible price, all payment services taken together were sufficient to provide, at the least, several close substitutes for a VISA card in any possible context. Cash, for example, might be a good substitute for face-to-face transactions involving small dollar amounts, while checks would be better for larger transactions involving long-distance exchanges. Phillips. TR. 144-151 (6/6/83); Baxter. TR. 24-35 (2/13/83).

Testimony by VISA experts also confirmed substitutability between VISA and other, technologically innovative, payment devices including but not limited to regional ATM cards (Cox. TR. 128-29 (1/13/83)), debit cards (Duffy. TR. 2870-72 (9/23/82)), as well as retail proprietary cards (Duffy. TR. 2667 (9/22/83)) and new multi-purpose cards like the Sears/Merrill Lynch cards now available. Cox. TR. 86-89, **[**79]** 128-29 (1/13/83).

To the extent that VISA also extends credit to consumers it can also be argued that it competes in the credit extension market along with commercial banks, savings and loan associations, consumer finance companies, credit unions, and certain competing credit cards such as Mastercard, department store proprietary cards, and oil company cards. NaBanco, however, has never alleged nor contended that VISA has any market power in this market, nor has it ever alleged that either VISA or its IRF requirement presented any anticompetitive effects therein. Therefore, the court does not include these credit extending devices within the relevant market except to the extent these devices also serve as payment system mechanisms (e.g. Mastercard, proprietary cards, oil company cards, etc.).

As for the geographic market which is relevant in the context of this case, there appears to be no issue: VISA competes nationally, indeed internationally, with competitive payment systems. Since NaBanco's business is similarly conducted on a nationwide scale, no relevant geographic sub-market is even arguably presented. NaBanco agrees with this. See NTB at 25.

Having already defined the relevant **[**80]** market as the nationwide market for payment systems, the court must still consider whether or not VISA's share of that market is such as to indicate that it wields power in that market. The Court concludes that it is not. VISA's share of the payment services market is probably less than five percent according to testimony heard at trial. Edwards 118-20 (6/3/83); Cox 139-40 (1/13/83). Exhibits 2089-2094. This share is far too small to allow VISA to have any legally pertinent anticompetitive effects Cox TR. 139-40 (1/13/84); Phillips TR. 156-58 (6/6/83); Guth TR. 3-4 (1/18/84).

Furthermore, in the opinion of NaBanco's own expert, Dr. Cox, the new regional ATM debit card networks will one day force VISA out of business unless VISA promptly reduces IRF. Cox TR. 41-42 (1/13/83). The existence and strength of this type of competition, implying as it does ease of entry into the market, together with the absence of abnormally high profits earned from VISA operations, (as testified to at trial), seems to preclude any compelling argument that VISA has market power. If VISA had any choice in the matter it would certainly seem appropriate for it to reduce IRF in light of the evidence presented.

[81]** Building on the foregoing comments, the Court makes and enters these additional and somewhat more specific findings of fact:

A. VISA lacks power in the relevant market. In the absence of such market power, VISA lacks the ability to impose any restraint detrimental to competition.

[*1259] 1. The relevant market in this case is the nationwide market for payment systems.

(a) Both parties agree that the geographic market is nationwide.

(b) The relevant product market in this case is a market consisting of VISA and all payment services used in retail sales. This market includes VISA, MasterCard, T & E cards, merchants' proprietary cards, merchants' open book credit, cash, travelers cheques, ATM cards, personal checks and check guarantee cards. None is a perfect substitute for a VISA card, but they are all quite good substitutes for each other and should be considered part of the same market. An examination of cross-elasticities of supply and demand demonstrates that the other payment services above are sufficiently close substitutes for the VISA card that they must be considered part of the same market.

B. VISA also competes in a market for the extension of credit to consumers. **[**82]** But NaBanco did not allege or contend that VISA had market power in the credit extension market, nor did it allege or contend that VISA or IRF had any anticompetitive effects in that market. That market includes other sources of credit available from commercial banks, savings and loans, consumer finance companies, credit unions and competing cards such as MasterCard, department store proprietary cards and oil company cards. *In the market so defined, VISA's share is less than 10% and VISA does not possess sufficient market power to effect an anticompetitive restraint.*

C. There is no market for the "sale" of cardholder transactions ("cardholder paper") from merchant banks to issuing banks, and it would be meaningless to use such a market for purposes of analysis in this case. Only the member which issued a card has any interest in acquiring from merchant banks transactions effected by that card.

D. VISA has a very insignificant share and no real power, in the payment service market.

(1) VISA's share of the payment service market is certainly less than 5%, and likely less than 3%. This share is far too small to allow VISA to have any anticompetitive effect.

(2) In the opinion **[**83]** of NaBanco's expert, Dr. Cox, the new regional ATM debit card networks will force VISA out of business if VISA does not reduce IRF soon. The existence and strength of this competition means that VISA does not have market power.

(3) Still further confirmation of the fact that VISA and it members lack significant market power is the absence of any abnormally high profits earned from VISA card operations.

(4) NaBanco's own arguments concede VISA's lack of market power. In its trial brief, it recognized that VISA and its members lack sufficient economic power over merchants to impose supracompetitive prices.

(5) Even if VISA currently had a large share of, and apparent power in, the relevant market, it still would not have market power because of the ease of entry into the market. There are no significant barriers to entry, particularly as a result of new technologies. The new ATM networks are an example of the easy entry into the marketplace. This ease of entry makes even more remote any possibility that VISA could impose an effective restraint.

(6) The fact that VISA and MasterCard set different IRF's during the early 1970's does not prove that either has market power. Rather, it **[**84]** confirms the existence of competition in the payment services market. On a transaction of the average size during that period, the difference was approximately only 10%.

The Interchange Fee is Pro-Competitive in Nature

IRF promotes the efficiency and competitiveness of VISA in two other related ways. The first, is of vital import to the day-to-day functioning of the system. As established, IRF eliminates the costly uncertainty **[*1260]** and prohibitive time and expense of "price negotiations at the time of the exchange" between the thousands of VISA members. *See* *Central Iowa Power Cooperative v. Federal Energy Regulatory Commission, 196 U.S. App. D.C. 249, 606 F.2d 1156, 1163 (D.C. Cir. 1979)* (establishment of price is necessary to the functioning of the cooperative and "to ensure that costs and benefits of the power pool will be shared fairly and predictably.") In doing so, it guarantees the universal acceptability that is at the heart of the competitive success of the product.

The second way in which the fee promotes efficiency and competitiveness is in a more long-term, economic sense. Briefly, the theory is that the parties to a national bankcard system must distribute **[**85]** the costs of the system in relation to prospective benefits so as to encourage members to engage in the appropriate balance of card-issuing and merchant-servicing. Far from being presumptively anticompetitive, the economics of bankcard pricing suggest that a "transfer payment" such as the IRF is precisely what one would expect to find in a bankcard joint venture seeking to price competitively in the payments systems market.

In the VISA "joint venture," both issuer and merchant banks perform essential roles, and both perform necessary tasks for the benefit of each other, which must be performed if the basic payment service is to be offered. As stated earlier, the more cardholders in the system, the more attractive the system is to merchants. At the same time, the more merchants in the system, the more attractive the card is to cardholders. In short, there is a fundamental economic interdependence between card issuing and merchant signing in the system. Edwards. TR. 9-11 (6/3/83); Baxter (6/2/83) (dep. 2 at 18-21); Ashby. TR. 1621-23. (9/15/82); Guth TR. 8. (1/18/84).

This fundamental interdependence can be felt within the system in two ways. First, the more cardholders in the system, **[**86]** the more attractive the card is to merchants, and the more merchant discount revenue is generated for merchant banks. As more merchants enter the system, and more cardholders develop, more cardholder revenue is generated for issuers. Second, as to the expense of operation, costs that the issuer banks bear, such as fraud or float costs or the costs of issuing the plastic, benefit the merchant and merchant bank in that they facilitate and encourage use of the cards at merchant locations. Similarly, the processing costs borne by the merchant banks are valuable to issuer banks. Edwards. TR. 9-11 (6/3/83); Cox. TR. 4-10, 75-77. (1/14/83); Bull. TR. 971-74 (5/15/82); Ashby. TR. 1604-10 (9/15/82).

Viewed from the perspective of the members then, for the VISA service to exist at all there must be members willing to issue cards and members willing to sign merchants. This system of interrelationships can be represented diagramatically as in Appendix I.

As asserted at trial, however, at the same time that these interrelationships exist between the cardholder and merchant sides of the VISA business, there also exists a serious cost imbalance between the two sides. VISA has contended, and the **[**87]** evidence suggests, that the card-issuing side of the payments business bears the substantial majority of the costs of the business, up to 88% of total system costs. Edwards. TR. 13-15 (6/3/83); Cox. TR. 55-61 (1/14/83). Notably, the issuing side bears most of the float costs and most of the credit and fraud losses Bull. TR. 907-17 (5/14/82); Edwards. TR. 13-15 (6/3/83). These costs are incurred on the issuing side by reason of VISA rules such as the rule which requires the issuer to pay the merchant bank for a transaction even if the cardholder never pays because such costs can be managed and controlled more efficiently by issuers. Edwards. TR. 13-15 (6/3/83).

There is nothing inherent in the system that suggests, much less guarantees, that the revenue stream that comes into the merchant bank from the merchant will correspond in its magnitude to the activity costs that must be incurred by the merchant **[*1261]** bank. Similarly, there is nothing to suggest, much less guarantee, that the revenue stream that comes into the card issuing banks from the cardholder will be equal in magnitude to the activity costs that the issuer banks incur. IRF serves the function of re-distributing the **[**88]** costs of the VISA service more equitably between the merchant and card issuer sides, that is, it is a "transfer payment" of sorts. In the process, IRF "equillibrates" the supply and the demand for VISA services by bringing the costs of the system in line with the revenues for each participating VISA member bank regardless of the role it plays, either merchant or issuer, in the VISA system. The economics of this analysis is depicted in diagrammatical terms in Appendix II.

Re-distribution is perhaps not the only alternative theoretically available to VISA to achieve this equilibrium, but it is the most, if not the only, realistic alternative. For example, VISA might attempt to meet the cost imbalance problem by suggesting to issuer banks that, where they can legally, they further raise the price of issuing a card, or charge a fee for the cardholder's float period. The evidence produced at trial, however, suggests that cardholder demand for cards drops off dramatically when yearly fees are raised. In addition, many state banking regulations have prohibited and continue to prohibit charging cardholders for the float period.

NaBanco has offered another alternative; private negotiation **[**89]** of individual "IRFs" which, initially at least, presents an interesting alternative. Again, in theory, private contracts between issuer and merchant banks would enable these banks to set a charge for IRF which would reflect the actual, true "price" which an issuer would be willing to pay - a price which would hopefully reflect the true costs of interchange after subtracting the additional costs experienced by issuer banks alone but from which merchant banks benefit. Transaction costs in this type of system would no doubt be high and stultifying since each and every bank would have to somehow contract each and every other bank with which it might have some card business contact. Further, there is no evidence to suggest that any "market" at all exists at the level of (and between) issuer and merchant banks. If there is a "market," it is a monopsonistic one as there is normally only one issuer bank willing to "purchase" any particular merchant bank's receivable. While each and every issuer bank might not behave monopsonistically, the incentive is certainly there for opportunistic behavior by some issuer banks which would take advantage of the situation by trying to exact higher and higher **[**90]** fees from merchant banks. What VISA calls the "free rider" problem, would likely lead to the system's collapse as more and more issuer banks following this course of action led more and more merchant banks to drop out of the system.

VISA's own history provides the proof that is necessary to come to this conclusion. Prior to the IRF regulation, VISA members acted in their own individual self-interest, and contrary to the interests of the system as a whole, in their dealings relating to interchange fees. Banks acted in a similar fashion in charging interchange on checks in the late 19th and early 20th centuries. Baxter (6/2/83) (dep. 2 at 37-43). Even one of NaBanco's own witnesses, Ms. Ashby, could not deny that she might increase her bank's interchange fee if VISA no longer set IRF. Ashby. TR. 1501-03 (9/15/82).

Thus IRF enables VISA to exist as a viable competitor in the payment systems market. Even if it could be proved that a sub-market for receivables exists, IRF increases interbrand competition in line with the policies outlined in *GTE* and *Sylvania.*

IRF is Reasonably Cost-Related

The persuasive evidence at trial suggested that IRF developed as a cost-related mechanism. **[**91]** VISA has spent thousands of dollars and hundreds of hours choosing a methodology which attempts to "average" out those costs associated with interchange and card issuing. Further the methodology **[*1262]** itself has undergone drastic changes from time to time.

Even from a purely theoretical standpoint, VISA has every incentive to set IRF at a level which establishes an equilibrium between the issuer and merchant sides of its operation. First, those members who are members of the VISA Board and therefore responsible for setting IRF invariably represent banks which both issue cards and sign up merchants.

Second, since the fee is only charged within the system, it is always a net "zero" to the VISA venture as a whole because dollar received by or on behalf of VISA member X is paid to on or behalf of member Y. Third, VISA members always have the option of altering the "mix" of their business between merchant and issuing activity. Finally, and perhaps most importantly, if consumer and merchant utilization must somehow be equalized, reducing demand by increasing merchant costs will necessarily reduce issuer demand and consequently reduce revenue opportunities on the issuing side of business.

[92]** Nevertheless, NaBanco has attacked VISA's IRF methodology as inadequate and unscientific and, as a result, "overbroad." Specifically NaBanco has challenged the particular elements which go into the formula by which VISA calculates "average" issuer bank costs. For example, NaBanco has challenged the fact that neither merchant nor issuer banks revenues are included in analyzing the fee level set by VISA, and that merchant bank costs are also not considered. This, NaBanco has argued, necessarily puts the entire financial burden of providing the "convenience use" period, for example, on the merchant banks - unfairly so NaBanco has claimed because 'revolving account' cardholders allegedly subsidize issuer banks for the costs associated with the float or convenience use period.

NaBanco has also attacked the "sampling" methodology used by VISA to determine which banks will be part of the larger, extended study by which VISA determines average costs. NaBanco has contended that VISA should use random sampling techniques to choose its sample banks, not the "purposeful" sampling engaged in by VISA.

The court finds that, contrary to NaBanco's arguments, the specific means used to calculate **[**93]** IRF -- the theory used to set it and the implementation of that theory -- while certainly not perfect, was and is careful, consistent, and within the bounds of sound business judgment. The cost reimbursement methodology in effect since 1973 was designed and recommended to VISA by Arthur Andersen after VISA solicited the advice of that accounting firm. Andersen was given free rein to design any appropriate methodology, both in 1973 and in its review of the VISA methodology in 1980. Friedman. TR. 15-18 (6/8/83); Stock. TR. 93-94 (1/5/83). Arthur Andersen carefully considered alternative methods for computing IRF, even some which have been suggested by NaBanco such as interchange at par. At the behest of VISA Arthur Andersen re-evaluated IRF methodology in 1977. Each time, Arthur Andersen concluded and VISA agreed that a cost-based methodology using systemwide average costs was preferrable to any other. Friedman. TR. 15-18 (6/8/83), TR. 7-8 (6/9/83).

IRF was designed to perform the equilibration function the court described earlier. Edwards TR. 73-76, 79-81 (6/3/83); Weil 31, 50-51 (1/9/84). It embodies the same analysis that a single firm such as American Express would conduct in order **[**94]** to allocate costs between its cardholder and merchant divisions were it to divide its business between the two. Weil. TR. 38-47 (1/9/84). These findings are true of both the 1973 and the 1981 methodology, even though the 1981 methodology contains refinements not present in the 1973 formula.

Similarly, the selection of the banks to be studied by Arthur Andersen is a careful process which yields banks that are, within limits, representative of the VISA system as a whole. VISA first examines the results of cost "questionnaires" made available to each member bank. Next it selects **[*1263]** from these five or six banks which appear to be representative of all member banks based on a number of factors, most particularly whether their per-unit costs are typical of the system as a whole. Schmidt. TR. 176-78 (6/9/83); Wecker. TR. 73 (1/11/84). This selection process is then reviewed and approved by Arthur Andersen before the banks are actually visited by the accounting firm for further study. Schmidt. TR. 176-78 (6/9/83). While it may be that, in the best of all worlds, random sampling would yield the most "accurate" results, and study and evaluation of each and every bank in the VISA system **[**95]** even better ones, the sampling technique employed by VISA is certainly adequate in light of the costs associated with systemwide evaluation. In fact, VISA's sampling technique seems to produce a more accurate result than does random sampling. Wecker. TR. 80-83, 100-108 (1/10/84), 100 (1/11/84); Exhibit 2810. If anything, the banks selected by VISA are representative of banks with slightly lower than average costs resulting in an IRF which is lower in amount than one of each banks true costs. Wecker. TR. 109-110 (1/10/84).

CONCLUSION

Plaintiff, NaBanco, having been conceived in and nourished by the enterprise it presently attacks, now finds one of the stabilizing mechanisms of that enterprise legally offensive. NaBanco seeks injunctive and damage relief, contending that the interchange fee, and particularly the manner of its setting, are both anti-competitive and in violation of the Sherman Act. Indeed, the plaintiff contends that the fabric under which it became successful is so faulty that it merits per se treatment and swift demise.

Because of the findings of fact and related conclusions of law previously set forth -- perhaps with prolixity justified only by the desire to **[**96]** make a complicated and important point evident -- the court rejects plaintiff's position and will enter judgment for defendant; not however, before some additional conclusory remarks.

The focal point of the case, the VISA interchange fee, was the product of turmoil created by the absence of an efficient method of transferring (distributing) costs incident to card issuing and merchant servicing functions in the early days of what became the present VISA system.

Considerable evidence was presented concerning the etiology of the IRF, the nature of VISA, the complicated method of setting the fee, the selection of banks for testing, the operation of NaBanco, the experience of various banks and bankers involved with VISA, MasterCard and NaBanco, as well as on other relevant points in issue. Both parties were well prepared and effective in presenting their positions. However, as the trial progressed and upon consideration of the totality of the evidence, it became increasingly clear not only that the plaintiff had not presented the more convincing and weightier evidence, but rather that the greater weight -- the more convincing evidence -- had been provided by defendant.

The present VISA **[**97]** business arrangement is relatively young. While describing it as a "joint venture" may be overly ambitious in the strict business organization sense, the term seems fairly applied from the anti-trust standpoint. The venture soon became aware that the "universality" of acceptance so vital to the system could not be achieved without a uniformity of regulation which included a non-divisive method of distributing costs. The more convincing evidence was that the mandated interchange fee (for the use of Base II) was necessary to achieve stability and thus universality; that to require exchange at par or remove the fee to permit negotiations for interchange charges among issuer and merchant banks would result in loss of competitiveness and chaos with the eventual destruction of the enterprise.

Indeed, one questions how much expertise is necessary to envision the consequences of literally thousands of issuer and merchant banks negotiating exchange fee contracts or ad hoc agreements for the purchase of specific paper where there is **[*1264]** no contract. The problem is stated: "A"--who has a card issued by a Miami bank visits a San Francisco store, whose bank has no exchange with the Miami **[**98]** bank. The Miami customer would simply be unable to use his card. Understandably, the store owner would accept only those cards authorized by his merchant bank. Universality is gone, and the enterprise is no longer competitive.

The argument that banks would eventually work out a par exchange is not borne out by VISA history. Different and more extreme methods of cost transfer (even if permitted in all states) would apparently impede the functioning of the system, rendering it less efficient, and thus less competitive.

The IRF serves to shave substantial costs and risks between VISA members and interchange transactions are an integration because in such transactions two different members combine their activities in order to offer a service to a cardholder and merchant. I conclude that to do violence to the method of setting the exchange fee would do violence to the functioning of the system.

IRF should be analyzed under the rule of reason because it is an agreement on the terms of interchange necessary for VISA to market its product and be an effective competitor. Prohibiting IRF would therefore undermine "interbrand" competition, "which is the primary concern of the ***antitrust law***." **[**99]** *Continental T.V., Inc., v. GTE Sylvania, Inc., 433 U.S. 36, 52 n. 19, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. Even if IRF were not necessary to market the product, it should be analyzed under the rule of reason because it is an agreement internal to a type of joint venture which yields efficiencies beneficial to competition, that its members, acting alone, could not offer, and which allows the venture to offer a product which is different from, and greater than, the sum of the individual products of its members.

VISA's establishment of an IRF, whether or not it is literally "price fixing," is not "price fixing" in any meaningful sense of the word or in a sense which makes it a per se violation of the Sherman Act. Price fixing generally refers to an agreement on prices which otherwise would be set by market forces. However, market forces could not set IRF for a number of reasons, most notably the likelihood of opportunistic, free rider behavior of the type identified by the Supreme Court when it eschewed per se analysis in *Continental T.V. Inc., v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*.

In addition, IRF is properly analyzed under the rule **[**100]** of reason because it is not mandatory. Acting on behalf of its principals, NaBanco is and always has been free to negotiate different terms of interchange, and VISA issuers have been willing to make alternate arrangements. A practice is not unlawful per se where, as in this case, there is no legal, practical or conspiratorial impediment to making alternate arrangements.

BMI and *Maricopa* do not require the Court to make a subjective judgment as to whether a joint venture's product is "unique." Rather, they call for the Court to compare the product of the venture to the individual offerings of the venture's members and determine whether the venture offers pro-competitive utilities which its members, acting alone, could not offer.

HN29[] The burden of proof in a rule of reason case rests with the plaintiff. The rule of reason requires "a systematic comparison" of the negative effects of the restraint on competition, if any, with any alleged positive effects on interbrand competition stemming from the restraints. In order to prevail, NaBanco has the burden of establishing that the anti-competitive effects of the setting of the IRF decidedly outweigh the pro-competitive benefits of the **[**101]** practice. It must show that the effects of the restraint were "substantially adverse," and that the adversity falls on market competition and not merely on its own business.

To establish anti-competitive effects, NaBanco must prove that VISA has **[*1265]** power in a relevant market. In order to establish such power NaBanco must begin by offering proof of "a well defined relevant market upon which the challenged anti-competitive actions would have a substantial impact." *(Graphic Products, supra at 1569*). NaBanco must then establish market power. (The ability to raise price significantly above the competitive level without losing all of one's business; *Graphic Products, at 1570*; the ability to raise prices above those which would be charged in a competitive market. Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. 2 n.46; 80 L. Ed. 2d 2, 104 S. Ct. 1551). Plaintiff has failed to establish its view of a relevant market and the court has found payment services to be the relevant market. In this market, VISA has little power. Even if this market definition were incorrect and VISA had short run power over price, it still would have no long-run monopoly power because there are **[**102]** few barriers to entry. Indeed, one of plaintiffs' experts predicted the demise of VISA due to competitive innovations, if VISA persists in maintaining the IRF.

Further, even if NaBanco had established that VISA had power in a relevant market and that IRF had substantial anti-competitive effects, VISA established that IRF is necessary to offer the VISA card -- a pro-competitive benefit which offsets any anti-competitive effects. In a rule of reason inquiry, the Court must evaluate the alternatives to the challenged practice as part of its weighing of the practice's pro-competitive effects. Although some cases place the burden on the plaintiff to establish that a realistic, viable and more pro-competitive alternative to the challenged practice exists, this court need not address the burden of proof issue. Assuming that the burden were VISA's, VISA met that burden.

Can it be said, in the factual setting presented here, that the IRF is a "market restraint of trade with no purpose except stifling of competition." White Motor Co. v. U.S., 372 U.S. 253, 9 L. Ed. 2d 738, 83 S. Ct. 696. I find, as a matter of fact and law that it is not, but rather, to borrow from *BMI* and *Realty* **[**103]** *Multi-List,* a method of integrating costs and risks which aids in the marketing of the product and permitting the public to utilize the service with such benefits as it may yield.

Judgment will this day be entered for defendant by separate order.

William Hoeveler

UNITED STATES DISTRICT JUDGE

DATED: SEPTEMBER 20, 1984

FINAL JUDGMENT

THIS CAUSE having come before the Court for non-jury trial before the undersigned Judge and the Court having heard argument of counsel, testimony of witnesses presented, reviewed exhibits presented and being otherwise advised in the premises, it is

ORDERED AND ADJUDGED that judgment be and it is hereby entered in favor of the defendant, VISA, U.S.A., and against the plaintiff, NATIONAL BANCARD CORPORATION. Costs which are properly taxable shall be done so by separate motion and order.

DONE AND ORDERED in Chambers at Miami, Florida, this 20th day of September, 1984.

William Hoeveler

U.S. District Judge

APPENDIX 1

(1) Figure 1 depicts the resulting demand-supply equilibriums when various demands by cardholders (dC), merchants (dM), and the system as a whole (dT) are superimposed on a graph representing the various marginal cost curves **[**104]** existing in the VISA system. The resulting price and quantity at the equilibrium (e) representing the intersection of dT and cT are equal to p* and q*.

The need for a transaction or interchange fee can be demonstrated by comparing the various line segments composing the dotted line q*e. In the process of producing an industry output of q*, merchant banks incur marginal costs in the amount of q*a and issuer banks incur marginal costs in the amount of q*d. The sum of these two sets of costs is q*e. In consideration for transactional services to facilitate q* exchanges, cardholders are willing to make expenditures in the amount of q*b and merchants are willing to make expenditures in the amount of q*c. The sum of these two revenue streams is q*e. What is important to note is that the marginal cost q*d of the activities performed by the issuer banks bears no necessary relation to the amount of revenue q*b forthcoming from the cardholders with whom these banks have contractual relationships. Similarly, the costs q*a associated with the activities performed by merchant banks have no necessary relation to the amount of revenue q*c forthcoming from the merchants with whom they have contractual **[**105]** relationships. The sum of the two revenue streams, however, must equal the sum of the two cost streams for the system to survive. Thus, whenever the revenue coming into a member bank does not match its **[*1266]** costs, there must be some side or transfer payment from either the merchant or the issuer bank to bring the receipts of each bank into balance. In the diagram, this transfer payment is represented by the line segment ac which exactly equals the surplus coming into the merchant bank depicted by line segment ac and the issuer bank's deficit depicted by line segment bd.

It should be noted that the position or shape of these lines are not based upon any particular "empirical" evidence. The lines are simply drawn in accordance with testimony presented by VISA at trial suggesting that BM revenues are greater than BI's revenues in the VISA system and that dC drops off considerably as prices rise. The important point is that so long as revenues to either issuer or merchant bank do not equal the costs to each of these banks, there will be a need for some kind of transfer payment.

APPENDIX 2

(1) Figure 1 illustrates the derivation of aggregate demand (dT) for transactional services **[**106]** of a given type in a single-merchant, single-cardholder economy. The quantity (q) axis is calibrated in units which represent the bundle of services that must be provided by VISA member banks and **[*1267]** their agents to *both* the cardholder (C) and the merchant (M) in order to facilitate the execution of one exchange of goods or services between cardholder and merchant. The price (p) axis represents the payments to member banks necessary to induce the requisite supply of services for any particular transaction.

Independently, neither cardholder or merchant necessarily confronts any particular price as the one he must pay in order to have his demand (dC) or (dM)) fulfilled. Thus, the individual demand curves of cardholder and merchant are drawn separately, each clearly demonstrating a different price (PC) or (PM)) which the cardholder or merchant is willing to pay for some level of services (q*); i.e., for any particular point on the combined demand curve, PC does not equal PM but their combined demand will be manifested by the price (p*) and quantity (q*) in this example.

(2) Figure 2 is similar to Figure 1 except that it is intended to represent total demand (dT) of all participating **[**107]** cardholders and merchants. While the individual demand schedules of particular cardholders must be aggregated vertically to reach a well-defined expression of aggregate demand for transactional services in a miniature economy, total cardholder demand and total merchant demand are firs summed horizontally to get total aggregate demand in a multi-cardholder/multi-merchant economy. This is because cardholders only trade with merchants and vice versa. Cardholders and merchants do not trade with other members of the set they represent.

(3) Figure 3 illustrates that relationships corresponding to that of cardholder and merchant on the demand side exist on the supply side as well. The cardholder has his banking relationship with one institution (IB) and the merchant typically has his with another bank (MB). Different tasks are performed for the cardholder than for the merchant. These different tasks mean different marginal costs ((cIB) or cMB)) for each bank for any particular transaction. Figure 3 depicts possible marginal cost curves for issuer banks and merchant banks, together with their vertical aggregation (cT) which corresponds to the total marginal cost per exchange facilitated by **[**108]** the two banks participating in that exchange. As was the case in Figure 2, Figure 3 represents the marginal cost curves one might expect in a multi-cardholder/multi-merchant economy.

[*1268] [SEE FIGURE 1 IN ORIGINAL]

[SEE FIGURE 2 IN ORIGINAL]

[SEE FIGURE 3 IN ORIGINAL]

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[Vogel v. American Soc. of Appraisers]

United States Court of Appeals for the Seventh Circuit

May 31, 1984, Argued ; September 20, 1984, Decided

No. 83-3218

Reporter

744 F.2d 598 *; 1984 U.S. App. LEXIS 18420 **; 1984-2 Trade Cas. (CCH) P66,209

HAROLD VOGEL, Plaintiff-Appellant, v. AMERICAN SOCIETY OF APPRAISERS, et al., Defendants-Appellees

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 83 C 6638 -- Thomas R. McMillen, Judge.

Disposition: Affirmed.

Core Terms

appraisal, prices, fixed-percentage, bylaw, customers, cartel, competitors, price fixing, antitrust, charges, seller, gem, preliminary injunction, price competition, anticompetitive, boycott, percent, appraisal fee, merits

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

Although irreparable harm is with minor and irrelevant exceptions one of the prerequisites to obtaining a preliminary injunction, all it means is that the plaintiff is unlikely to be made whole by an award of damages or other relief at the end of the trial.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN2[] **Injunctions, Grounds for Injunctions**

Where the imbalance of harms is very great, the plaintiff is entitled to a preliminary injunction upon a showing just of a modest prospect of success on the merits. But if the balance is closer, whether because each party, or neither party, can show substantial harm if the ruling on the application for preliminary injunction goes against him, the plaintiff must show a greater likelihood of success in order to get the injunction.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN3[] **Practices Governed by Per Se Rule, Boycotts**

A boycott is illegal per se under the antitrust laws only if used to enforce a rule or policy or practice that is itself illegal per se.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN4[] **Practices Governed by Per Se Rule, Boycotts**

If a rule of a private association is not illegal per se, neither is the enforcement of the rule, as by expelling a noncomplying member -- the normal method by which a private association enforces its rules.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN5[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Any combination which tampers with price structures is engaged in an unlawful activity.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > 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

HN6[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Judicial language about the per se illegality of competitors' tampering with price must, like all legal language, be read with sensitivity to its context. In general, the only types of horizontal price agreements that the antitrust laws have been held to forbid are those that have the purpose or likely effect of raising price above the competitive level.

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

HN7[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

Before a court leaps to the conclusion that an agreement among competitors is price fixing, the court should take a quick look to see whether it has clear anticompetitive consequences and lacks any redeeming competitive virtues.

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 novelty of a challenged practice is a reason against per se classification.

Counsel: Daniel Galatzer, Lamet, Galatzer & Assoc., Chicago, Illinois, for Plaintiff.

Robert Marc Chemers, Pretzel & Stouffer, Chicago, Illinois, for Defendant.

Judges: Posner, and Flaum, Circuit Judges, and Gordon, Senior District Judge. *

Opinion by: POSNER

Opinion

[*599] POSNER, Circuit Judge.

This is an antitrust case of Doric simplicity -- yet some difficulty. Harold Vogel, an experienced gem appraiser, charges a flat one percent fee, subject to a minimum fee of $10. He was a member of the principal (and to simplify this opinion we shall pretend the only) defendant, the American Society of Appraisers, until it expelled him pursuant to a bylaw of the Society which states "that it is unprofessional and unethical for the appraiser to do work for a fixed percentage of the amount of value . . . which he determines at the conclusion of his work." His expulsion, published in the Society's newsletter on March 1, 1983, caused **[**2]** Vogel to lose referrals from members of the Society and from other appraisers. (Appraisers specialize -- Vogel, for example, in gems -- and therefore an appraiser will sometimes refer a customer to another appraiser.) Vogel brought this suit under *section 1* of the Sherman Act, *15 U.S.C. § 1*, alleging that the bylaw constituted a price-fixing agreement among the members of the Society and that his expulsion from the Society constituted a boycott of him by the members. He moved for a preliminary injunction that would have required his reinstatement pending the decision of the case on the merits. This was denied, and he appeals the denial under *28 U.S.C. § 1292(a)(1)*.

The Society argues that Vogel has not shown irreparable harm and therefore is not entitled to an injunction, regardless of the merits of his suit. *HN1*[] Although irreparable harm is (with minor and irrelevant exceptions) one of the prerequisites to obtaining a preliminary injunction, all it means is that the plaintiff is unlikely to be made whole by an award of damages or other relief **[**3]** at the end of the trial. See *Semmes Motors, Inc. v. Ford Motor Co.,*

* Hon. Myron L. Gordon, of the Eastern District of Wisconsin, sitting by designation.

429 F.2d 1197, 1205 (2d Cir. 1970) (Friendly, J.). This Vogel has shown. The consequences of his public expulsion from the appraisers' society will be hard to monetize for purposes of admeasuring damages but cannot be assumed to be trivial. True, there are methods of estimating a business loss due to an exclusionary act -- for example, **[*600]** by comparing the plaintiff's profits before and after the act occurred -- but the methods often are unreliable because of the difficulty of correcting for other things happening at the same time that may have affected those profits. See Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 Harv. L. Rev. 1566, 1577-86 (1967). And true, Vogel will be reinstated if he wins his case on the merits. But the losses he will suffer in the meantime are irreparable harm -- less harm than in some other preliminary-injunction cases, no doubt, but it could still be much greater than the harm to the defendant if the injunction were granted; and in that event the net harm from denial would **[**4]** clearly exceed the net harm from grant. In fact, the Society does not contend that reinstating Vogel temporarily would harm it in the slightest.

So Vogel has some equity in his application for a preliminary injunction -- but maybe not much. He argues that his right to permanent relief probably will appear as soon as he moves for summary judgment. This implies that when the district judge ruled on the application for a preliminary injunction the period of irreparable harm was expected to be brief and the amount of that harm therefore quite limited. There was no long-dragged-out trial in the offing during which the plaintiff's losses would be mounting up. ***HN2***[] Where the imbalance of harms is very great, the plaintiff is entitled to a preliminary injunction upon a showing just of a modest prospect of success on the merits. But if the balance is closer, whether because each party, or neither party, can show substantial harm if the ruling on the application for preliminary injunction goes against him, the plaintiff must show a greater likelihood of success in order to get the injunction. See **[**5]** Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119, 123 (7th Cir. 1982); American Hospital Ass'n v. Harris, 625 F.2d 1328, 1331 (7th Cir. 1980); Charlie's Girls, Inc. v. Revlon, Inc., 483 F.2d 953, 954 (2d Cir. 1973) (per curiam). So it becomes important to inquire whether Vogel has a good chance, not just some chance, of winning this suit.

In considering his chances, we need not assess the boycott allegations separately. ***HN3***[] A boycott is illegal per se under the antitrust laws only if used to enforce a rule or policy or practice that is itself illegal per se. See Wilk v. American Medical Ass'n, 719 F.2d 207, 221 (7th Cir. 1983); Bruce Drug, Inc. v. Hollister, Inc., 688 F.2d 853, 859-60 (1st Cir. 1982); United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1367-69 (5th Cir. 1980). In the Supreme Court's first case holding that boycotts were illegal per se, Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 58 L. Ed. 1490, 34 S. Ct. 951 (1914), **[**6]** an association of lumber retailers had blacklisted wholesalers who had the temerity to compete with the members of the association by selling directly to consumers (that is, to the retailers' customers). The boycott was a method of enforcing a patently anticompetitive horizontal conspiracy and therefore was itself illegal per se. But ***HN4***[] if a rule of a private association is not illegal per se, neither is the enforcement of the rule, see Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n, Inc., 672 F.2d 1280, 1285-89 (7th Cir. 1982), as by expelling a noncomplying member -- the normal method by which a private association enforces its rules.

If the bylaw forbidding members of the American Society of Appraisers to charge for appraisal on a fixed-percentage basis is a form of price fixing, it is illegal per se and Vogel, as a victim of illegal price fixing and an illegal boycott, would be entitled to reinstatement. It is not hard to find judicial statements to the effect that any interference with price brought about by an agreement between competitors **[**7]** is illegal price fixing. The best-known example is United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221, 84 L. Ed. 1129, 60 S. Ct. 811 (1940): ***HN5***[] "Any combination which tampers with price structures is engaged in an unlawful activity. Even though the **[*601]** members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces." And for a notable application of this formulation of the per se rule see Plymouth Dealers' Ass'n v. United States, 279 F.2d 128 (9th Cir. 1960). Although not all of the 4,500 members of the American Society of Appraisers compete with each other, some of the 63 gem appraisers who belong to the Society probably do, though all we really know is that four of the gem appraisers have their places of business in Illinois, as does Vogel. We shall assume for now, but return to the point later, that the bylaw is an agreement among competitors in a sense relevant to this suit; and in a literal sense, **[**8]** at least, the bylaw did "tamper" with a "price structure."

But ***HN6***[] judicial language about the per se illegality of competitors' tampering with price must, like all legal language, be read with sensitivity to its context. In general, the only types of horizontal price agreements that the antitrust laws have been held to forbid are those that have the purpose or likely effect of raising price above the competitive level. See *United States v. United States Gypsum Co., 438 U.S. 422, 441 n. 16, 446 n. 22, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*. The classic example is the sellers' cartel, or price-fixing conspiracy (a covert cartel), which agrees to raise price above the competitive level or, what has the same competitive effect, to divide the market into exclusive territories, thus preventing the members from competing with each other. Sometimes competitors agree to discontinue particular forms of price competition, such as competition in credit terms; this too is forbidden, as its purpose and likely effect is to force the net price to the buyer above the competitive level. **[**9]** See, e.g., *Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648-49, 64 L. Ed. 2d 580, 100 S. Ct. 1925 (1980)* (per curiam); *National Electrical Contractors Ass'n, Inc. v. National Constructors Ass'n, 678 F.2d 492, 501 (4th Cir. 1982)*; *United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174, 185-86 (3d Cir. 1970)*. Sometimes competitors agree to use methods of pricing that do not eliminate price competition but make that competition less profitable and hence less likely -- for example, by agreeing that each seller will adhere to his previously announced prices. Such an agreement does not put a floor under prices but it does prevent a seller from offering secret discounts. A secret discount enables a seller to expand his output, and his profits, by selling at a shade below the cartel price without provoking an immediate reaction from his competitors. The effort of cartel members to "cheat" their fellows in this fashion will, by increasing the output of the product, eventually make the cartel (or conspiracy, or oligopoly) price untenable. See Stigler, The Organization of Industry 42 (1968). So an agreement not **[**10]** to "cheat" in this way is forbidden too. *See* *Sugar Institute, Inc. v. United States, 297 U.S. 553, 582-83, 601-02, 80 L. Ed. 859, 56 S. Ct. 629 (1936)*.

There are two exceptions to the principle that the only horizontal price "tampering" that is illegal per se is the type calculated to raise the market price above the competitive level. First, buyer cartels, the object of which is to force the prices that suppliers charge the members of the cartel below the competitive level, are illegal per se. See, e.g., *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 223-24, 92 L. Ed. 1328, 68 S. Ct. 996 (1948)*. Just as a sellers' cartel enables the charging of monopoly prices, a buyers' cartel enables the charing of monopsony prices; and monopoly and monopsony are symmetrical distortions of competition from an economic standpoint. See Stigler, The Theory of Price 205-06 (3d ed. 1966). Second, in *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*, the Supreme Court, by a 4 to 3 vote, held recently that an agreement among doctors to limit the fees they charged for **[**11]** services performed for insured patients was illegal per se, in part because **[*602]** the agreement might be "a masquerade for an agreement to fix uniform prices, or it may in the future take on that character." *Id. at 348*.

Were it not for *Maricopa*, it would be clear that the Society's prohibition of fixed-percentage appraisals was not illegal per se, as the prohibition seems unrelated or at most very tenuously related to any purpose or probable consequence of raising the price of appraisals. Members of the Society are free despite the prohibition to charge as much or as little as they like. Of course on pricing option is taken away from them, and if it were an option that promoted price competition, its prohibition would be highly suspect. But there is no indication it is. While it is true that, if rigidly adhered to, fixed-percentage fees will yield tiny charges for appraising items of slight value, Vogel's method does not work that way. He charges a minimum fee of $10, which means that he charges one percent only for appraisals of $1,000 or more and charges progressively higher percentages as the value of the item appraised falls off from there (for **[**12]** example, 10 percent for an item worth $100).

The apparent tendency of the pricing system that the Society has outlawed is to raise, not lower, the absolute level of appraisal fees, especially for expensive items. For the system gives the appraiser a stake in the value appraised and therefore makes him likely to err on the high side in estimating that value. It conduces not only to high prices but to high prices unrelated to the costs of the appraiser's work, even when there is no fraud in the appraisal. Although there doubtless is some positive correlation between the value of an item and the amount of time the appraiser puts in on appraising it, a 10-carat diamond worth 100 times as much as a one-carat diamond is not, on that account alone, likely to require or receive 100 times the amount of attention from the appraiser. Fixed-percentage appraisal fees seem more closely geared to differences in the wealth of customers than to differences in appraisers' time costs or skills -- seem in fact to be a method of price discrimination, which is normally anticompetitive. (Not always, though, as we saw in discussing secret discounts from a cartel price, which are discriminatory since they **[**13]** are selective rather than across the board, normally being offered to the biggest customers only. See Stigler, The Organization of Industry, *supra*, at 43-44, 60.)

Of course, if there is vigorous competition among appraisers, it will limit both the percentage charged and the amount of the appraisal, and may even prevent Vogel from adhering to his fixed-percentage method. But his suit is based on the assumption that competition has not had this effect, so maybe there isn't much competition in gem appraising -- we just don't know. Competition to one side, sometimes a customer will want and be quite content to pay for a high appraisal -- if for example he is trying to sell the item being appraised. But the challenged bylaw does not limit the fee or the appraisal; it merely outlaws a method of fee setting that seems to invite the appraiser to practice a fraud on his customer, by first announcing that his fee is a fixed percentage and then over appraising the item; or, at the very least, that invites discrimination against wealthier, or less sophisticated, customers. Another strike against the fixed-percentage fee system is that (according to a letter attached to one of Vogel's **[**14]** briefs in the district court) the one percent fee that Vogel charges is (or was) the industry norm; so by abolishing the system the Society may, for whatever reason, have been breaking up a collusive arrangement.

Ethical concerns have often, and unavailingly, been offered as reasons for limiting price competition. See, e.g., *National Society of Professional Engineers v. United States, 435 U.S. 679, 693-96, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*; but cf. *United States v. United States Gypsum Co., supra, 438 U.S. at 448*, citing *Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588, 603-04, 69 L. Ed. 1104, 45 S. Ct. 586 (1925)*. But there is no suggestion that the **[*603]** Society's aversion to fixed-percentage appraisal fees actually covers an aversion to price competition; nor, as we have said, is it apparent how such fees promote price competition. Moreover, there is no evidence that the Society has any power in the market for appraising gems, or any other market, and an absence of market power is a reason against inferring that a business practice is monopolistic.

The challenged bylaw is more likely a praiseworthy **[**15]** effort at self-regulation than a device for facilitating supracompetitive pricing. This is not to say that the Society's members are altruists. Presumably they are profit-maximizers. They may merely think that a practice likely to bring the appraisal business into disrepute will depress profits in the long run. They may even be concerned with potential antitrust liability from adhering to a one percent fee system -- a type of "ethical" concern to which ***antitrust law*** ought to give some weight.

The strongest objection to banning fixed-percentage fees is that by putting pricing on the Society's agenda the ban could foster price fixing. The letter mentioned earlier indicates that when the Society outlawed the fixed-percentage fee its members had "difficulty in abiding by" the new rule, prompting the Society's vice-president (whose last name, Gadd, has powerful associations for students of anti-trust law, see *American Column & Lumber Co. v. United States, 257 U.S. 377, 401-02, 66 L. Ed. 284, 42 S. Ct. 114 (1921))* to suggest an illustrative fee schedule complete with specific fees (one, for example, being $750 to appraise items worth between $40,000 and $100,000) arrayed **[**16]** much as in a percentage-fee schedule. If in the trial on the merits Vogel can show that abolishing fixed-percentage fees encouraged the members of the Society to adopt a collusive fee schedule as a substitute, he will be well on his way to proving a violation of the statute. But the danger that abolishing an anticompetitive fee system will lead to adoption of an equally or more anticompetitive one in its place is (on this record at least) too speculative to bring the per se rule into play.

The Supreme Court has told us that ***HN7***[] before we leap to the conclusion that an agreement among competitors is price fixing we should take a quick look to see whether it has clear anticompetitive consequences and lacks any redeeming competitive virtues. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*; see also *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 104 S. Ct. 2948, 2960, 82 L. Ed. 2d 70 (1984)*. Having done so we conclude that there is insufficient basis in the present **[**17]** record for characterizing the Society's prohibition of fixed-percentage appraisal fees as price fixing. Two additional considerations conform us in this conclusion. First, contrary to our earlier assumption, Vogel has not quite shown that the agreement of which he is complaining is an agreement among competitors, as most of the members of the American Society of Appraisers are not gem appraisers, and of the few who are only four have their places of business in Illinois. We do not know how many of these are in Chicago, where Vogel has his place of business, and we do not know the radius within which Vogel competes for customers. Maybe the bylaw affects competition among other appraisers belonging to the Society, and maybe Vogel would have standing to complain about it even if competition in the market in which he operates were not affected by it. But his failure to make a clear-cut showing that the bylaw is an agreement among competitors weakens his case. Second, **HN8**[] the novelty of the challenged practice (novel to the courts, that is) is a reason against per se classification. See *White Motor Co. v. United States, 372 U.S. 253, 263, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963)*; **[**18]** but see *Arizona v. Maricopa County Medical Society, supra, 457 U.S. at 349-51*. The attempt to get rid of the fixed-percentage appraisal fee may be perniciously anticompetitive in ways that we cannot perceive from the scanty record before us, but to **[*604]** condemn it before any evidence on its competitive effects has been produced would prevent the courts from acquiring any information about it. It is difficult enough for judges to inform themselves about business practices without shutting off the information flow before it begins, by prematurely adopting a rule of blanket illegality.

All this leaves out of account, however, the possibility that the *Maricopa* decision signals an expansion of the traditional per se rule against price fixing beyond agreements likely to reduce competition. Commentators have wondered how an agreement by sellers to limit the amount they will charge their customers -- the agreement in *Maricopa* -- can reduce competition. See Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886 (1981); Harrison, *Price Fixing, the Professions, and Ancillary Restraints: Coping with Maricopa County*, *1982 U. Ill. L. Rev. 925, 936-44*; **[**19]** Liebeler, *1983 Economic Review of Antitrust Developments: The Distinction Between Price and Nonprice Distribution Restrictions*, *31 UCLA L. Rev. 384, 397-98 (1983)*. But the price ceiling in *Maricopa* may have been intended as a target or even a floor -- a concern heightened by the fact that 85 to 95 percent of the county's doctors were charging at or above the ceiling. See *457 U.S. at 341 n. 10*. A group of sellers is unlikely to fix a maximum price that will not return them a comfortable profit; and having done so they may be disinclined to charge a lower price even if it would cover their costs plus a reasonable profit, if not as comfortable a one. Furthermore, sellers who exchange the kind of price and cost information that is necessary to fix a ceiling may find they have done all that is necessary to fix a floor as well; that is, the *process* of agreeing on the ceiling may foster supracompetitive pricing, whether tacit or explicit. Maybe therefore *Maricopa* is to be explained as a case where a cartel-facilitating practice, analogous to banning secret price cutting, was condemned. In any event, it is distinguishable from this case.

Now **[**20]** Vogel may be able to prove at trial that the bylaw is an unreasonable restraint of trade and is therefore unlawful under *section 1* even though not illegal per se. But this will require him to establish a relevant market (by adding up the sales of all the gem appraisers to whom customers in the various areas served by the Society's gem-appraiser members could turn if those members charged supracompetitive prices for appraising, see *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 331, 5 L. Ed. 2d 580, 81 S. Ct. 623 (1961))*; to show that the Society's members as a group have a substantial share of that market; and to prove that the anti-competitive effects of the bylaw in that market exceed any procompetitive effects that the Society may be able to point to. See *National Collegiate Athletic Ass'n v. Board of Regents, supra, 104 S. Ct. at 2961-62*; *Lektro-Vend Corp. v. Vendo Co., 660 F.2d 255, 268-69 (7th Cir. 1981)*; *Graphic Products Distributors, Inc. v. Itek Corp., 717 F.2d 1560, 1569, 1571, 1573 (11th Cir. 1983)*. Vogel may be able at trial to show all this -- or to show that the bylaw really is so dangerous **[**21]** that it should be deemed illegal per se. We do not mean to prejudge the trial. But as he has shown none of these things as yet, we have no basis for thinking him likely to succeed in doing so at trial.

AFFIRMED.

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Battipaglia v. New York State Liquor Authority

United States Court of Appeals for the Second Circuit

June 11, 1984, Argued ; September 21, 1984

No. 84-7168

Reporter

745 F.2d 166 *; 1984 U.S. App. LEXIS 18336 **; 1984-2 Trade Cas. (CCH) P66,206

JACK R. BATTIPAGLIA and BACCHUS SELECTIONS INC., Plaintiff-Appellants, v. NEW YORK STATE LIQUOR AUTHORITY, Defendant-Appellee, PEERLESS IMPORTERS INC., Defendant-Intervenor

Prior History: **[**1]** Appeal from an order of the District Court for the Southern District of New York, Richard Owen, Judge, granting motions for summary judgment by the defendant New York State Liquor Authority and a wholesaler who had intervened as a defendant in an action by a wholesaler and a retailer which sought a declaration that certain provisions of *§ 101-b of New York's Alcoholic Beverage Control Law* are in violation of *§ 1* of the Sherman Act and therefore unconstitutional and an injunction against their enforcement.

Disposition: Affirmed.

WINTER, Circuit Judge, filed a dissenting opinion.

Core Terms

prices, wholesalers, wine, liquor, Sherman Act, anti trust law, retailers, resale price, posting, regulation, brand, fair trade contract, anticompetitive, adherence, discounts, invalid, price information, importation, price schedule, consumers, licensed, facial, alcoholic beverage, per se violation, provisions, authorize, distilled, immunity, prevail, cases

LexisNexis® Headnotes

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN1[] **Public Enforcement, State Civil Actions**

See *N.Y. Alco. Bev. Cont. Law. § 101*b(3)(b).

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN2[] **Public Enforcement, State Civil Actions**

*N.Y. Alco. Bev. Cont. Law § 101*b(4) provides that the schedule required by paragraph 3(b) must be filed before the fifth day of each month and that the prices and discounts would become effective on the first day of the following calendar month and should remain effective for such month. Within ten days after the filing the Authority must make the schedules or a composite available for inspection by licensees. Within three days after the date provided for such inspection, a wholesaler may amend his filed schedule for sales to retailers in order to meet lower competing prices and discounts provided such amended prices are not lower and discounts are not greater than those to be met.

Constitutional Law > Prohibition

HN3[] **Constitutional Law, Prohibition**

See U.S. Const. amend. XXI, § 2.

Constitutional Law > Prohibition

HN4[] **Constitutional Law, Prohibition**

U.S. Const. amend. XXI demands wide latitude for regulation by the state.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Governments > Police Powers

Constitutional Law > Prohibition

HN5[] **Congressional Duties & Powers, Commerce Clause**

Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a concrete case.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Constitutional Law > Prohibition

Governments > Police Powers

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

HN6[] **Interstate Commerce, State Powers**

U.S. Const. amend. XXI did not entirely remove state regulation of alcoholic beverages from the ambit of the *Commerce Clause*.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN7[] Antitrust & Trade Law, Sherman Act

See Sherman Act, 15 U.S.C.S. § 1.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Constitutional Law > Supremacy Clause > General Overview

Governments > Police Powers

HN8[] Public Enforcement, State Civil Actions

As in the typical preemption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute. A state regulatory scheme is not preempted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Constitutional Law > Supremacy Clause > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN9[] Per Se Rule & Rule of Reason, Per Se Violations

A state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under the Sherman Act, 15 U.S.C.S. § 1, when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Constitutional Law > Supremacy Clause > General Overview

HN10[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

Antitrust & Trade Law > ... > 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

HN11[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A manufacturer's use of vertical non-price restraints was not per se illegal but rather should be scrutinized under the rule of reason since restraints on intrabrand competition may promote interbrand 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 > Cartels & Horizontal Restraints > Price Fixing

HN12[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A program to exchange price information is illegal only if, in addition to the agreement to exchange information, the defendants agree to fix prices.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN13[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Whether or not there is an agreement to fix prices depends on the nature of the information and on the presence of conscious parallelism, i.e., identical or nearly identical pricing accompanied by plus factors.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN14[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The dissemination of price information is not itself a per se violation of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN15[] **Public Enforcement, State Civil Actions**

N.Y. Alco. Bev. Cont. Law § 101-b does not mandate or authorize conduct that necessarily constitutes a violation of the anti-trust laws in all cases.

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Lawrence Kill, New York, New York, (Anderson, Russell, Kill & Olick, Steven M. Pesner, and Daniel N. Sang, New York, New York), for Defendant-Intervenor.

Judges: Friendly, Van Graafeiland **[**2]** and Winter, Circuit Judges. Winter, Circuit Judge, dissenting.

Opinion by: FRIENDLY

Opinion

[*167] FRIENDLY, Circuit Judge:

Plaintiff Jack R. Battipaglia is the owner of a licensed liquor store in Long Island City, New York. Plaintiff Bacchus Selections, Inc. is a licensed wholesaler of wines. In this action in the District Court for the Southern District of New York against the New York State Liquor Authority (SLA), they sought a declaration that certain provisions of *§ 101-b of New York's Alcoholic Beverage Control Law* requiring wholesalers to post and maintain schedules of prices and discounts violate *§ 1* of the Sherman Act and are therefore invalid under the *Supremacy Clause*. The complaint alleged that the effect of those provisions was "to restrain commerce in the product market of wine in the State of New York by prohibiting wholesalers and retailers from competitive pricing which could benefit the consuming public . . ., that the provisions of the Alcoholic Beverage Control Law . . . and the conduct of Defendant Authority constitute a combination and conspiracy in restraint of trade and commerce in wine among the states", and that "by reason of the above-mentioned illegal **[**3]** acts and practices, Defendant Authority has proximately caused injury to plaintiffs in the form of higher prices to them and to members of the general consuming public who purchase wine in the State of New York."

[*168] After answer and limited discovery, plaintiffs moved for summary judgment. Judge Owen denied the plaintiffs' motion in an opinion which held that the New York statute did not contravene *§ 1* of the Sherman Act but that, if it did, conduct thereunder was insulated from attack under the antitrust laws by the "state action" doctrine of *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*. [1] *583 F. Supp. 8*. After the motion was decided, Peerless Importers Inc. (Peerless), another wholesaler of wines, was granted leave to intervene as a defendant in opposition to plaintiff's motion. Thereafter the Authority and Peerless moved for summary judgment in their favor. The judge granted the motions on the basis of his opinion denying plaintiffs' motion, and this appeal followed.

[4]** DISCUSSION

Section 101-b is entitled "Unlawful discriminations prohibited; filing of schedules; schedule listing fund". We quote *§ 1* in the margin. [2] Section 2 makes it unlawful for any person who sells liquor or wine to discriminate in price,

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[1] Judge Owen added that, "Given the foregoing, I need not consider the applicability of the *21st Amendment* to these facts."

[2]

> It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale, and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate the undue stimulation of sales of alcoholic beverages and the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, and other inducements to selected licensees, which contribute to a disorderly distribution of alcoholic beverages, and which are detrimental to the proper

discounts for time of payment, or on quantity of merchandise sold between one wholesaler and another wholesaler or between one retailer and another retailer purchasing liquor or wine having the same brand or trade name and of like age and quality, or to grant any discount, rebate, free goods, allowance or other inducement of any kind except certain maximum discounts therein specified. Section 3(b), which is the object of plaintiffs' attack, provides that

> ***HN1***[] no brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule . . . is filed with the liquor authority, and is then in effect[,]

unless "prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter." *N.Y. Alco Bev. Cont. Law § 101-b(3)(b)*. **[**5]** ***HN2***[] Section 4 provides that the schedule required by paragraph 3(b) must be filed before the fifth day of each month and that the prices and discounts would become effective on the first day of the following calendar month and should remain effective for such month. Within ten days after the filing the Authority must make the schedules or a composite available for inspection by licensees. Within three days after the date provided for such inspection, a wholesaler may amend his filed schedule for sales to retailers in order to meet lower competing prices and discounts "provided such amended prices are not lower and discounts are not greater than those to be met." *N.Y. Alco. Bev. Cont. Law § 101-b(4)*.

[6]** I

For some of us who were "present at the creation" of the *Twenty-First Amendment*, there is an aura of unreality in plaintiffs' assumption that we must examine the validity of New York's Alcoholic Beverage Control Law (ABC Law) just as we would examine the constitutionality of a state statute governing the sale of gasoline. The *Twenty-First Amendment* was designed to end the "noble experiment" by which the Federal government endeavored to control the drinking habits **[*169]** of all citizens and to place control of alcoholic beverages in the states. Fulfillment of the latter purpose required that, in addition to repealing the *Eighteenth Amendment*, which was accomplished by *§ 1*, the Amendment should give the states full authority to deal with the subject of intoxicating liquor free from limitations imposed by the *Commerce Clause*, which had hampered such regulation before the *Eighteenth Amendment* was adopted. This was accomplished by § 2 of the Twenty-First Amendment which provides:

HN3[] The transportation or importation into any State, Territory, or possession of the United States for **[**7]** delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

In its first encounter with the Amendment, only three years after ratification, the Supreme Court, without dissent, ruled that a state could impose a license fee on the importation of beer that would have been forbidden by the *Commerce Clause* itself. *State Board of Equalization v. Young's Market Co., 299 U.S. 59, 64, 81 L. Ed. 38, 57 S. Ct. 77 (1936)*. The Court also posed, as a rhetorical question, "Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer . . .," *id. at 63*, something as antithetical to the Sherman Act as could be imagined. [3] **[**10]** Discussion continued in this vein until *Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 12 L. Ed. 2d 350, 84 S. Ct. 1293 (1964)*. Although Justice Stewart there made the frequently cited declaration quoted in the margin, [4] *id. at 332*, and also said that a contention that the *Twenty-First Amendment* had somehow operated to "repeal" the *Commerce Clause* "would be patently bizarre and is demonstrably incorrect", *id. at 331-32*, **[**8]** the actual decision was the unsurprising one -- although it did surprise two Justices -- that the

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> regulation of the liquor industry and contrary to the interests of temperance, it is hereby further declared as the policy of the state that the sale of alcoholic beverages should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.

See also the preamble quoted in Part IV *infra*.

[3] While such action by a state would now be immune from antitrust attack under *Parker v. Brown*, there is nothing to indicate that the *Young's Market* Court was peering that far into the future or thought that any such justification was required.

[4] Both the *Twenty-first Amendment* and the *Commerce Clause* are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.

Amendment did not empower New York to prohibit the sale at John F. Kennedy International Airport of tax-free liquor for "ultimate delivery and use . . . in a foreign country", *id. at 333*. Justice Stewart's remarks in *Idlewild* must also be read along with his observation, only two terms later, that in a case concerning liquor destined for use, distribution or consumption exclusively in New York -- indeed another section of the very statute here at issue -- "the ***HN4***[] *Twenty-First Amendment* demands wide latitude for regulation by the state." *Joseph E. Seagram & Sons v. Hostetter, 384 U.S. 35, 42, 16 L. Ed. 2d 336, 86 S. Ct. 1254 (1966)*. However, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 106-10, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*, the Court gave further attention to the relation of state powers under the *Twenty-First Amendment* and the commerce power and, after noting that the Amendment gave the states "virtually **[**9]** complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system", *id. at 110*, concluded that:

> ***HN5***[] Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case". *Hostetter v. Idlewild Liquor Corp., 377 U.S., at 332*.

Id. Since this appeal was argued, the Court has again stated that "it is by now clear that ***HN6***[] the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the *Commerce Clause*," *Bacchus Imports, Ltd. v. Dias, **[*170]** 468 U.S. 263, ____, 52 U.S.L.W. 4979, 4982-83, 82 L. Ed. 2d 200, 104 S. Ct. 3049 (1984)*. [5]

Still this is not at all to say, as plaintiffs assume, that attacks on state regulation of the liquor business as conflicting with the antitrust laws are to be decided as if § 2 of the Twenty-First Amendment did not exist. In *Bacchus Imports*, the Court referred to the language in *Midcal* that a "pragmatic effort [must be made] to harmonize state and federal powers," *445 U.S. at 109*, and also to the statement in *Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, ___, 52 U.S.L.W. 4803, 4809, 81 L. Ed. 2d 580, 104 S. Ct. 2694 (1984)*, **[**11]** that "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." We hold that the challenged sections of New York's Alcoholic Beverage Control Law are not in direct conflict with *§ 1* of the Sherman Act but that if they were, the interests of New York are entitled to prevail. We leave undecided the question whether Judge Owen was correct in relying, as an alternative ground for decision, on the proposition that New York's activity is protected by the state action doctrine.

II

Since *§ 1* of the Sherman Act is directed only to ***HN7***[] "contract[s], combination[s] in the form of trust or otherwise, or conspirac[ies] in restraint of trade or commerce", *15 U.S.C. § 1*, plaintiffs have been faced from the outset with the difficulty that the challenged provisions of the Alcoholic Beverage Control Law do not compel any agreement. The schedules required to be filed by the wholesalers are **[**12]** their individual acts. Indeed the complaint does not allege any agreement among the wholesalers; it complains only of the acts of the Authority. In a case that had been wending its way through the New York courts while this one has been pending in the district court and this court, the New York Court of Appeals considered a few sentences sufficient to dispose upon this ground of a challenge to subdivision 3 of *section 101-b* apparently identical to that made here. *Admiral Wine & Liquor Co. v. State Liquor Authority, 61 N.Y.2d 858, 473 N.Y.S.2d 969, 462 N.E.2d 146 (1984)*, *modifying 89 A.D.2d 522, 452 N.Y.S.2d 213 (1st Dept. 1982)*.

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[5] Three Justices believed that the decision, with the facts of which we need not here concern ourselves, was inconsistent with § 2 of the Twenty-First Amendment. *Bacchus Imports, 52 U.S.L.W. at 4983* (Stevens, J., dissenting).

Plaintiffs continue to insist, however, as they did unsuccessfully in the district court and in the New York courts, that the case is ruled in their favor by Midcal, supra. Analysis of *Midcal* demonstrates that the contention is fallacious.

The California statutory scheme challenged in *Midcal* required that every "wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier . . . [who] own[ed] or control[led] a brand of wine resold to retailers or consumers . . . make and file a fair **[**13]** trade contract *and* a schedule of resale prices. . . ." *See* Calif. Bus. & Prof. Code § 24866(b) (emphasis supplied). Another section of the code imposed similar obligations on all wine brand owners who were based outside the state. *See* Calif. Bus. & Prof. Code § 24867. Price posting was required only in those rare instances where there was no fair trade contract, *see* Calif. Bus. & Prof. Code § 24866(a), and, as will be seen, such posting was altogether different in its nature and effect from that required by New York. Finally, it was made unlawful for any licensee to purchase, sell or resell any wine at a price other than the one established by either the governing fair trade contract or by a posted price schedule. *See* Calif. Bus. & Prof. Code § 24862. In short, California had created a resale price maintenance system for wine. [6]

[14]** **[*171]** In Midcal Aluminum, Inc. v. Rice, 90 Cal. App. 3d 979, 153 Cal. Rptr. 757 (1979), the petitioner, a licensed wholesaler, which had been accused of selling wine at prices below those contained in a price schedule and of selling wine which was not covered by a "fair trade" contract, sought a determination that the California statute was unconstitutional. The California Court of Appeal for the Third Appellate District held that the statute violated the Sherman Act. The court also found that the California law was not protected by either "state action" immunity or § 2 of the Twenty-First Amendment. The court considered that these holdings were required by the decision of the Supreme Court of California in Rice v. Alcoholic Beverage Control Appeals Board, 21 Cal. 3d 431, 146 Cal. Rptr. 585, 579 P.2d 476 (1978), where that court struck down similar restrictions on the sale of distilled liquors, there being nothing to show that the provisions with respect to wine had been enacted out of special solicitude for the California wine industry. When the respondent Director of Alcoholic Beverage Control argued that if the fair trade contract provision **[**15]** of the statute were to be held invalid, the wholesale price posting provision "should be severed from the invalid portions of the statutes," Midcal, 153 Cal. Rptr. at 761, the Court of Appeal declined to do this. It pointed out that the price posting provision was an incident of a legislative scheme to fix prices; that price posting was required only when there was no fair trade contract in effect; that price posting was intended to have the same effect as a fair trade contract, namely, to fix the price at which sales might be made by retailers; and that the Department had ruled that only one distributor could file a price schedule for any trading area and that this would bind all other distributors -- indeed one of the charges against Midcal was that it sold wine for less than the prices contained in a schedule filed by a competing wholesaler. Hence the California court concluded that the price posting provision was an integral part of the price fixing scheme and was not severable.

The California Retail Liquor Dealers Association intervened as a defendant when the Alcoholic Beverage Control Department refused to appeal. The California Supreme Court declined to **[**16]** hear the case, doubtless because it regarded the decision of the Court of Appeal as following inevitably from its own previous decision in *Rice*, and the Dealers Association sought and obtained certiorari from the Supreme Court of the United States.

The Supreme Court was obliged to take the case as it found it. The California Court of Appeal had construed both parts of the statute, the fair trade contract provision and the alternative price posting provision, which was ruled to be nonseverable therefrom, to be part of a plan whereby all persons at various levels in the chain of distribution were forced to establish identical prices fixed by the brand owner for each brand of wine. Justice Powell was thus able to decide quite summarily that the scheme compelled by the California statute violated § 1 of the Sherman Act. He said that "the wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers", and quoted Justice Hughes' remark in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408, 55 L. Ed. 502, 31 S. Ct. 376 (1911), that such vertical control destroys horizontal competition as

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[6] When originally enacted, California's "fair trade" system was protected from Sherman Act preemption by the Miller-Tydings Resale Price Maintenance Act of 1937, 50 Stat. 693, which exempted from federal anti-trust laws state statutes sanctioning resale price maintenance. The Miller-Tydings Act was repealed by the Consumer Goods Pricing Act of 1975. *See* 89 Stat. 801 (1975).

effectively as **[**17]** if wholesalers "formed a combination and endeavored to establish the same restrictions . . . by agreement with each other", and then passed on to the more difficult issues in the case, namely, whether the state's involvement was sufficient to establish antitrust immunity under *Parker v. Brown, supra, 317 U.S. 341*, and whether the California statute was within the protection of the *Twenty-First Amendment*, which we shall discuss below.

[*172] The challenged sections of the ABC Law plainly are not a resale price maintenance scheme of the sort condemned in *Midcal*. In contrast to *Midcal*, each wholesaler is completely free to file whatever price schedules he desires, and his schedule now has no controlling effect on retail prices since § 101-bbb, which prohibited retail sales at a price less than that established in a retail price schedule, has been declared to be unconstitutional by the New York Court of Appeals. *See Mezzetti Associates, Inc. v. State Liquor Authority, 51 N.Y.2d 761, 432 N.Y.S.2d 372, 411 N.E.2d 791 (1980)*. *Midcal* simply did not deal with a statute like New York's which merely requires wholesalers to post and adhere **[**18]** to their own unilaterally determined prices and nothing more.

However, the inappositeness of *Midcal* is not the end of the matter. It can be argued that *§ 101-b* is nevertheless inconsistent with *§ 1* of the Sherman Act since it forces each wholesaler to inform other wholesaler of its prices and then to adhere for a month to them (or a lowered price meeting that of a competitor filed within three days), unless prior written permission of the SLA is obtained, [7] and that if this had been done pursuant to an agreement, the agreement would have constituted a violation of *§ 1* under such cases as *American Column & Lumber Co. v. United States, 257 U.S. 377, 66 L. Ed. 284, 42 S. Ct. 114 (1921)*; *Sugar Institute v. United States, 297 U.S. 553, 80 L. Ed. 859, 56 S. Ct. 629 (1936)*, and *United States v. Container Corp., 393 U.S. 333, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969)*. [8]

[19]** An identical argument was rejected by Judge Blumenfeld in *United States Brewers Ass'n, Inc. v. Healy, 532 F. Supp. 1312, 1329-30* (D. Conn.), *rev'd on other grounds*, *692 F.2d 275* (2 Cir. 1982), *aff'd*, *464 U.S. 909, 104 S. Ct. 265, 78 L. Ed. 2d 248 (1983)*, on a challenge to a Connecticut posting statute similar to New York's except for the absence of the three day provision. He correctly distinguished *Midcal* as involving an implicit agreement for resale price maintenance and cited *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* (2 Cir. 1981). [9] He then applied our holding in *Modern Home Inst. v. Hartford Accident & Indemnity Co., 513 F.2d 102, 108-09* (2 Cir. 1975), that *§ 1* of the Sherman Act "is directed only at joint action" and "does not prohibit independent business actions and decisions," and ruled that the Connecticut statute did not violate *§ 1* simply because it compelled individual actions which, if taken pursuant to an agreement, might have constituted **[**20]** a violation. *Brewers Ass'n, 532 F. Supp. at 1330*. This holding was adopted in *Enrico's Inc. v. Rice, 551 F. Supp. 511 (N.D. Calif. 1982)*, *vacated as moot*, *730 F.2d 1250* (9 Cir. 1984), in rejecting an attack on a California administrative rule similar to the New York statute, which granted wholesalers the opportunity to match lower posted prices. The judge refused to follow a decision by the California Court of Appeal for the First District, in *Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Board, 136 Cal. App. 3d 829, 186 Cal. Rptr. 552, 557 (1982)*, *cert. denied*, *464 U.S. 863, 104 S. Ct. 193, 78 L. Ed. 2d 170 (1983)*, which held, on a record showing price posting to have had an anticompetitive effect, [10] that the

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[7] The record contains no information as to what use has been made of this provision.

[8] A partial answer might be that, except for action taken under the three day provision, no wholesaler, when he establishes his own prices, knows what the other wholesalers' prices will be, although he knows what their previous prices were.

[9] The district court decision in *Serlin* rested both on the lack of any element of agreement and on *Parker v. Brown*. Although this court affirmed "essentially on the grounds stated in Judge Daly's well-reasoned opinion" and noted that "the Connecticut statutes do not authorize or compel private parties to enter contracts or combinations to fix prices in violation of *§ 1* of the Sherman Act," our discussion focused on the availability of *Parker v. Brown* immunity. *Morgan, 664 F.2d at 355, 356*.

[10] The Court summarized the evidence in a footnote:

> 8. For *inter* brand competition, in 1955, per case prices of the leading gins varied $2.71 per case or approximately 7 percent. In 1975, the difference per case between the highest and lowest leading gin was a single cent. During that same period the case price of bourbons, excluding Ten High, narrowed from $13.47 (14%) variance to $.47 (1%). The leading scotch whiskeys went from $.50 per case variance equal to 9/10 percent to $.29 per case variance or 3/10 percent.

posting **[*173]** requirement "suffer[ed] from the same infirmity as the wholesale price posting requirements examined in *Midcal*." Finally, *Miller v. Hedlund, 579 F. Supp. 116 (D. Ore. 1984)*, held that Oregon price posting and adherence provisions substantially similar to New York's, except for the absence of the three day meeting price provision, **[**21]** did not violate *§ 1* of the Sherman Act because they did not "require inter-wholesaler agreement or concerted action," *id. at 121*, but that regulations requiring wholesale prices to be constant without regard to transportation conditions and forbidding quantity discounts would be preempted but were saved by *Parker v. Brown*.

[22]** We must confess to some doubt how the difference of opinion between the federal district courts and the New York Court of Appeals, on the one hand, and the California Court of Appeal, on the other, with respect to the "agreement" issue should be resolved. The position of the former is appealing. *Section 1* requires an agreement, state compulsion of individual action is the very antithesis of an agreement, and the argument that an agreement could have been inferred if the wholesalers had voluntarily done what they have been compelled to do is simply too "iffy". Against this, there is some force in the argument that a statute compelling conduct which, in its absence, would permit the inference of an agreement unlawful under *§ 1* is inconsistent with that section unless saved by *Parker v. Brown*.

We do not need to resolve that difficult question on this appeal in light of *Rice v. Norman Williams Co., 458 U.S. 654, 73 L. Ed. 2d 1042, 102 S. Ct. 3294 (1982)*. That case, also originating in California, involved a statute which provided that a licensed importer, through whom alone alcoholic beverages could be brought into California, "shall not purchase or accept **[**23]** delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent." *Calif. Bus. & Prof. Code § 23672* (Supp. 1984). The California Court of Appeal for the Third District held that the statute was *per se* illegal under the Sherman Act and thus was invalid on its face. This time the Supreme Court reversed.

Justice Rehnquist began his opinion for the Court by laying down the governing standards, *458 U.S. at 659*:

> ***HN8***[] As in the typical pre-emption case, the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption **[*174]** of the state statute. A state regulatory scheme is not pre-empted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not pre-empted by the federal antitrust laws simply because the state **[**24]** scheme might have an anticompetitive effect.

> For intrabrand competition, with one exception, every wholesaler who sold one of the leading brands of gin, scotch whiskey or straight whiskey charged the same per case price as his competitors.
>
> Additionally, during the 15-month period prior to the hearing, there were only two instances where the price of one of the analyzed brands was reduced. In November and December 1979, John Walker Red and Gordon's Gin were reduced in price; during those two months every wholesaler in Northern California who handled that brand made the exact same price reduction. The following January, each increased his price to the same amount charged by their competitors.

Lewis-Westco, 186 Cal. Rptr. at 557 n.8.

The only evidence approaching this in the present record is a portion of Battipaglia's affidavit in support of plaintiffs' motion for summary judgment which states that for five of the largest selling brands of wine, which were distributed by six or more wholesalers, there were several months in which there was wholesale price uniformity and other months in which there were price disparities, ranging in the case of one wine from 10% to 13%. Peerless endeavors to explain the uniformity on the basis that each wholesaler pays the same price to the supplier, that most of the wholesalers are parties to the same collective bargaining agreement, and that the costs of goods, wages and fringe benefits amount to 95% of a wholesaler's total costs. Peerless argues further that there is vigorous inter-brand competition among wines.

He then characterized *Midcal* as involving a statute that required members of the California wine industry "to file fair trade contracts or price schedules with the State, and provided that if a wine producer had not set prices through a fair trade contract, wholesalers *must* post a resale price schedule for that producer's brands." *Id.* (emphasis in original). The *Midcal* Court had held that "the statute facially conflicted with the Sherman Act because it *mandated* resale price maintenance, an activity that has long been regarded as a *per se* violation of the Sherman Act." *Id. at 659-60* (emphasis in original). After referring to *Joseph E. Seagram & Sons, Inc. v. Hostetter, supra, 384 U.S. 35*, he elaborated as follows, *458 U.S. at 661*:

> Our decisions in this area instruct us, therefore, that ***HN9***[] a state statute, when considered in the abstract, may be condemned under the antitrust laws only if it mandates or authorizes conduct that necessarily constitutes a violation **[**25]** of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute. Such condemnation will follow under *§ 1* of the Sherman Act when the conduct contemplated by the statute is in all cases a per se violation. If the activity addressed by the statute does not fall into that category, and therefore must be analyzed under the rule of reason, the statute cannot be condemned in the abstract. ***HN10***[] Analysis under the rule of reason requires an examination of the circumstances underlying a particular economic practice, and therefore does not lend itself to a conclusion that a statute is facially inconsistent with federal antitrust laws.

Addressing the statute there challenged, he referred to the holding in *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*, that ***HN11***[] a manufacturer's use of vertical non-price restraints was not *per se* illegal **[**26]** but rather should be scrutinized under the rule of reason since "restraints on intrabrand competition may promote interbrand competition." *Norman Williams, supra, 458 U.S. at 661*. He regarded the California statute as merely enforcing "the distiller's decision to restrain intraband competition", leaving him free to designate as few or as many licensed importers as he pleased. *Id.* The statute thus was not facially invalid, although "the manner in which a distiller utilizes the designation statute and the arrangements a distiller makes with its wholesalers will be subject to Sherman Act analysis under the rule of reason", *id. at 662-63 n.9*, that because of the Court's resolution of the preemption issue, it was not necessary "to consider whether the statute may be saved from invalidation under the doctrine of *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, or under the *Twenty-first Amendment*."

Application of the *Norman Williams* standard calls for affirmance here even if we were to accept *arguendo* the contention that an exchange of price information and price adherence compelled by a state are to be **[**27]** treated, for the purpose of antitrust preemption analysis, as if they were voluntary. The Supreme Court has never held that the exchange of price information, in the language of *Norman Williams*, "necessarily constitutes a violation of the antitrust laws in all cases." Until *United States v. Container Corp., 393 U.S. 333, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969)*, "[***HN12***[] a] program to exchange price information was illegal only if, in addition to the agreement to exchange information, the defendants **[*175]** agreed to fix prices." Note, *Antitrust Liability for an Exchange of Price Information -- What Happened to* Container Corporation, 63 Va. L. Rev. 639, 649 (1977) (footnote omitted). ***HN13***[] Whether or not there was such an agreement would depend on the nature of the information exchanged -- broadly speaking, whether it was of the sort in *American Column & Lumber Co. v. United States, supra, 257 U.S. 377*, or of that in *Maple Flooring Manufacturers Ass'n v. United States, 268 U.S. 563, 69 L. Ed. 1093, 45 S. Ct. 578 (1925)* **[**28]** -- and on the presence of "conscious parallelism", i.e., identical or nearly identical pricing accompanied by "plus factors". See, *e.g.* *Interstate Circuit, Inc. v. United States, 306 U.S. 208, 83 L. Ed. 610, 59 S. Ct. 467 (1939)*; *United States v. General Motors Corp., 384 U.S. 127, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)*. But see, *e.g., Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 541, 98 L. Ed. 273, 74 S. Ct. 257 (1954)*; *Levitch v. Columbia Broadcasting System, Inc., 495 F. Supp. 649, 674-75 (S.D.N.Y. 1980)*, *aff'd* *697 F.2d 495* (2 Cir. 1983). Although *Container Corp., supra, 393 U.S. at 334*, upheld the sufficiency of a complaint charging "an exchange of price information but no agreement to adhere to a price schedule as in *Sugar Institute v. United States, 297 U.S. 553, 80 L. Ed. 859, 56 S. Ct. 629*, or *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811*", the decision was fact bound, the Court observing, *e.g.*, that the industry was "dominated by relatively few sellers", **[**29]** that "the product is fungible and the competition for sales is price", and that "the demand is inelastic, as buyers place orders only for immediate, short term needs." Justice Fortas, concurring, made clear his understanding that the Court's opinion did not "hold that the exchange of specific information among sellers as to prices charged to individual customers, pursuant to mutual arrangement, is a *per se* violation of the Sherman Act," *393 U.S. at 338-39*, and the Court has subsequently cited the Fortas opinion as support for saying that ***HN14***[] "the dissemination of price information is not itself a *per se* violation of the Sherman Act." *United States v. Citizens & Southern National Bank, 422 U.S. 86, 113, 45 L. Ed. 2d 41, 95 S. Ct. 2099 (1975)*. ***HN15***[] *Section 101-b* thus does not mandate or authorize conduct "that necessarily constitutes a violation of the anti-trust laws in all cases." New York wholesalers can fulfill all of their obligations under the statute without **[**30]** either conspiring to fix prices or engaging in "conscious parallel" pricing. So, even more clearly, the New York law does not place "irresistible pressure on a private party to violate the antitrust laws in order to comply" with it. It requires only that, having announced a price independently chosen by him, the wholesaler should stay with it for a month.

In placing our decision upon *Norman Williams* and declining to decide between the two lines of authority with respect to the issue of agreement, we are, of course, acting on the premise that this case is a facial attack on the statute and are leaving open the possibility of a challenge based upon its actual operation. We entertain no doubt that despite the factual material summarized in note 10 *supra*, itself scanty and inconclusive, the attack here was on the ground of facial unconstitutionality. The complaint was addressed to the face of the statute and claimed, erroneously as we have shown, that *§ 101-b* was similar to the California statute invalidated in *Midcal*. Plaintiffs themselves moved for summary judgment, asserting that there was no genuine issue as to any material fact and that they were entitled to judgment **[**31]** as a matter of law. When the judge ruled against them and the defendants moved for summary judgment on the basis of the judge's opinion, plaintiffs did not controvert their own assertions that there were no genuine factual issues. Indeed they made no claim of the existence of such issues on this appeal. We hold, on the authority of *Norman Williams*, that they failed to make out a case of facial invalidity.

[*176] III

The district judge held that if he had been wrong in concluding that *§ 101-b* is not preempted by *§ 1* of the Sherman Act, the statute was nevertheless shielded from the antitrust laws by *Parker v. Brown, supra, 317 U.S. 341 (1943)*. Although our conclusion that he was right in his holding in regard to preemption makes it unnecessary to go further so far as this court is concerned, we think it desirable to discuss the application of *Parker v. Brown* and also the balancing of federal and state interests required by the *Twenty-First Amendment* if *§ 101-b* was preempted and not saved by the state action exception.

Midcal established that in order for state activity in the control of the sale of alcoholic beverages to enjoy the benefit **[**32]** of immunity for state regulation of private conduct, two tests must be met: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy '; second, the policy must be 'actively supervised' by the state itself." *Midcal, 445 U.S. at 105* (quoting *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)*(opinion of Brennan, J.).

There can be no fair question that *§ 101-b* meets the first test, as demonstrated by the first subparagraph of the statute which we have quoted in note 2 *supra*, and the preamble quoted in part IV of this opinion. There is grave question, however, whether the second test is satisfied. *Midcal* held that it was not on the facts there presented, since California, having "authorize[d] price-setting and enforce[d] the prices established by private parties", neither established prices nor reviewed the reasonableness of the price schedules nor regulated the terms of the fair trade contracts, *445 U.S. at 105-06*.

It can be argued with some force that the case with respect to *§ 101-b* is distinguishable. California **[**33]** sought to achieve a system of minimum resale prices, a goal clearly forbidden by the antitrust laws. Under such a system, the prevailing price level should have been of primary importance to the state. It was thus appropriate to require active state involvement in price setting as a condition to immunity. New York, in contrast, has sought only to produce orderly market conditions, specifically by preventing price discrimination. Under such a program there is nothing that the state can "actively supervise" except to see that the statutory requirements are obeyed -- and there is no claim that the state has neglected this.

However, the most influential treatise on the subject, Areeda & Turner, 1 ***Antitrust Law*** para. 213d, at 75 (1978), comes to a contrary conclusion. Posing a hypothetical quite similar to the instant case and assuming that unless exempt the practices would violate the antitrust laws, the authors would deny immunity since "although the state legislature has decided that these practices would be desirable, it has created a continuing, unsupervised private power to act anticompetitively." [11] In *Miller v. Oregon Liquor Control Comm'n, 688 F.2d 1222, 1225* (9 Cir. 1982), **[**34]** the court, quoting from the Areeda & Turner treatise, refused to apply *Parker v. Brown* so as to uphold self-executing State Liquor Commission regulations requiring wholesalers of beer and wine to post prices ten days prior to their effective dates and, in the case of price decreases, to maintain them for 180 days for malt beverages and 30 days for wine. Our own decision in *Morgan v. Division of Liquor Control, supra*, 644 F.2d 353, which held *Parker v. Brown* to be applicable, rested on the ground that Connecticut had there engaged in active supervision by requiring that a wholesaler's posted prices must not be less than his statutorily defined costs. [12] We must confess **[*177]** that there seems to us to be some anomaly in according immunity where a state's program is highly offensive to the antitrust laws, as was true in *Parker v. Brown* itself, provided only that the state involves itself to a certain degree in the iniquity, but in refusing to do so when the state's objective is less at variance with the antitrust laws and is accomplished by a method which requires nothing but policing. Since reliance on *Parker v. Brown* is unnecessary in this case, **[**35]** we think it best to say that we neither approve nor disapprove the alternative holding of the district court and leave the issue for another day.

IV

On the other hand, if we are wrong in thinking that *§ 101-b* is not in conflict with the antitrust laws in the sense required by *Norman Williams* for a declaration of facial invalidity, here, in contrast to *Midcal*, the state's interest should prevail under the balancing process there prescribed for cases where the procompetition policy of the federal antitrust laws comes in conflict with a state's exercise of the authority reserved to it by § 2 of the Twenty-First **[**36]** Amendment.

We begin by observing that the California statute's confrontation with federal policy in *Midcal* was as sharp as could be imagined. Contracts for resale price maintenance had long been held to be *per se* violations of *§ 1* of the Sherman Act. *See, e.g., Dr. Miles Medical Co. v. John D. Park & Sons, supra, 220 U.S. 373*; *Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*. Although states had been permitted to sanction these by the Miller-Tydings Act of 1937, see note 6 *supra*, in order to "protect small retail establishments that Congress thought might otherwise be driven from the market place by large-volume discounters", *Midcal, supra, 445 U.S. at 102*, Congress rescinded that permission by the Consumer Goods Pricing Act of 1975. California was thus attempting to continue, with respect to alcoholic beverages, exactly what Congress had condemned.

As against this strong federal interest, the Court found that California's interest was extremely weak. This finding was made rather easy by the attitude taken by California itself. Justice Powell remarked that, "As the unusual posture **[**37]** of this case reflects, the State of California has shown less than an enthusiastic interest in its wine pricing system," *445 U.S. at 111 n.12*, adding that "the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal" which struck down the law. *Id.* Beyond this the Supreme Court of California in the *Rice* case, *supra*, *21 Cal. 3d 431, 579 P.2d 476, 146 Cal. Rptr. 585* (dealing with distilled liquors), which the Court of Appeal for the Third District found decisive in *Midcal, 90 Cal. App. 3d 979, 153 Cal. Rptr. 757, 760* (dealing with wine), had engaged in the balancing process and found the state's interest in resale price maintenance to be small. After saying that the Supreme Court accords "respectful consideration and great

[11] Query whether the necessary supervision would be furnished if the SLA were required to monitor the filings and report any evidence of agreement on prices to the legislature.

[12] These included a minimum mark-up of 11% on spirits and cordials, 20% on wine bottled outside Connecticut and beer, and 36% on wine bottled within Connecticut. *Conn. Gen. Stat. §§ 30-68*, 30-68e, *30-68j* (1975).

weight to the views of the state's highest court" on such a matter, quoting *Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100, 82 L. Ed. 685, 58 S. Ct. 443 (1938)*, Justice Powell went on to summarize the findings of the California Supreme Court in *Rice*. That court had identified two purposes behind the California legislature's **[**38]** decision to prescribe resale price maintenance: "to promote temperance and orderly market conditions", the latter being primarily aimed at "protect[ing] small licensees from predatory pricing policies of large retailers." *Midcal, 445 U.S. at 112* (quoting *Rice v. Alcoholic Beverage Control Appeals Board, 579 P.2d at 490, 493)*. The state Supreme Court cited a study made by a state agency which showed that per capita liquor consumption in California had risen by 42% while resale price maintenance was in effect and a congressional study showing that states with fair trade acts had a higher rate of firm failures and a lesser rate of growth in **[*178]** small retail stores than free trade states. The state Supreme Court thus found no persuasive justification to continue "fair trade laws which eliminate price competition among retailers", *579 P.2d at 494*, and the Court of Appeal came to the same conclusion with respect to the wine trade. With the state courts thus having in effect given up the ghost, the state liquor agency making no attempt to defend the statute it was administering and only the state attorney general as *amicus* having **[**39]** a good word to say for the law, the Court had an easy time in concluding that nothing in the record suggested that the wine pricing system helped sustain small retail establishments or inhibited the consumption of alcohol by Californians, and that "the unsubstantiated state concerns put forward in [the] caser simply [were] not of the same stature as the goals of the Sherman Act." [13]

The situation here is quite different. As shown in Part II of this opinion, there is no such direct conflict between the antitrust laws and the state enactment as there was in *Midcal*. Moreover, the state interest is strong. In the 1964 repeal of the former system of resale price maintenance, the New York Legislature declared:

> § 8. In enacting section eleven of this act **[**40]** [repealing the resale price maintenance law], it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor in this state, (b) that consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states, and that price discrimination and favoritism are contrary to the best interests and welfare of the people of this state, and (c) that enactment of section eleven of this act will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state. In order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act [requiring that liquor price affirmations be filed] is, therefore, declared as a matter of legislative **[**41]** determination.

Act of April 16, 1964, ch. 531, 1964 N.Y. Laws. Promotion of temperance is not the only interest reserved to the states by § 2 of the Twenty-First Amendment. The Legislature thus at least thought it was promoting price competition. Furthermore it expressly found that "price discrimination and favoritism are contrary to the best interests and welfare of the people of this state" -- a policy which is reflected in the federal antitrust laws, *15 U.S.C. § 13*. There can be no doubt that requiring wholesalers to post their prices and to observe them for a month is an effective way, perhaps the only really effective way, of enabling the SLA to prevent price discrimination. The provision in *§ 101-b(4)* allowing a wholesaler, within three days after disclosure of the price schedules, to meet any lower price, while not strictly necessary to enforcement of the policy against discrimination, was a reasonable effort by the legislature to prevent the one month adherence provision from severely damaging the competitive position of a wholesaler who had posted prices even slightly above the lowest ones. Although it can be argued that this operates **[**42]** as a disincentive to reducing prices in the original filings, plaintiffs have not alleged this in their complaint, produced evidence that it has occurred, or shown that it has had deleterious effects. Since most brands are sold to all wholesalers at nearly the same price, as the Robinson-Patman Act generally requires, there is not much **[*179]** possibility of price competition at the wholesale level, see note 10 *supra*. On the other hand, as was

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[13] The Court reserved the question "whether the legitimate state interests in temperance and the protection of small retailers ever could prevail against the undoubted federal interest in a competitive economy." *445 U.S. at 113-14*.

conceded at argument, the ABC Law has not prevented vigorous competition -- both intrabrand and interbrand -- among wine retailers. Here also, in contrast to *Midcal*, those charged with administering the statute and the highest court of New York have identified it as embodying an important state policy. The "weighing" process prescribed by *Midcal* cannot mean that whenever a state statute has some anticompetitive effect, the federal interest prevails; unless there is some anticompetitive effect, there is no occasion to weigh. At least upon a record such as this, § 2 of the Twenty-First Amendment dictates deference to the state.

Affirmed.

Dissent by: WINTER

Dissent

WINTER, Circuit Judge, dissenting:

I respectfully dissent. I **[**43]** disagree with the majority's conclusion that the arrangements mandated by the New York legislation in question would not be *per se* violations of *Section 1* of the Sherman Act if solely the result of an agreement among private firms. I therefore also take a different view of the application of *California Retail Liquor Dealers Assn. v. Midcal Aluminum, 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)* and of the *twenty-first amendment* to this case.

It is true that arrangements that merely call for the exchange of price information are subject to rule of reason, rather than *per se*, analysis. *United States v. Container Corp., 393 U.S. 333, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969)*; *Maple Flooring Manufacturers Assn. v. United States, 268 U.S. 563, 69 L. Ed. 1093, 45 S. Ct. 578 (1925)*; *American Column & Lumber Co. v. United States, 257 U.S. 377, 66 L. Ed. 284, 42 S. Ct. 114 (1921)*. However, the challenged legislation not only mandates the exchange of price information but also requires adherence to publicly announced prices until thirty days after notice is given of a new price. A requirement of adherence **[**44]** to announced prices has been uniformly held illegal without regard to its reasonableness. *Sugar Institute v. United States, 297 U.S. 553, 601, 80 L. Ed. 859, 56 S. Ct. 629 (1936)* ("steps . . . to secure adherence, without deviation, to prices and terms . . . announced" are illegal). The Supreme Court emphasized as recently as 1980 the "plain distinction between the lawful right to publish prices . . . on the one hand, and an agreement among competitors limiting action with respect to the published prices, on the other." *Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 649-50, 64 L. Ed. 2d 580, 100 S. Ct. 1925 (1980)* (per curiam). *See also* *United States v. Trans-Missouri Freight Association, 166 U.S. 290, 41 L. Ed. 1007, 17 S. Ct. 540 (1897)*. The arrangement in question thus would be *per se* illegal if accomplished solely through private agreement, and our decision, therefore, is governed by *Midcal* rather than by *Rice v. Norman Williams Co., 458 U.S. 654, 73 L. Ed. 2d 1042, 102 S. Ct. 3294 (1982)*. Indeed, to hold otherwise is to forbid states from authorizing resale price maintenance, the anticompetitive **[**45]** effect of which is the subject of great controversy, *see* R. Bork, *The Antitrust Paradox* 288-91 (1978), but to allow them to authorize horizontal price fixing, about which all agree.

I also do not share the majority's concern that the arrangement here is compelled by law rather than achieved through private arrangement. The relevant issue under the *supremacy clause* has to do with the degree to which a state may bring about the very anti-competitive arrangements the Sherman Act was designed to avoid. Whether a state merely authorizes private parties to fix prices or compels them to do so may of course be relevant to the first part of the two-part *Midcal* test, namely whether the challenged restraint is "clearly articulated and affirmatively expressed as state policy." *445 U.S. at 105* (quoting *City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 410, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978))*. Nevertheless, the fact that the state compels a private cartel offers no reason to exempt the legislation from scrutiny under the *supremacy clause*.

[*180] I also conclude that the legislation in question fails the *Midcal* test. **[**46]** Although the policy of creating the cartel in question is surely " one clearly articulated and affirmatively expressed" by the state, the legislation fails to meet the second part of the *Midcal* test, namely that "the policy must be 'actively supervised' by the State itself."

445 U.S. at 105 (quoting City of Lafayette v. Louisiana Power and Light Co., 435 U.S. at 410). As was the case with the California legislation at issue in *Midcal*, New York does nothing whatsoever to establish the actual prices charged, review their reasonableness, monitor market conditions, or engage in reexamination of the program. As in *Midcal*, "the national policy in favor of competition [is] thwarted by casting . . . a gauzy cloak of state involvement over what is essentially a private pricefixing arrangement." 445 U.S. at 106.

Our decision in Morgan v. Division of Liquor Control, 664 F.2d 353 (2d Cir. 1981) is not to the contrary. In that case, we held that Connecticut legislation met the second part of the *Midcal* test because it set a floor for prices established by an express statutory formula and allowed free competition **[**47]** above that floor. In the present case, the only "monitoring" of the state program lies in the provision that responsive price changes cannot be lower than those announced by competitors. That provision, which heightens rather than monitors the anti-competitive impact of the legislation, hardly satisfies the second part of the *Midcal* test.

While I quite agree with Judge Friendly's observations that we should not treat the twenty-first amendment as though it had no application at all to the present case, I do not perceive it to be of any great importance given my view of the New York legislation. Although the statute expresses a concern over the perils of cheap (competitively priced) liquor, the notion that this legislation was even remotely the result of political pressure exerted by aroused temperance groups is a quaint fiction. The self-evident purpose of the statute is to create a cartel of liquor wholesalers for their benefit. Although I believe that the twenty-first amendment allows a state to limit consumption of alcohol by causing its price to be high, I also believe that in such an instance a state must do something more than authorize a cartel of dealers to seek out **[**48]** their profit maximizing price/output level. The issue need not be elaborated in dissent beyond stating my view that where state legislation merely legislates a cartel of liquor dealers and plays no further role in determining prices and output, its self-evident purpose is not to protect the public from the evils of the demon rum, but to preserve the high standard of living of those who sell it. Since the twenty-first amendment was plainly designed only to allow the states to legislate against the evils of intoxicating liquors rather than to reward its purveyors, I see no room for its application in the present case.

I therefore dissent.

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Ohio-Sealy Mattress Mfg. Co. v. Kaplan

United States Court of Appeals for the Seventh Circuit

April 19, 1984, Argued ; September 21, 1984

Nos. 83-2321, 83-2405

Reporter
745 F.2d 441 *; 1984 U.S. App. LEXIS 18368 **; 1984-2 Trade Cas. (CCH) P66,213

OHIO-SEALY MATTRESS MANUFACTURING COMPANY, SEALY MATTRESS COMPANY OF HOUSTON, SEALY MATTRESS COMPANY OF FORT WORTH, SEALY MATTRESS COMPANY OF PUERTO RICO, INC., SEALY OF THE NORTHEAST, and SEALY MATTRESS COMPANY OF GEORGIA, Plaintiffs-Appellants, v. MORRIS A. KAPLAN, SEALY MATTRESS COMPANY OF ILLINOIS, WILLIAM H. WALZER, SEALY CONNECTICUT, INC., SEALY GREATER NEW YORK, INC., WATERBURY MATTRESS COMPANY, MORTON H. YULMAN, SEALY OF EASTERN NEW YORK, INC., SEALY OF MINNESOTA, INC., PETER D. BROWN, SEALY MATTRESS COMPANY OF MICHIGAN, INC., T. C. ENGLEHARDT, JR., FRED G. HODGES BEDDING COMPANY (A/K/A SEALY MATTRESS COMPANY OF READING, PA), SEALY OF DES MOINES, INC., WALTER HERTZ, SEALY MATTRESS COMPANY OF NEW JERSEY, INC., JOSEPH V. MOFFITT, SEALY OF THE CAROLINAS, PEERLESS MATTRESS COMPANY, LLOYD B. ROSENFELD, SEALY MATTRESS COMPANY OF OREGON, JOSEPH R. RUDICK, MARYLAND BEDDING COMPANY, JAMES THOMPSON, HOWARD G. HAAS, SEALY, INCORPORATED, SEALY SPRING CORPORATION, SEALY MATTRESS COMPANY OF COLORADO, INC., SEALY MATTRESS COMPANY OF NORTHERN CALIFORNIA, INC., SEALY MATTRESS COMPANY OF SOUTHERN CALIFORNIA, INC., SEALY MATTRESS COMPANY OF ARIZONA, INC., SEALY MATTRESS COMPANY OF FLORIDA, INC., SEALY MATTRESS COMPANY OF PITTSBURGH, INC., and SEALY MATTRESS COMPANY OF PHILADELPHIA, INC., Defendants-Appellees

Prior History: [1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 76 C 810 -- William T. Hart, Judge.

Core Terms

licensees, damages, territories, manufacturing, post-verdict, equitable relief, plant, acquisitions, injunction, parties, district court, decree, res judicata, prayer, equitable, products, enjoin, injunctive relief, intrabrand, centers, repair, anti trust law, future damage, pre-verdict, conditions, antitrust, passover, charges, right of first refusal, additional evidence

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN1[] **Private Actions, Standing**

The United States Supreme Court articulates the legal principles applicable to the recovery of damages resulting from ongoing conduct violative of the antitrust laws. The court first states that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover damages caused by that act.

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN2[] Right to Jury Trial, Actions in Equity

A plaintiff cannot create speculativeness, and then use that uncertainty as to future damages to avoid the policies underlying res judicata.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN3[] Private Actions, Remedies

There is broad latitude in establishing antitrust damages in private suits.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4[] Injunctions, Preliminary & Temporary Injunctions

It makes little sense for a district judge to enjoin an evil no longer present or to ignore an evil that has turned acute since the time of the verdict.

Civil Procedure > ... > Jury Trials > Right to Jury Trial > Actions in Equity

Civil Procedure > Trials > Jury Trials > Right to Jury Trial

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN5[] Right to Jury Trial, Actions in Equity

When legal and equitable claims are joined in one action, absent exceptional circumstances, a litigant has a right to have the issues common to the legal and equitable claims tried first to a jury.

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Judges: Pell and Wood, Circuit Judges, and Weigel, Senior District Judge. *

* Stanley A. Weigel, Senior District Judge of the Northern District of California, sitting by designation.

Opinion by: PELL

Opinion

[*442] PELL Circuit Judge.

This case which, for purposes of clarity, we shall label *Ohio II*, is the second of six civil suits brought by the Ohio-Sealy Mattress Manufacturing Company (Ohio) against its licensor, Sealy, Incorporated (Sealy), and other defendants. The first civil suit, which we shall label *Ohio I*, was filed in 1971, and, following two appeals to this court, ultimately resulted in Ohio's obtaining a substantial damages award as well as an order of equitable relief. [1] The present appeal in *Ohio II* is taken from two orders of the district court entered on August 1, 1980, and June 16, 1983. The appeal, involving two challenging questions **[**2]** regarding the doctrine of res judicata, requires us to determine the preclusive effects of the *Ohio I* litigation on the *Ohio II* case.

I. FACTS

Both *Ohio I* and *Ohio II* are antitrust suits brought by Ohio, one of the most successful and aggressive licensees of appellee Sealy, which owns numerous trademarks to a popular brand of mattresses **[*443]** and other bedding products. The resolution of this appeal makes necessary our examination of the procedural history of each suit.

A. The *Ohio I* litigation [2]

[3]** *Ohio I*, a marathon case which, from the filing of the complaint to its final disposition on appeal, lasted over one decade, had its origins in a 1967 Supreme Court case *United States v. Sealy, Inc., 388 U.S. 350, 356, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967)*. In *United States v. Sealy, Inc.*, the Supreme Court invalidated Sealy's system of allocating mutually exclusive manufacturing and sales territories to its manufacturer-licensees. The Court found that Sealy was a joint venture of its stockholder-licensees and that the licensees were "themselves directly, without even the semblance of insulation, in charge of Sealy's operations." *Id. at 353*. Sealy's system of assigning each manufacturer an enclave free of intrabrand competition, the Court held, was therefore a *horizontal* market allocation per se violative of *Section 1* of the Sherman Act. [3] Approximately four weeks after the Court handed down its decision, the licensee-directors of Sealy met to discuss the ramifications of the Court's ruling. Concern was expressed over the competition that could be expected from "renegade," "out of control," and "predatory" licensees no longer constrained **[**4]** by the exclusive territory system. Sealy thereafter developed a new Uniform License Agreement that all its licensees signed in 1968, save one whose license was reacquired by Sealy some years later. The new agreement preserved the same territories (designated Areas of Primary Responsibility or "APRs") as had been used before, and Sealy agreed not to permit any other manufacturer to produce Sealy products in a licensee's territory. The Agreement was thus exclusive as to manufacture, but it was not on its face exclusive as to sales. A licensee was permitted to sell Sealy products in another licensee's APR. Any licensee who would be inclined to sell outside his own APR, however, faced several disincentives. First, each licensee was held accountable for adequate sales in his APR. As an incentive to sell only within his APR, each licensee, once he achieved a quota of sales in his APR, had to pay only one-half the standard royalty to Sealy for all subsequent sales of Sealy products

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[1] When we use the terms "Ohio I," "Ohio II," and "Ohio III" in this opinion, we refer to entire lawsuits, not to the successive occasions a particular cause of action has been before this court.

[2] Much of this discussion is derived from this court's opinion in *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978)*, *cert. denied*, ***440 U.S. 930, 59 L. Ed. 2d 486, 99 S. Ct. 1267, 201 U.S.P.Q. (BNA) 256 (1979)***.

[3] The *Sealy* Court dealt with an aggregate of trade restraints, including horizontal market allocation as well as minimum retail price fixing. In *United States v. Topco Associates, Inc., 405 U.S. 596, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972)*, the Supreme Court removed the ambiguity created by *Sealy*; the *Topco* Court held that horizontal territorial restraints even if unaccompanied by price fixing are considered per se illegal. *405 U.S. at 609* & n.9.

made that year inside or outside his APR. Second, there was a surcharge placed on sales outside a licensee's APR. The surcharge was termed a "passover payment," and the seller had to remit it to Sealy, **[**5]** which in turn paid it over to the licensee in whose territory the seller had successfully marketed his product. Although Sealy characterized the payment as one designed to prevent an out-of-APR licensee from taking a "free ride" on a fellow licensee's advertising efforts, Sealy itself conducted the great bulk of the advertising for the Sealy brand. The passover charge could run as high as eleven percent. Third, a licensee making an out-of-APR sale had to pay a one percent "product service repair" charge to Sealy. As originally conceived, Sealy was to hold these payments in a fund from which it would reimburse licensees who actually made repairs on products they had not sold, but in practice Sealy paid the charges over to "invaded licensees" whether or not they in fact made any repairs. Fourth and finally, the 1968 Uniform License Agreement limited a licensee to manufacture Sealy products at specified plant locations and prohibited the adding of plant locations without Sealy's written approval. A licensee contemplating an out-of-APR **[*444]** sale faced high transportation costs because of the bulk and weight of the product, and the plant location clause exacerbated this impediment **[**6]** to competition. A licensee who wanted to locate a plant at the periphery of his APR in order to compete more effectively against his neighboring licensees was prevented from so doing. Ohio twice sought permission to construct a plant in Toledo, Ohio, in order to compete more effectively against the Detroit licensee. On both occasions, Sealy denied Ohio's request.

Sealy also inserted into the Uniform License Agreement a clause giving Sealy the "right of first refusal" should a licensee desire to sell his business. Sealy **[**7]** exercised this clause against Ohio on three occasions between 1970 and 1972, thereby blocking Ohio's efforts to obtain the Philadelphia, Florida, and Pittsburgh licensees. In 1970, Ohio contracted to buy the Philadelphia licensee, but upon a complaint from the neighboring Baltimore licensee, Sealy exercised the right of first refusal and the Philadelphia licensee retracted its offer to sell. In 1972, the same sequence of events took place, but this time Sealy acquired the Philadelphia licensee. In 1970, the principal of the Florida licensee reached an agreement to transfer his business to Ohio, but he withdrew his business from sale after Sealy exercised its right of first refusal. In 1972, Ohio for a second time contracted to buy the Florida licensee but Sealy exercised its right of first refusal and acquired the Florida concern. A similar scenario was played out with respect to the Pittsburgh licensee in 1972 and 1973.

In 1971, Ohio and four wholly owned subsidiaries brought suit against Sealy and other defendants seeking both damages and injunctive relief. The claims in the complaint fell largely into two categories. First, there were claims related to the post-1967 market allocation **[**8]** we have just described. Second, there were claims based upon Sealy's use of tying arrangements with respect to bedding components. The latter category of claims need not concern us further. With respect to the former category of claims, Ohio sought the following: First, it requested recovery of the passover payments and product service repair charges it had remitted to Sealy, plus an injunction against future imposition of those charges. Second, Ohio sought damages based upon Sealy's refusal to allow it to locate a plant in Toledo, plus an injunction against future enforcement of the plant location clause. Third, it requested lost profits and preparatory expenses with respect to the failed acquisitions of the Philadelphia, Florida, and Pittsburgh licensees, plus divestiture by Sealy of those licensees. Finally, Ohio sought an injunction against future enforcement of the exclusive manufacturing territories provision. Following extensive pre-trial discovery, the damages claim was tried to a jury, and in April 1975 the jury returned a general verdict in excess of six million dollars in favor of Ohio.

Approximately one year after the general verdict of April 1975, district court **[**9]** Judge Parsons denied Sealy's motion for a new trial upon the condition that Ohio accept a fifty percent remittitur. Ohio acceded to the remittitur and thus, after trebling, received damages in excess of ten million dollars. Eight months later, Judge Parsons denied Ohio equitable relief.

Ohio I came to this Court for the first time on appeal in 1978. *See* [Ohio-Sealy Manufacturing Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978)](), *cert. denied*, *440 U.S. 930, 59 L. Ed. 2d 486, 99 S. Ct. 1267, 201 U.S.P.Q. (BNA) 256 (1979)*. Sealy argued on appeal that there was insufficient evidence upon which the jury could have found a system of market allocation. We agreed with Sealy that the enormity of the damages award necessarily implied the jury had found that Sealy had allocated the market and had thereby perpetuated the horizontal constraints the Supreme Court in 1967 found per se violative of the Sherman Act. We disagreed, however, with Sealy's assertion that the evidence adduced at trial was insufficient to support such a finding. Although any one of the license provisions Sealy used may not have effected a horizontal market allocation, the evidence **[**10]** of all of the provisions **[*445]** taken together, combined with the fact that most directors of Sealy were licensees, entitled the district court to let the jury decide whether Sealy had illegally divided the market. We reversed the district court, however, with respect to the denial of injunctive relief. We reasoned that the district court had failed to apprehend the jury's necessary finding that Sealy had effected a market allocation: "We think the court erred, thus, in premising its equitable relief decision on the assumption that the only fact established by the jury verdict was that at least one acquisition somehow violated the antitrust laws. Under the evidence and the instructions, and as the case was argued, the jury verdict must also be read to include a finding that Sealy was engaged in the scheme of market allocation in which one or more acquisitions were at least a part." *Id. at 844*. We thus remanded the case to Judge Parsons with instructions to reconsider the denial of equitable relief. We directed Judge Parsons to consider what "total mix of equitable relief, if any, might be just in the circumstances." *Id. at 845* & n. 34. We also **[**11]** directed Judge Parsons to "consider the evidence adduced both at the jury trial and at the equitable relief hearing," and we permitted him to "take any additional evidence . . . [he] might find helpful." *Id. at 845*.

On remand, the district court took additional evidence from the parties and concluded those evidentiary proceedings in 1979. In March of 1981, Judge Parsons entered a final decree, in which he stated at the outset that Sealy had voluntarily agreed to cease collecting passover payments, enforcing the plant location clause, or collecting product service repair charges. Judge Parsons then stated that he had decided not to enjoin Sealy from future enforcement of the exclusive manufacturing territories provision. Judge Parsons reasoned that permitting any licensee to open a plant anywhere in the nation would amount to appropriation of the licensor's property. He also stated that his enjoining enforcement of the plant location clause and collection of the surcharges on out-of-APR sales was a measure sufficient to end market allocation. Judge Parsons declined to enjoin the exercise of the right of first refusal unless Sealy's exercise were linked to **[**12]** an anti-competitive purpose. Judge Parsons reasoned that Sealy had a protectible interest in maintaining the quality of products bearing the Sealy label, and that the right of first refusal, if not used for anti-competitive purposes, effected legitimate control over the identity of those who manufacture under the Sealy name. Next, Judge Parsons concluded that divestiture of the Pittsburgh, Florida, and Philadelphia licensees was not required. Finally, Judge Parsons denied Ohio's supplemental motion to recover damages that had accrued since the jury verdict. Judge Parsons reasoned that Ohio had pending at that time two lawsuits in which it sought to recover those supplemental damages.

Ohio appealed from the final decree, arguing that Judge Parsons erred when he failed to (1) enjoin the exercise of the exclusive manufacturing clause, (2) order divestiture, and (3) award supplemental damages. *Ohio-Sealy Manufacturing Co. v. Sealy, Inc., 669 F.2d 490 (7th Cir. 1982)*, *cert. denied*, *459 U.S. 943, 103 S. Ct. 257, 74 L. Ed. 2d 201 (1982)*. This court affirmed Judge Parsons on each point. We began our opinion by noting that an equitable decree in a **[**13]** private antitrust suit should fashion "injunctive relief only to the extent necessary to protect [the plaintiff] from future damages likely to occur if the defendant continues the unlawful antitrust conduct." *Id. at 495*. We then considered the denial of injunctive relief with respect to the exclusive manufacturing territories provision and concluded that the district court's other injunctive relief was sufficient to restore "significant intrabrand competition among neighboring licensees." *Id. at 496*. Although the exclusive manufacturing territories provision might prevent Ohio from competing effectively in every APR, we stated that Ohio was not entitled to secure by injunctive relief every conceivable competitive goal. *Id.* On the issue of divestiture, we noted that Ohio had **[*446]** acquired two licensees near the APRs of the Philadelphia and Florida licensees. We also stated that Ohio's Medina, Ohio, plant was near the Pittsburgh licensee's APR. We therefore concluded that Ohio Sealy could engage in significant intrabrand competition at those locations and that divestiture was accordingly unnecessary. Finally, we agreed with the district **[**14]** court that Ohio was not entitled to supplemental damages. With respect to supplemental damages resulting from Sealy's pre-verdict conduct, we divided the damages into two types, namely those that were provable at trial and those that were not. We stated that the doctrine of res judicata barred Ohio from recovering damages of the first type in any further *Ohio I* proceeding or in any subsequent law suit. We concluded that Ohio was, however, entitled to bring a fresh cause of action in a separate lawsuit to recover damages of the second type. Finally, with respect to any damages issuing from Sealy's post-verdict conduct. Ohio again had an independent cause of action that it could pursue in a separate suit.

B. The *Ohio II* Litigation

In March 1976, Ohio and five wholly owned manufacturing subsidiaries filed a new suit naming as defendants, *inter alia*, Sealy, certain Sealy subsidiaries, Sealy's president, and several former members of Sealy's Board of Directors. The complaint was in six counts. Count I was brought under Sections 4 and 16 of the Clayton Act, *15 U.S.C. §§ 15*, *26*, and sought damages and injunctive relief for violations of *Section* **[**15]** *1* of the Sherman Act, *15 U.S.C. § 1*. Distilled to its simplest elements, Count I alleged that all the practices upon which the jury based its 1975 verdict continued without change after 1975. In particular, the complaint alleged that Sealy had reenacted the Uniform License Agreement, reelected the licensee directors to Sealy's board, collected passover and product service repair charges, and "excluded Ohio from competing effectively in the Florida, Philadelphia, and Pittsburgh markets." Paragraph 92 of Count I contained the damages prayer, and it read in pertinent part:

> 92. Ohio-Sealy's injury by reason of all said unlawful restraints and activities has manifested itself in damages, including the following:
>
> (a) Lost profits in connection with the loss of the acquisition of the Florida, Philadelphia, and Pittsburgh licensees.
>
> (b) Loss of profits and increased costs of doing business in connection with refusals of a Toledo plant location in 1971 and 1973.
>
> (c) Royalties paid on bedding not bearing Sealy trademarks and trade names.
>
> (d) Net passover payments and warranty repair charges made by Ohio-Sealy.

Count II sought damages **[**16]** and injunctive relief under Section 8 of the Clayton Act, *15 U.S.C. § 19*, and alleged that certain individuals were at the same time directors of licensees and directors of Sealy, Inc. Paragraph 104 of the complaint, the damages prayer for Count II, stated that as a direct result of the interlocking directorate, Ohio had been injured and would continue to be injured "as set forth in Count I." Counts III through VI alleged numerous additional violations of federal law as well as state law, but these matters have now been settled or adjudicated, and none is relevant to this appeal.

In July 1979, Ohio filed a third suit, *Ohio III*, against Sealy and certain new directors. Sealy and the other defendants in *Ohio III* filed a motion to abate the action as duplicative of *Ohio II*. In response to that motion, Ohio amended its complaint in *Ohio II*, limiting the temporal scope of that complaint to the period before April 24, 1978. *See Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 90 F.R.D. 40 (N.D. Ill. 1980)*. Sealy and the district court agreed to that time limitation.

Only three matters are presently before this court on appeal, **[**17]** namely the damages prayers of subparagraphs 92(a) and 92(b) **[*447]** and a request under Count II to enjoin enforcement of the exclusive manufacturing territories provision. The prayer under subparagraph 92(c) was adjudicated below and this court affirmed the district court's decision on interlocutory appeal. *See Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 712 F.2d 270 (7th Cir. 1983)*, *cert. denied*, *464 U.S. 1002, 78 L. Ed. 2d 698, 104 S. Ct. 509*. With respect to the prayer under subparagraph 92(d), Ohio agreed below that it was foreclosed by the judgment in *Ohio I* from seeking recovery of payments made before the 1975 jury verdict. *See Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 90 F.R.D. 11, 14 & n.6 (N.D. Ill. 1980)*. As to payments made after the 1975 verdict and before April 24, 1978, the defendants in *Ohio II* tendered treble the amount of the payments and the district court dismissed the prayer. With respect to injunctive relief under Count II, Sealy acceded to an injunction against the interlocking directorate, which left only the request for an injunction against enforcement of the exclusive manufacturing **[**18]** territories provision.

By order dated August 1, 1980, district court Judge Aspen granted Sealy summary judgment with respect to the damages Ohio sought under subparagraphs 92(a) and 92(b). Judge Aspen reasoned that Ohio sought post-verdict damages resulting from pre-verdict acts, and that Ohio could have establishes those damages at trial in 1975 by projecting them into the future and discounting them to present value. *See Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 90 F.R.D. 11, 17 (N.D. Ill. 1980)*. Hence, principles of res judicata barred Ohio from recovering post-verdict damages from Sealy, Inc. Judge Aspen also stated that principles of satisfaction of judgment barred Ohio from recovering post-verdict damages from the other defendants in *Ohio II*.

In May 1982, *Ohio II* was reassigned to District Judge William Hart. On June 16, 1983, Judge Hart ruled in an unpublished order that principles of res judicata also barred Ohio from obtaining an injunction in *Ohio II* against enforcement of the exclusive manufacturing territories provision. Judge Hart reasoned that in our opinion in the second appeal from *Ohio I*, this court had directed Judge **[**19]** Parsons to take all the additional evidence he needed to fashion equitable relief. In 1979, Judge Parsons in fact held an evidentiary hearing and invited the parties to submit to him evidence concerning post-verdict events that might bear on Ohio's prayer for equitable relief. In March 1981, Judge Parsons entered his final decree. Since Ohio had limited the time period of *Ohio II* to acts occurring before April 24, 1978, all facts relevant to the prayer for equitable relief in *Ohio II* were or could have been litigated before Judge Parsons. This court affirmed Judge Parsons' decree in 1982, and hence, Judge Hart maintained, the matter of enjoining enforcement of the exclusive manufacturing territories provision had been fully and finally adjudicated in *Ohio I*.

With the entry of Judge Hart's June 16, 1983, order, all claims in *Ohio II* had been dismissed, rendered moot, or settled. Final judgment was entered on June 30, 1983. Ohio now appeals from Judge Aspen's order of August 1, 1980, and Judge Hart's order of June 16, 1983.

II. DISCUSSION

A. Judge Aspen's August 1, 1980, Order

By order of August 1, 1980, Judge Aspen decided that Ohio's damages claim for **[**20]** the post-verdict consequences of the defendants' pre-verdict acts was barred by res judicata. Ohio assigns error to this point. Our resolution of Ohio's appeal requires us to examine the law of res judicata in the context of a continuing conspiracy to violate the antitrust laws.

In *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971)*, ***HN1***[] the Supreme Court articulated the legal principles applicable to the recovery of damages resulting from ongoing conduct violative of the antitrust laws. The Court first stated that "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to **[*448]** recover damages caused by that act." *Id. at 338*. Under this rule, Ohio had the right to seek post-verdict damages from Sealy's post-verdict acts. For example, when Sealy continued after the 1975 verdict to collect passover and product service repair charges, a new cause of action to recover those payments accrued to Ohio. *See Lawlor v. National Screen Service Corp., 349 U.S. 322, 327-28, 99 L. Ed. 1122, 75 S. Ct. 865 (1955)*; *Poster Exchange, Inc. v. National Screen Service Corp., 517 F.2d 117, 126-29 (5th Cir. 1975)*. **[**21]** Sealy does not contest that Ohio had such a right, and the claim for Ohio's post-verdict payments has in any event been resolved by settlement. The Court next stated that "each separate cause of action that so accrues entitles a plaintiff to recover not only those damages which he has suffered at the date of accrual, but also those which he will suffer in the future from the particular invasion, including what he has suffered during and will predictably suffer after trial." *Id. at 338-39*. It is under this rule, Sealy contends, that Ohio is not entitled to recover in *Ohio II* the damages described in subparagraphs 92(a) and 92(b). The acquisitions of the Philadelphia, Florida, and Pittsburgh licensees as well as the denial of the Toledo, Ohio, plant location all occurred prior to the jury's verdict in 1975. Ohio was required to argue to the jurors sitting in *Ohio I* that it would incur damages into the future from the acts described in subparagraphs 92(a) and 92(b). Ohio's failure to make such an argument to the jurors sitting in *Ohio I* bars it forever from recovering the post-verdict damages it has suffered because of the acquisitions and denial of a new plant location. **[**22]** The Court placed a proviso on its second rule but Sealy maintains that even considering the proviso, Ohio is still barred. The proviso stated, "It is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable." *Id. at 339*. In his August 1, 1980 decision, Judge Aspen considered whether the post-verdict damages Ohio sought in *Ohio II* might indeed be recoverable because the fact of their accrual was "speculative" or their amount "unprovable" at trial in 1975. In a carefully crafted opinion, Judge Aspen ruled that neither standard articulated in the *Zenith* proviso could save Ohio's claim for damages. The possibility of future damages was not so speculative as to preclude presentation to the jury. Ohio knew that Sealy would not simply yield up the Philadelphia, Florida, and Pittsburgh licensees in the event of an unfavorable jury verdict. Sealy would continue to retain those licensees and hence recovery of future damages was an issue ripe for presentation **[**23]** to the jury in

1975. Although Ohio had chosen to seek equitable relief, including divestiture, in a later proceeding, the prospect of equitable relief did not render speculative the accrual of future damages under the *Zenith* proviso. ***HN2***[] Plaintiff, by his own actions, could not "create speculativeness, and then use that uncertainty as to future damages to avoid the policies underlying res judicata." *Ohio-Sealy Mattress Manufacturing Co. v. Kaplan, 90 F.R.D. 11, 17 (N.D. Ill. 1980)*. Moreover, the future damages that Ohio sought in *Ohio I* were capable of proof at trial in 1975 under well established methods of projecting lost profits. ***HN3***[] There is "broad latitude" in establishing antitrust damages in private suits, and although Ohio could not establish damages with "mathematical certainty," it had at its disposal the tools lawyers generally employ to make a just and reasonable estimate of future losses. *Id., citing Bailey v. Meister Brau, Inc., 535 F.2d 982, 991 (7th Cir. 1976)*.

We are unable to agree with Judge Aspen's conclusion that Ohio is barred in *Ohio II* from recovering post-verdict damages resulting from Sealy's pre-verdict conduct. **[**24]** The accrual of future damages resulting from the acquisitions of the Philadelphia, Florida, and Pittsburgh licensees and the denial of a Toledo plant was speculative **[*449]** at the time of the 1975 jury verdict. In order to explain our position, it is necessary to elaborate on that part of our 1978 affirmance of *Ohio I* that discusses the Supreme Court's then recently announced decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. *See Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc., 585 F.2d 821, 831-33 (7th Cir. 1978)*.

In *Brunswick*, the Court addressed the requirements for recovery of treble damages under Section IV of the Clayton Act, *15 U.S.C. § 15*. Petitioner was a large national manufacturer of pinsetting equipment that had acquired several bowling centers after those centers defaulted on the obligations they had issued to purchase the manufacturer's pinsetting products. Respondents were bowling centers that competed with the centers petitioner acquired. At trial, respondents tried to establish damages compensable under Section IV solely by showing **[**25]** that their profits would have increased had petitioner not kept the defaulting centers in business. The Court assumed for purposes of the case that petitioner's entry into a market of small concerns violated Section VII, which proscribes acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly." *15 U.S.C. § 18*. The Court held that respondents were not entitled to damages under Section IV because the acquisitions had not caused any "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent." *Id. at 489* (emphasis in original). Respondents would have suffered the same "loss" regardless of the identity of the concern acquiring the defaulting centers. *Id.* If a small concern as opposed to Brunswick had acquired the centers, respondents would have incurred the "loss" without a Section VII violation. The Court also noted that if the centers Brunswick acquired had been thriving businesses, the Section VII violation would have been at least as plain, yet respondents could not have identified any revenue they would have received but for the acquisitions. *Id. at 487* n. **[**26]** 12. In essence, respondents were seeking damages on the theory that they faced non-predatory competition from centers that otherwise would have closed, but the antitrust laws are meant to promote competition. It would contradict the purposes underlying ***antitrust law*** to award respondents profits they would have realized if fair competition had been reduced. *See generally* Areeda, Antitrust Violations Without Damage Recoveries, 89 Harv. L. Rev. 1127 (1976).

On the first appeal in *Ohio I*, Sealy argued to this court that under *Brunswick* Ohio had suffered no damages compensable under Section IV. We dealt with Sealy's argument as follows:

> The thrust of Sealy's argument is that the competitive situation would have been the same regardless of whether the prior licensee, Ohio, or Sealy had primary responsibility for the territories in question. It insists that Ohio is merely a disappointed desirous purchaser of the licensees, and to award damages for the disappointment is a perversion of the antitrust laws. If Ohio had claimed damages here on the theory that, *e.g.*, Sealy's acquisitions in themselves violated Section VII of the Clayton Act, Sealy's **[**27]** argument might have some plausibility. Sealy ignores, however, the theory Ohio argued to the jury and on which the district court gave instructions, that Sealy's exercise of its right of first refusal was a part of a scheme of market allocation, done to keep Ohio from establishing new bases from which it might effectively compete with neighboring licensees.

Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc., 585 F.2d at 832.

Thus, the critical point we made in response to Sealy's argument was that acquisitions *could not be viewed in isolation* for purposes of determining the recoverability of damages under Section IV. This is entirely logical as a matter of first principles. Had Sealy not enforced the plant location clause and not collected passover and product service repair charges, Ohio could have located plants on the periphery **[*450]** of its Georgia territory and shipped bedding products into the Florida market unfettered by external constraints. The result would have been vigorous competition between Ohio and the Florida licensee for a share of the Florida market in Sealy products. The acquisition of the Florida licensee by Sealy **[**28]** was compensable in *Ohio I* only because Sealy employed *additional tactics* to maintain Florida as an enclave free of intrabrand competition. Had Sealy not used other tactics to erect barriers around the Florida territory, Sealy's acquisition of the Florida licensee would have been no more compensable under Section IV than was Brunswick's acquisition of defaulting bowling alleys. Under the same reasoning, Sealy's acquisition of the Pittsburgh and Philadelphia licensees became compensable under Section IV only because Sealy enforced the other contract provisions that prevented Ohio from competing in those territories from its bases in Ohio and Massachusetts. Finally, Sealy's denying a Toledo plant location was compensable because Sealy erected other barriers, such as the exclusive manufacturing territories provision, that kept elevated Ohio's cost of doing business beyond its territories.

At the time Ohio asked the jury to assess damages in *Ohio I*, Ohio was entitled to believe that Sealy would in the future obey the nation's antitrust laws. That is, Ohio could proceed under the assumption that, in the event of a verdict in Ohio's favor, Sealy would open its territories **[**29]** to reasonable intrabrand competition from neighboring licensees. Judge Aspen was correct when he stated that at the time of trial Ohio could not have expected Sealy to hand the Philadelphia, Florida, and Pittsburgh licensees over to Ohio in the event the jury returned a verdict against Sealy. Judge Aspen, however, erred when he ignored all the other tricks, gambits, and ploys Sealy allegedly continued to use after April 1975 to seal off its territories from reasonable intrabrand competition. Ohio was perfectly correct to proceed under the assumption that Sealy would discontinue those tactics following an award in Ohio's favor that indicated the jury necessarily found a horizontal division of markets. It would have been absurd for Ohio to argue to the jury in 1975 that it would continue to feel antitrust injury from Sealy's acquisitions and denial of a Toledo plant location well into the future. That Sealy would not dismantle its barriers to reasonable intrabrand competition following a verdict for Ohio was highly speculative, and Ohio accordingly cannot be barred from bringing its current damages action.

This is an unusual case in that Sealy's liability in 1975 for its wrongful **[**30]** acquisitions of the Philadelphia, Florida, and Pittsburgh licensees and denial of a new plant location in Toledo depended directly upon Sealy's enforcement of other contract provisions that effectively sealed off Philadelphia, Florida, Pittsburgh, and the out-of-APR territory around Toledo from intrabrand competition. The post-verdict damages that Ohio now seeks are thus not, as Sealy would have us believe, "continuing damages for *old* and *now insulated*, illegal conduct." *Exhibitor's Poster Exchange, Inc. v. National Screen Service Corp., 421 F.2d 1313, 1319 (5th Cir. 1970)* (emphasis added). The post-verdict damages sought in *Ohio II* necessarily required for their accrual Sealy's alleged maintenance of the host of other devices that insured the APR's in question would remain enclaves untroubled by competition from Ohio. Ohio was not required to predict that these devices would remain in place following the 1975 verdict. A contrary conclusion on our part would in effect confer on defendants immunity from civil liability for their post-verdict maintenance of barriers around Philadelphia, Florida, Pittsburgh, and the out-of-APR territories surrounding **[**31]** Toledo. *See* *Lawlor, supra, at 329*. We accordingly hold, with regard to the pre-verdict acquisitions of the Philadelphia, Florida, and Pittsburgh licensees and pre-verdict denial of a Toledo plant, that Ohio may proceed with its legal claim in *Ohio II* to recover such post-verdict damages, if any, as it is able to prove for the period between April 1975 and April **[*451]** 1978 as a direct result of unlawful restraint, if any, continued by Sealy after April 1975 and to April 1978.

B. Judge Hart's June 16, 1983, Order

In its first appeal of *Ohio I* to this court, Ohio argued that Judge Parsons erred when he denied all equitable relief. We agreed with Ohio that Judge Parsons' denial was erroneous, and we remanded the cause to Judge Parsons with instructions to "take any additional evidence . . . [he] might find helpful in fashioning equitable relief." *Ohio-*

Sealy Mattress Manufacturing Co. v. Sealy, Inc., 585 F.2d 821, 845 (7th Cir. 1978). In 1979, when Judge Parsons convened the equitable relief hearing we had sanctioned, he advised the parties to submit to him additional evidence concerning post-verdict conduct:

> I have **[**32]** decided that I will need to hear additional evidence concerning three provisions of the license agreement which remained in dispute [the exclusive manufacturing territories provision, the right of first refusal clause, and the no-competitive interests provision]. Of concern with respect to all these provisions is the fact that the financial positions of the parties, their corporate structures and the economic conditions in the relevant market *may have today changed significantly over the course of this litigation*. The complaint in this case was filed eight years ago. The jury verdict was handed down over four years ago. I heard post-trial evidence on equitable relief almost three years ago. *Whatever changes have occurred during this time should bear substantially on plaintiffs' prayer for equitable relief*.

(Emphasis added.) The relief proceeding focused largely on Ohio's challenge to the exclusive manufacturing territories provision and the issue of divestiture. Shortly before the conclusion of the hearing, Judge Parsons once again invited the parties to offer additional evidence. Finally, in a post-hearing order dated April 15, 1980, Judge Parsons advised **[**33]** the parties: "I should welcome any factual and explanatory assistance to me in fashioning an injunctive type order, even though it means considering transactions which post date the formal hearings [in August 1979] on equitable relief."

It is thus plain that Judge Parsons gave the parties ample opportunity to apprise the court of all post-verdict conduct that might have a bearing on Ohio's prayer for an injunction against enforcement of the exclusive manufacturing territories provision. Judge Parsons' practice of taking evidence on post-verdict conduct was clearly warranted by our 1978 instructions and as a matter of original principles. ***HN4***[] It would make little sense for a district judge to enjoin an evil no longer present or to ignore an evil that had turned acute since the time of the verdict. *Cf. Champion Spark Plug Co. v. Reich, 121 F.2d 769, 772 (8th Cir. 1941)*, *cert. denied*, *314 U.S. 669, 86 L. Ed. 535, 62 S. Ct. 130, 51 U.S.P.Q. (BNA) 547*; *Continental Securities Co. v. Interborough Rapid Transit Co., 207 F. 467, 471 (S.D.N.Y. 1913)* ("Equity acts in the present tense. . . . [It] mold[s] the decree to actualities not **[**34]** history.").

Judge Parsons ultimately granted most of the equitable relief Ohio sought, but he concluded that an injunction against enforcement of the exclusive manufacturing territories provision was unnecessary to effect reasonable intrabrand competition. We affirmed Judge Parsons' decree in the second appeal of *Ohio I* to this court. *See Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc., 669 F.2d 490, 496 (7th Cir. 1982)*. Ohio filed *Ohio II* in 1976 and requested, *inter alia*, an injunction against enforcement of the exclusive manufacturing territories provision. Judge Aspen thereafter limited the temporal scope of *Ohio II* to the period between April 1975 and April 1978. Judge Hart was thus correct when he held in his August 1, 1983, order that principles of res judicata barred Ohio from seeking an injunction in *Ohio II* against enforcement of the exclusive manufacturing territories provision. Every fact relevant to the injunction sought in *Ohio II* had occurred when, in March 1981, the **[*452]** district court entered the equitable decree in *Ohio I*. Ohio had a full and fair opportunity to present Judge Parsons with evidence of **[**35]** post-verdict occurrences that could militate in favor of enjoining exercise of the exclusive manufacturing territories provision. The fact that Ohio may not have availed itself of this opportunity is immaterial. Res judicata makes a final judgment conclusive as to the parties on all issues of fact and law that were litigated or could have been litigated. *See* J. Moore, J. Lucas and T. Currier, Moore's Federal Practice para. 0.405[1] (2d ed. 1983). Ohio now seeks a second chance in which to convince the district court that events occurring up to April 1978 require a result different from the one rendered by Judge Parsons in 1981 and perfected through appeal to this court in 1982. Res judicata is appropriately applied to prevent this needless relitigation of issues fairly and conclusively decided in prior proceedings.

Ohio raises two supplemental arguments in support of its position that it is entitled to litigate in *Ohio II* the issue of enjoining enforcement of the exclusive manufacturing territories provision. First, Ohio maintains that Judge Parsons expressly reserved Ohio's right to litigate in *Ohio II* the propriety of an injunction in light of post-verdict conditions. **[**36]** We reject this argument for three independent reasons. First and foremost, the passage of Judge Parsons' decree that Ohio quotes in support of its position plainly refers to independent matters, namely Sealy's acquisition of its Portland licensee and Sealy's threat to revoke Ohio's license. Judge Parsons reserved addressing these issues because they were the subject of *Ohio III*. The reservation when read in context, however, cannot be said to refer to the exclusive manufacturing territories provision. Second, it takes an irrational stretch of the imagination to suppose that Judge Parsons would on three occasions invite the parties to submit evidence to him concerning post-verdict conditions and then base his decree solely upon conditions as they existed in 1975. Third, in his decree in *Ohio I*, Judge Parsons in fact referred to post-verdict conditions. For example, he expressly addressed himself to the "1975 Sealy Uniform License Contract," an agreement executed subsequent to the verdict in *Ohio I*. It is thus plain that Judge Parsons did not defer until *Ohio II* consideration of an injunction against enforcement of the exclusive manufacturing territories provision **[**37]** based upon post-verdict conditions. He expressly asked the parties to inform him about post-verdict conditions and formulated his decree in light of those conditions the parties chose to bring to his attention.

Ohio also argues that it is entitled to litigate the issue of enjoining the exclusive manufacturing territories provision because Judge Parsons' opinion is not "coherent." This make weight argument need not delay us long. Judge Parsons' opinion painstakingly analyzes the propriety of several equitable measures. On the issue of the exclusive manufacturing territories provision, Judge Parsons determined that permitting a licensee to manufacture anywhere in the nation would be tantamount to permitting a licensee to appropriate the licensor's property; no licensee would ever again seek multiple licenses, for his single license would enable him to manufacture wherever he desired. We approved of Judge Parsons' reasoning when we affirmed the decree of equitable relief in 1982. Ohio may have preferred a different outcome on this aspect of the *Ohio I* litigation, but it cannot now legitimately argue that its claim received less than a coherent disposition in prior proceedings.

[38]** For the sake of completeness, we raise one argument concerning res judicata that Ohio failed to make in its present appeal to this court. In *Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988 (1959)*, the Supreme Court held that ***HN5***[] when legal and equitable claims are joined in one action, absent exceptional circumstances, a litigant has a right to have the issues common to the legal and equitable claims tried first to a jury. By virtue of our disposition of the first issue in this appeal, Ohio will now be entitled to proceed with its damages action. If we in addition **[*453]** hold that Judge Parsons' equitable relief proceeding in 1979 functioned as the equitable relief proceeding for *Ohio I* and *Ohio II*, it could be argued that Ohio is being forced in *Ohio II* to reverse the order of proceedings dictated by *Beacon Theaters*. Upon closer examination, however, this argument fails. *Beacon Theaters* requires a judge, absent exceptional circumstances, to hear equitable claims after legal claims have been tried to a jury because a reverse order might infringe upon a litigant's right to a jury trial. If the equitable proceeding **[**39]** were held first, principles of former adjudication would preclude the jury's consideration of issues necessarily and actually decided by the judge. In the instant case, the rationale articulated in *Beacon Theaters* behind having the legal proceeding come first, however, is inapplicable. The preclusive effects, if any, that follow from the proceeding before Judge Parsons will follow whether we label that proceeding "the equitable proceeding for *Ohio I*" or "the equitable proceeding for *Ohio I* and *Ohio II*." There accordingly would be nothing gained by postponing the equitable relief proceeding in *Ohio II* until after jury trial on the damages claim. The parties to the damages action in *Ohio II* will have no greater opportunity to try issues to the jury if we were to consider the equitable proceeding in *Ohio II* not to have yet taken place.

CONCLUSION

Having considered all the arguments urged by the parties to this appeal, we conclude that Ohio may proceed with its damages action against defendants to recover such post-verdict damages as it is able to prove for the period between April 1975 and April 1978 as a result of Sealy's pre-verdict acquisitions of **[**40]** the Philadelphia, Florida, and Pittsburgh licensees and pre-verdict refusal of a Toledo plant location, all as specified hereinbefore in this opinion. Ohio may not, however, proceed with its prayer for an injunction against enforcement of the exclusive manufacturing territories provision. The parties shall bear their own costs. The final judgment entered in the district court accordingly is AFFIRMED IN PART, REVERSED IN PART, and the cause is REMANDED to the district court for proceedings consistent with this opinion.

End of Document

Package Shop, Inc. v. Anheuser-Busch, Inc.

United States District Court for the District of New Jersey

September 24, 1984, Decided

Civil Action No. 83-513

Reporter
1984 U.S. Dist. LEXIS 24942 *; 1984 WL 6618

THE PACKAGE SHOP, INC., et al., Plaintiff, v. ANHEUSER-BUSCH, INC., et al., Defendants.

Notice: NOT FOR PUBLICATION

Subsequent History: Summary judgment granted by Package Shop, Inc. v. Anheuser-Busch, Inc., 675 F. Supp. 894, 1987 U.S. Dist. LEXIS 11857 (D.N.J., 1987)

Core Terms

distributors, retailers, brewers, territorial, beer, conspiracy, Wine, wholesalers, prices, plaintiffs', exclusive territory, vertical, rule of reason, class certification, effects, anticompetitive, products, discounts, horizontal, membership, quantity, cases, defendants', antitrust, price-fixing, distributorships, benefits, brand, written agreement, class action

LexisNexis® Headnotes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN1[] **Class Actions, Prerequisites for Class Action**

See Fed. R. Civ. P. 23(a).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN2[] **Class Actions, Prerequisites for Class Action**

If the initial prerequisites of Fed. R. Civ. P. 23(a) are met, plaintiffs must additionally meet the requirements of at least one of the three subsections of Rule 23(b).

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN3[] **Prerequisites for Class Action, Maintainability**

Fed. R. Civ. P. 23(b)(3) provides that an action may proceed as a class action if 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. To support certification, common issues need only predominate; they need not be dispositive of the entire litigation.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Evidence > Burdens of Proof > Allocation

HN4[] Class Actions, Certification of Classes

The burden of demonstrating fulfillment of the conditions outlined in Fed. R. Civ. P. 23 for maintenance of a class action lies with the moving party. The strength of a plaintiff's case on the merits is not to be considered in determining whether a class should be certified. There is no requirement of a prima facie showing of merit in a class action to support certification. However, some analysis of the substantive claims and the essential elements needed to establish those claims is necessary for thorough evaluation of whether the requirements of Rule 23 have been met. A preliminary hearing addressed not to the merit's of plaintiff's individual claim but to whether she is asserting a claim which, assuming its merit, will satisfy the requirements of Rule 23 has never been regarded as violative of Rule 23.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN5[] Class Actions, Certification of Classes

In order to determine whether common or individual issues predominate for the purpose of deciding whether a class should be certified under Fed. R. Civ. P. 23(b)(3), a court must first identify the legal and factual issues in the case.

Antitrust & Trade Law > Sherman Act > Claims

HN6[] Sherman Act, Claims

To prevail on the merits of a claim under section 1 of the Sherman Act, 15 U.S.C.S. § 1, a private plaintiff must prove three distinctive elements: (1) a violation--a contract, combination or conspiracy which unreasonably restrains trade; (2) causation--that the plaintiff suffered antitrust impact or fact of injury as a result of the violation; and (3) amount of damages.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN7[] Cartels & Horizontal Restraints, Price Fixing

An indirect purchaser from a supplier has no legal right to sue the supplier directly for establishing an illegal restraint. In order to establish liability for an alleged horizontal conspiracy, plaintiffs must prove that the distributors, with whom the plaintiffs did deal directly, were involved in the conspiracy with the manufacturers. Proof of the existence of a horizontal conspiracy among the manufacturers cannot prove the existence of a vertical conspiracy between the manufacturers and the distributors, although it may constitute some evidence of such a vertical conspiracy.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN8[] **Price Fixing & Restraints of Trade, Vertical Restraints**

Vertical restrictions on intra-brand competition are no longer per se violations of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, and must instead be analyzed under the rule of reason. Under rule of reason analysis, to prove a *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, violation, a plaintiff must both establish a contract, combination or conspiracy in restraint of trade and also demonstrate that the restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN9[] **Tying Arrangements, Per Se Rule**

A per se *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, tying violation is established when a plaintiff proves (1) the existence of a tie; (2) that the seller has sufficient economic power with respect to the tying product to appreciably restrain free competition in the tied product; and (3) that a not insubstantial amount of interstate commerce is affected.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN10[] **Tying Arrangements, Sherman Act Violations**

An illegal tying arrangement is made out under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, when the seller of a product over which he has market power conditions its sale upon the purchase of one or more additional items. If such a condition is expressly spelled out in contract or can fairly be inferred from the operation of contractual terms, a plaintiff need prove no more in order to make out the first element of his tying claim. If, however, a class action tie-in claim is made, without basis in an express agreement, proof of salesmanship coupled with inequality of bargaining power does not prove the existence of a tie, but rather proof of actual coercion on an individual basis is necessary to prove the existence of a tie.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN11[] Sherman Act, Claims

In order to establish *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, violation, a plaintiff must prove the existence of a contract, conspiracy or combination in restraint of trade and prove either an unlawful purpose or an anticompetitive effect. A plaintiff need only demonstrate unlawful purpose or anticompetitve effect, not both. Purpose and effect are linked disjunctively in antitrust analysis.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Evidence > Burdens of Proof > Allocation

HN12[] Per Se Rule & Rule of Reason, Per Se Violations

The question of whether a plaintiff must show purpose or effect turns on whether the violation alleged falls into the per se or rule of reason category. In a per se case, a plaintiff often need only establish an anticompetitive purpose. Because of the nature of the violation, actual anticompetitive effect need not be shown because such effect is presumed. In contrast, to establish a violation in a rule of reason case, a plaintiff usually need only show anticompetitive effect.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Elements

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN13[] Conspiracy to Monopolize, Elements

To prove that a conspiracy or other form of agreement violates *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*, a plaintiff must show either that it falls in one of the categories of per se illegality or that it has an actual or at least probable anticompetitive effect.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Evidence > Admissibility > Circumstantial & Direct Evidence

HN14[] Sherman Act, Claims

In a distributor termination in furtherance of a price-fixing conspiracy, intent to agree may not be inferred simply from the fact that other distributors complained to the manufacturer prior to termination. Rather, there must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributor were acting independently. An antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective. The concept of a common scheme or agreement includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.

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

HN15[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A finding of a combination, contract or conspiracy can be made in a rule of reason case absent any express proof of intent. In a rule of reason case, intent to restrain trade may be inferred from circumstance surrounding the challenged contracts or acts. Plaintiffs in a per se case are put to a stricter test in establishing an agreement since they need show nothing further to prove an antitrust violation.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN16[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

In a rule of reason antitrust claim such as a vertical distribution claim, the unreasonableness of the restraint as well as the existence of the restraint must be established. Plaintiffs must show that the restraint has an unreasonable anticompetitive effect on competition.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN17[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

In the context of a restricted distribution case, establishing the unreasonableness of a restraint entails demonstrating that the restrictions' anticompetitive effects on intra-brand competition are not outweighed by its pro-competitive effects on interbrand competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN18[] **Per Se Rule & Rule of Reason, Sherman Act**

In a rule of reason case, the factfinder weighs all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN19[] **Per Se Rule & Rule of Reason, Sherman Act**

Mere factual complexity in a rule of reason case is no reason to deny class certification.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN20[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

To establish an antitrust violation on a claim of parallel business behavior, there must be (1) a showing of acts by defendants in contradiction of their own economic interests, and (2) satisfactory demonstration of a motivation to enter an agreement.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN21[] **Regulated Practices, Price Fixing & Restraints of Trade**

Generally a manufacturer has an interest in maintaining intra-brand competition so as to keep retail prices low and sales high.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN22[] **Monopolies & Monopolization, Conspiracy to Monopolize**

Merely invoking the incantation "conspiracy" does not insure that common questions will predominate.

Antitrust & Trade Law > Sherman Act > Claims

HN23[] **Sherman Act, Claims**

Proof of impact is an essential element of any antitrust action.

Antitrust & Trade Law > Sherman Act > Claims

HN24[] **Sherman Act, Claims**

To prove antitrust impact, a plaintiff must show that he suffered some loss in his business or property and that there is a causal relationship between the antitrust violation and the loss. Impact or causation is a distinct element of liability, independent of proof of a violation. It is also distinct from the matter of individual damages.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Commonality

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN25[] **Sherman Act, Claims**

There is absolutely no requirement that an antitrust loss be personal or unique to a plaintiff, so long as the plaintiff has suffered loss in his business or property. When an antitrust violation impacts upon a class of persons who do have standing, there is no reason why proof of the impact cannot be made on a common basis so long as the common proof adequately demonstrates some damage to each individual. Whether or not fact of damage can be proven on a common basis depends upon the circumstances of each case.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN26[] **Vertical Restraints, Price Fixing**

In order to establish that vertical restraints constitute an unreasonable restraint on trade, it must be determined whether restrictions' anticompetitive effects on intra-brand competition are not outweighed by their pro-competitive effects on interbrand competition. In order to establish fact of damage, plaintiffs must show that the anticompetitive effects outweigh the pro-competitive effects of the restraint as to each member of a proposed class, since at least some damage to each individual plaintiff must be shown. Unless this fact of damage to each class member can be established by common proof, class certification should be denied.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN27[] **Robinson-Patman Act, Claims**

Because of the requirement that disfavored customers show functional competition between themselves and favored customers, impact in class action claims brought under § 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*, has been held not provable by common evidence.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN28[] **Prerequisites for Class Action, Maintainability**

The necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN29[] Prerequisites for Class Action, Maintainability

In addition to finding that common questions predominate, *Fed. R. Civ. P. 23(b)(3)* requires that a court determine whether a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Antitrust & Trade Law > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN30[] Antitrust & Trade Law

Efficiency suggests that the antitrust claims of all retailers affected by a practice be disposed of in a single lawsuit.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Maintainability

HN31[] Prerequisites for Class Action, Maintainability

One important factor in determining whether a class action is superior is the difficulty likely to be encountered in the management of the case.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

HN32[] Prerequisites for Class Action, Adequacy of Representation

Antagonisms within a class justifying denial of certification must relate to the subject matter of the suit.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Constitutional Law > ... > Case or Controversy > Standing > Third Party Standing

HN33[] Standing, Third Party Standing

An association has standing to sue on behalf of its members if: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Constitutional Law > ... > Case or Controversy > Standing > Third Party Standing

HN34[] Private Actions, Standing

The Hunt standards apply to the question of associational standing in antitrust actions.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Constitutional Law > ... > Case or Controversy > Standing > Third Party Standing

HN35[] Standing, Third Party Standing

Hunt does not require that each of an association's members have independent standing. It is sufficient for associational standing purposes that a significant portion of an association's members would have had individual standing.

Civil Procedure > ... > Justiciability > Standing > Third Party Standing

Constitutional Law > ... > Case or Controversy > Standing > Third Party Standing

HN36[] Standing, Third Party Standing

The third criterion of the Hunt associational standing test requires consideration of two questions: (a) whether the nature of the claims involves individualized proof, and (b) whether the association is competent to speak for its members.

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Shanley & Fisher, Esqs., BY: Mary E. Tracey, Esq., Newark, NJ, Attorneys for Defendant B & B Beverage Co.

Ellenport & Holsinger, Esqs., BY: John R. Holsinger, Esq., Roseland, NJ, Attorneys for Defendants Hub Beer Distributors, Inc. and Hub City Distributors, Inc.

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Judges: DICKINSON R. DEBEVOISE, United States District Judge.

Opinion by: DICKINSON R. DEBEVOISE

Opinion

DEBEVOISE, District Judge.

This action, brought under section 1 of the Sherman Act, *15 U.S.C. §1*, and the New Jersey Antitrust Act, *N.J.S.A. 56:9-1, et seq.*, alleges horizontal and vertical conspiracies to create and maintain a system of exclusive territorial distributorships for the distribution of beer products in New Jersey. Plaintiffs are two small retail liquor stores in Elizabeth, New Jersey, which derive a significant portion of their revenues from the sale of beer, and the Wine & Spirits Retailers of New Jersey, Inc. Wine & Spirits holds itself out as a trade association comprised of over 600 New Jersey liquor and beer retailers. The two retailer plaintiffs seek treble damages. All three plaintiffs seek injunctive relief. Jurisdiction is based on §§4 and 16 of the Clayton Act, *15 U.S.C. §§15*, *26*. Plaintiffs invoke the pendent jurisdiction of the court to raise claims under the New Jersey Antitrust Act. *N.J.S.A. 56:9-1, et seq.*

Following amendment of the complaint, the remaining defendants are five **[*4]** brewers of beer - Anheuser-Busch, Inc., Miller Brewing Co., Pabst Brewing Co., Christian Schmidt Brewing Co., and the Schaefer and Schlitz divisions of Stroh Brewing Co. - and 22 distributors of the defendant brewers' beer (including Anheuser-Busch which serves as its own distributor in one territory). Based on the defendant brewers' answers to interrogatories, plaintiffs ascertained that at least 84.5% of all beer sold in New Jersey in 1982 was brewed by the brewer defendants. Through discovery, plaintiffs also learned that the 22 distributor defendants distributed approximately 90% of the beer distributed in the state in 1982.

The essence of plaintiffs' case is that the defendants have maintained a system under which each brewer authorizes only one distributor to distribute its beer within a defined geographic territory. This system of exclusive territories has had the purpose and effect of eliminating intrabrand and interbrand competition among the defendant brewers and distributors of each brand of beer within each specific territory. According to plaintiffs, this system is carried out by means of three types of conspiracies:

1) A horizontal conspiracy among the brewers, created **[*5]** by their allegedly consciously parallel behavior in entering exclusive territorial distributorship agreements;

2) A series of vertical conspiracies between each brewer and each of its distributors; and

3) Horizontal conspiracies among the distributors, including a) a uniform conspiracy among all the distributors to maintain and respect each other's exclusive territories for all brands of beer and b) conspiracies among the distributors of each brand to respect each other's exclusive territories.

Plaintiffs have moved for certification of a plaintiff class consisting of all retailers licensed under *N.J.S.A. 33:1-12* to sell alcoholic beverages which have purchased defendant brewers' beer from one or more of the defendant distributors. The class which plaintiffs seek to represent numbers approximately 12,000. Defendants have moved to dismiss plaintiff Wine & Spirits Retailers of New Jersey, Inc.

1. *The Territorial Agreements.*

Class certification discovery revealed that all of the defendant brewers, except Schmidt's, utilized form agreements authorizing the defendant distributors to sell their beer. The vast majority of these agreement specified territorial "areas of primary responsibility" **[*6]** or "area[s] of primary marketing responsibility" for the distributor's sale of beer. Many of these agreements also either specifically denied that they defined exclusive territories or were silent on the issue. Several more recently executed agreements explicitly do establish exclusive territorial distributorships.

The plaintiffs allege that the agreements establishing "areas of primary responsibility" and the like in fact establish exclusive territories. They assert that these alternate terms are merely euphemisms designed to hide the true nature of the agreements. The parties submitted the relevant portions of the brewer-distributor agreements applicable during the four year period for which defendants may be liable under the antitrust statutes.

a. Anheuser-Busch

The agreements between Anheuser-Busch and its distributors prior to December, 1982 contained the following language:

> Wholesaler agrees to exercise its best efforts to promote, sell and service Anheuser-Busch's Products in the geographic area designated on Exhibit 1 as Wholesaler's primary market area. Wholesaler shall be primarily responsible for servicing retail accounts in its primary market area with Anheuser-Busch Products **[*7]** and will be expected to concentrate its efforts in that area. It is understood, however, that, unless required by state law, Anheuser-Busch does not assign exclusive areas and does not grant exclusivity to Wholesaler in its primary market area. (Plaintiffs' Exhibit 8; Brewer Defendants' Exhibit 4).

However, in December, 1982, two months before the filing of this suit (and the end of the liability period), Anheuser-Busch entered its current "Wholesaler Equity Agreements" which state:

> Anheuser-Busch hereby appoints Wholesaler as the wholesale distributor of, and grants to Wholesaler the right to sell, the Products in the territory described in Exhibit 2 ("Territory") and agrees that it will not appoint another wholesaler for the Products sold by Wholesaler in the Territory . . . . Wholesaler hereby accepts said appointment and agrees to exercise its best efforts to promote, sell and service the Products in the Territory. Wholesaler agrees that it will not sell Products directly or indirectly to customers located outside the Territory. (Plaintiffs' Exhibit 8).

b. Miller

Prior to May, 1983, Miller's agreements with its distributors contained no references to exclusive territories. According **[*8]** to the brewer defendants, during the four-year period prior to the filing of this action, Miller used several different agreements with its different distributors. But each agreement designated an area in which the distributor was primarily responsible for distributing Miller products. (Brewer Defendants' Brief pp. 14-15).

Both the plaintiffs and brewers submitted the following excerpt of a January, 1968, letter from Miller to each of its New Jersey distributors as evidence of the true meaning of its agreements during the liability period:

> We would also like at this time to call your attention to the fact that a number of states have adopted or are considering adoption of laws or regulations establishing specific territorial limitations for distributors. Naturally

> all of our current agreements with our distributors must be considered to incorporate the territorial requirements of such laws and regulations. Doing so is one of the purposes of the territorial description contained in our existing agreement. Otherwise, the purpose of the territorial description is to assure service and a source of supply of Miller beer to beer retailers, and ultimately to consumers in such area. It is not **[*9]** our purpose to impose territorial limitations upon our distributors and our agreement is to be so interpreted. (Plaintiffs' Exhibit 12).

Miller's current wholesaler agreements, which became effective on May, 1, 1983, explicitly provide for exclusive territories:

> Miller hereby appoints Distributor as its sole distributor within the geographic area described in the Distributor Data Sheet ("Distributor's Area") for the Miller products listed in the Distributor Data Sheet ("Miller products"). Unless Miller has granted its prior written approval, Distributor shall not sell or supply Miller products to any retail location within another authorized Miller distributor's area nor to any person Distributor has reason to believe will sell or supply all or part of such products to any retail location within another authorized Miller distributor's area. (Plaintiffs' Exhibit 13).

c. Pabst

The distribution agreements between Pabst Brewing Company and its New Jersey wholesalers in effect on February 15, 1979 set forth an "area of primary marketing responsibility," and explicitly distinguish such areas from exclusive territories:

> Any provisions in the distributorship agreements with the distributor which **[*10]** limit or restrict the sale and distribution of any Pabst beer products by the distributor to a particular geographical area or territory or to any type or class of customer are hereby modified to provide that such geographical area or territory shall hereafter constitute the distributor's area of primary marketing responsibility, and hereafter Pabst and the distributor shall have the right to sell and distribute Pabst beer products in any place or area that, and to any person to whom, Pabst or the distributor may be lawfully authorized so to do. (Defendant Brewers' Ex. 6, P4).

Beginning about 1980, Pabst and its wholesalers modified their agreements. These newer agreements retain language specifically refuting plaintiffs' claims of territorial exclusivity:

> Anything herein to the contrary notwithstanding, no provision hereof shall be construed to limit or restrict the sale and distribution of any said beer by the distributor to a particular geographical area or territory or to any type or class of customer, and Pabst and the distributor shall have the right to sell and distribute said beer in any place or area that, and to any person to whom, Pabst or the distributor may be lawfully authorized **[*11]** so to do. (Plaintiffs' Exhibit 14).

Despite this disclaiming language, the Pabst agreements, like those of Anheuser-Busch and Miller, contain very specific descriptions of the territory for which the distributor was being given "primary marketing responsibility." For example, Pabst's agreement with High Grade Distributor defines its territory in extremely precise terms:

> In the State of New Jersey:
>
> FOR PABST BLUE RIBBON BEER, ANDEKER BEER, PABST EXTRA LIGHT BEER, HAMM'S BEER and HAMM'S SPECIAL LIGHT BEER:
>
> All of SOMERSET and UNION COUNTIES.
>
> All of MIDDLESEX COUNTY except that portion lying south of a line drawn as follows, to-wit: Commencing at the point where State Highway 18 crosses the Raritan River; thence easterly and southerly along State Highway 18 to the intersection of State Highway 18 with State Highway 516; then easterly along State Highway 516 to the eastern boundary of MIDDLESEX COUNTY; including the City of Brunswick and excluding the Town of Old Bridge. (Plaintiffs' Exhibit 14).

d. Stroh (Schaefer and Schlitz)

Since the time this action commenced, Schlitz and Schaefer, whose distribution arrangements are at issue here, have merged into Stroh. Defendants assert that during the **[*12]** liability period, Schlitz and Schaefer each maintained a variety of "differently worded contracts, letters and understandings".

According to defendants there were two types of Schaefer agreements with its distributors. One type was "in the form of a barebones appointment of a primary distributor for geographical areas" designated in the agreement. An example of this type of agreement is Schaefer's agreement with Peerless Beverage Co., which appointed Peerless as the "primary distributor for Schaefer brand beer products manufactured by Schaefer in the geographic areas designated as follows…" (Plaintiffs' Exhibit 15). However, in a March 11, 1982, letter to Peerless, Schaefer stated, "since we do not expect that Schaefer brand beer products handled by you will be sold by others in the territory assigned to you we are dependent on you alone for the sales in that area." (Plaintiffs' Exhibit 15).

According to defendants, the other type of Schaefer agreement states that the distributor "shall have the primary responsibility for the sale of Schaefer Beer" in a defined area and that "as long as Distributor works and develops the territory" to Schaefer's "reasonable satisfaction", Schaefer "does **[*13]** not intend to distribute or to appoint another distributor within "the defined area." (Brewer Defendants' Exhibit 7, PP 1,3).

Defendants state that Schlitz's contracts generally designated a territory described as the distributor's "area of prime interest and responsibility." For example, plaintiffs submitted one such agreement stating "Schlitz and Wholesaler desire that Wholesaler serve as a Wholesaler within the geographic area described below: which is defined as Wholesaler's area of prime interest and responsibility." (Plaintiffs' Exhibit 17).

e. Schmidt's

Schmidt's contends that during the liability period it "did not enter into, nor was it a party to, any agreement, oral or written, with any New Jersey wholesalers," and more specifically, that it had no agreements oral or written, with its New Jersey wholesalers with respect to either exclusive territories or areas of primary responsibility. (Affidavit of Robert L. Welty, Schmidt's Vice-President, PP 3 and 6).

The interrogatory answers of Schmidt's distributors each describes oral agreements or arrangements with Schmidt's. One Schmidt's distributor, Ritchie and Page, states that its oral agreement provides for "an **[*14]** area of responsibility". The other distributors' answers either deny the existence of territorial restrictions or are silent on the question. (Defendant Schmidt's Brief, Exhibit A).

In a letter to Holly Distributors, Inc., dated April 15, 1977, Schmidt's stated that Holly was "appointed as the distributor of the specified brands of our products for the designated territory set forth on Schedule "A", attached hereto." (Plaintiffs' Exhibit 19). By way of explanation of this letter, Schmidt Vice-President Welty stated in his affidavit that prior to April 15, 1977, Schmidt's distributed beer in New Jersey through a wholly-owned subsidiary. On March 17, 1977, the subsidiary agreed to sell its wholesale beer distribution business to Holly. Schmidt's and the subsidiary sought to make certain that Holly would continue to service customers of the subsidiary, and Welty claims that the April 15 letter "merely identifies the location of [the subsidiary] trading area formerly serviced by [it]." Welty states that no other New Jersey wholesaler has any such letter appointment. (Welty Affidavit, PP 7-10, 12). The April 15 letter itself states that Schmidt's "does not enter into contractual or franchise **[*15]** agreements with any distributors or wholesalers. Our business is conducted on an order to order basis." (Plaintiffs' Exhibit 19).

The defendants contend that there are at least 54 individual arrangements for the distribution of beer between the five brewers and the 21 distributors at issue in this case. Defendants emphasize that some of the brewers changed their agreements during the four year period and some of the brewers maintained different agreements with their various distributors at the same time. Even so, it is clear that the 54 agreements would fall into categories of a far smaller number. For example, it appears that Anheuser-Busch maintained five agreements with its distributors prior to December, 1982 which were identical except for the name of the distributor and its territory. Anheuser-Busch maintained another five starting agreements in December, 1982, which also conformed to one another.

Anheuser-Busch attaches to its current agreements a portion of a map of New Jersey reflecting the distributor's exclusive territory (Plaintiffs' Exhibit 8). When pieced together, all of Anheuser-Busch's exclusive distributorships form a complete map of the state. The brewer defendants **[*16]** submitted a map of New Jersey outlining the territories and areas of the primary responsibility which the brewers, except Schmidt's, assigned to distributors. Each brewer's division of the state is somewhat different, and defendants emphasize that each wholesaler of each brand of beer faces a unique array of competitors. However, despite the differences, the overriding impression given by this map is that the brewers have each divided the state into very similar territories (Brewer Defendants' Brief, p. 21).

Pursuant to a pre-trial order, all discovery on the merits of this litigation was stayed pending class certification, discovery and resolution of the class certification question. Plaintiffs attribute their general lack of evidence of the alleged horizontal conspiracies to the fact that discovery on the merits has not yet begun, and that the means of proof of these conspiracies are uniquely in the defendants' possession. But plaintiffs have submitted copies of a final judgment entered by B & B Beverage Co. and High Grade Beverage Co., two defendant distributors here, with the New Jersey Attorney General in 1981. According to plaintiffs, pursuant to the judgment, the two distributors **[*17]** were fined for entering into a written contract expressly allocating between themselves distribution territories for several brands of beer in several New Jersey counties. (Plaintiffs' Reply Brief, Exhibits B and C).

The brewer-distributor written agreements aside, plaintiffs claim that the defendants do in fact operate exclusive territories for the distribution of beer. Maurice Bierman, owner of plaintiff the Package Shop, testified in deposition that when he attempted to buy Anheuser-Busch beer from defendant High Grade his regular distributor for other brewers' beers, he was told that High Grade would not sell to him because his store is located in an exclusive territory in which Anheuser-Busch distributes for itself. (Plaintiffs' Brief, at 40-41). Allen Borsky, the owner of plaintiff Shalbor (*Id.* at 53), Arthur Reckler, a trustee of plaintiff Wine & Spirits and a liquor store owner in Colonia, New Jersey, (*Id.* at 63), and others all similarly testified that their orders for beer were rejected by wholesalers on the ground that the retailer was located in another wholesaler's territory. At least in Bierman's case, the wholesaler who refused to sell him Anheuser-Busch beer, did so **[*18]** at Bierman's store while delivering another brand of beer and with Anheuser-Busch beer in its truck.

For their part, the defendants appear to emphasize that exclusive distributorships are not established in most of their brewer-distributor written agreements. With the exception of Schmidt's, their briefs do not seriously argue that they did not maintain exclusive distributorships.

2. *The Plaintiffs and Proposed Class.*

Two of the named plaintiffs, The Package Shop, Inc. and Shalbor, Inc., are small retail package stores located in Elizabeth, New Jersey. Both hold Class C Plenary Retail Distribution consumption licenses, pursuant to *N.J.S.A. 33:1-12*. This statutory section, which includes a number of subdivisions, covers a wide variety of retailers. Included in the proposed class are retailers of all sizes and both those who sell beer for on-premise and those who sell beer for off-premise consumption.

The Package Shop's average yearly gross income is approximately $ 160,000, of which sales of beer represent 25%. It buys beer brewed by each of the five defendant brewers from five of the defendant distributors, but does not obtain any brand brewed by the defendant brewers from more than one **[*19]** distributor. Plaintiff Shalbor's 1982 gross receipts were approximately $ 280,000, of which beer sales comprised 40 to 45%. It belongs to a purchasing cooperative, and buys beer brewed by each of the defendant brewers from five of the defendant distributors. In 1982, Shalbor did not obtain any of defendant brewers' brands from more than one distributor, except that it obtained Schaefer from both Peerless Beverage Co. and from the Schaefer Brewing Co.

Plaintiff Wine & Spirits Retailer of New Jersey ("Wine & Spirits") is self-described as a trade association comprised of over 600 New Jersey liquor and beer retailers, including stores which sell for off-premise consumption, restaurants and taverns. It is a not-for-profit corporation whose purposes include the promotion of the welfare and education of retailers. Membership is open to all holders of liquor retail licenses in New Jersey.

Wine & Spirits was formed in 1979 as a vehicle for retailers to oppose state plans to deregulate the liquor industry. Maurice Bierman, owner of the Package Shop, was instrumental in organizing the association. At a meeting of over

1,200 New Jersey retailers, which he chaired, the organization was formed and **[*20]** he was, in plaintiffs' words, "elected president of the organization by acclamation."

Wine & Spirits became involved in litigation challenging the authority of state officials to promulgate the deregulation plans. This litigation was finally resolved in *Heir v. Degnan, 82 N.J. 109, 411 A.2d 194 (1980)*.

In late 1979, Wine & Spirits and three New Jersey liquor retailers including The Package Shop commenced an antitrust class action against 26 New Jersey liquor wholesalers and their trade association, alleging price-fixing and other antitrust violations. The parties reached a settlement and submitted a stipulation of settlement to Chief Judge Clarkson S. Fisher of this District in September, 1981. The parties stipulated to a provisional certification of a class of all retailers licensed under N.J.S.A. 33-1-12 who had purchased wine or liquor from one or more of the defendants. Pursuant to the agreement, the defendants agreed to pay $ 900,000 in damages. $ 600,000 was placed in an escrow account for distribution to class members who filed proofs of claim. Payment of any undistributed proceeds was to be made to Wine & Spirits. The stipulation provided that:

> Wine and Spirits Retailers of New Jersey Inc. **[*21]** shall use the funds distributed to it, consistent with the antitrust laws of the United States and the State of New Jersey, to take any and all actions which it deems appropriate, beneficial and consistent with the law and the general welfare with respect to the retail alcoholic beverage industry in New Jersey, including, but not limited to, the following: (i) to enhance and foster the ongoing vitality of the retail alcoholic beverage industry throughout the State; (ii) to lobby and bring about the passage and enforcement of laws and regulations which are lawful, appropriate and beneficial and consistent with the general welfare of the public and to otherwise represent the interests of the retail alcoholic beverage industry before appropriate governmental agencies and parties.

On December 4, 1981, Chief Judge Fisher entered judgment approving the settlement and certifying the plaintiff class. Of the potential class members to whom notice was mailed, only one opted out, and there was not one objection (Defendants' joint Memorandum at 8,12; Transcript, December 14, 1981, proceeding before Chief Judge Fisher, at 4). A total of 691 class-members filed claims with the court, which ordered **[*22]** distribution of payments from the escrow fund to each of these class members.

Wine & Spirits currently has four officers, three of whom are New Jersey retailers licensed under *N.J.S.A. 33:1-12*. Its Board of Trustees is composed of the three retailer officers and four other New Jersey retailers. Each of the trustees testified on deposition to being unable to buy defendant brewers' beers from more than one distributor. One of the Wine & Spirits trustees, Anthony Calvino, is also currently president of the North Jersey Liquor Stores Association ("NJLSA"). Another trustee, Joseph Villani, is also a member of NJLSA, which, he stated is for retail package shops only, while "[t]he Wine & Spirits Retailers is for everybody." (Villani Dep. at 79). Villani was also vice-president of the Union County Package Store Association in 1981. Another trustee served as president of the South Jersey Package Stores Association for two years.

Wine & Spirits' Statement of Assets and Fund Balance as of December 31, 1982 reflects funds totaling $ 350,655. It has authorized the expenditure of an unlimited amount of its funds for this suit and is prepared to pay for all expenses of the litigation.

Defendants challenge **[*23]** Wine & Spirits'status as a membership organization. They point out that its only membership list consists of several pages of handwritten entries on accounting paper listing the names of 575 contributors to the 1979 opposition to deregulation. There has not been a membership meeting since incorporation. (Villani Dep. at 30-31). The last meeting of any kind was in 1980 or 1981. Defendants point out that Wine & Spirits' membership is not limited to retailers.

Defendants also contend that Wine & Spirits has failed to comply with many requirements of *N.J.S.A. 15A:1-7*, which governs not-for-profit corporations. In contradiction of the law, few or none of the trustees or officers has ever been elected. Rather, they are self-appointed. The membership of Wine & Spirits never voted to bring this suit and was not consulted prior to the filing of the suit. (Bierman Dep. at 263; Freedman Dep. at 111).

In support of its motion to dismiss Wine & Spirits for lack of standing, defendants submitted an affidavit of Leo. L. Bromley, past president of NJLSA, which is composed of several hundred dues paying independent retail liquor store licensees. Bromley claims that NJLSA determined that Wine & Spirits' **[*24]** earlier antitrust litigation against the New Jersey liquor wholesalers was "not in the best interests of the New Jersey liquor retailers". Bromley also stated that NJLSA "has no interest in joining or approving the plaintiffs' pursuit of the present action." *Id.* at P6. He stated that NJLSA retained a law firm to examine the merits of the case and the need, if any, for intervention by NJLSA, and that the firm "rendered an opinion to the effect that they [sic] saw little justification for the suit itself and therefore recommended that the Association take no action in that connection." *Id.*

In fact, the Bromley's affidavit is rife with inaccuracies and misrepresentations. On plaintiffs' motion, the law firm's opinion letter was produced. The memorandum of law attached to the letter, while acknowledging the need for extensive discovery and likelihood of vigorous opposition by defendants, stated, "[T]here is a fair chance of establishing the cause of action." (Certification of Anthony Calvino, Exhibit C, Memorandum of Law, at 4). The firm's letter itself stated, "Our firm would be happy to handle this litigation." (*Id.* Opinion Letter at 2). According to Anthony Calvino, Wine & Spirits trustee **[*25]** and current president of NJLSA, NJLSA did not join the case because of the expense involved. (Calvino Affidavit, P12). Plaintiff Calvino also stated that, in fact, NJLSA had never indicated in any way that it was opposed to Wine & Spirits' prior liquor antitrust litigation. Bromley actually filed a proof of claim in that case on behalf of his liquor store and received payment from the settlement fund. (Calvino Affidavit PP6-8 and Exhibits A and B). Bromley's action suggests support rather than opposition to the litigation.

3. *Expert Economic Opinions.*

Both plaintiffs and defendants have submitted affidavits of economists, who have presented their opinions on the economic issues bearing on the question of whether a class should be certified.

Plaintiffs' economist, W. John Jordan, states that the establishment and maintenence of exclusive territories has the effects of reducing or eliminating intrabrand competition, reducing interbrand competition, and artificially raising the price of beer for all the 12,000 proposed class member retailers. He claims that the elimination of the exclusive territories will enhance price and service competition statewide. Jordan contends that the use of exclusive **[*26]** territories in a market as concentrated as the New Jersey beer market (*see supra*) significantly increases prices in that market. (Jordan Reply Affidavit, P10).

Jordan makes two points of particular relevance to the certification issue. First, he claims, in contrast to defendants' economist, that the market for wholesaler-to-retailer distribution of beer in New Jersey is inherently statewide. Jordan cites as evidence that the market is statewide an alleged fact that in the summer of 1982, an independent beer distributor located in northern New Jersey, sold Anheuser-Busch beer in southern New Jersey at prices below that of the franchised Anheuser-Busch distributor. Since this was an independent firm, it was not confined to a territory and sold beer wherever potential profits were greatest. Jordan claims this event is evidence that the market is statewide: there was sufficient profit to be made because of price differentials to make it economically viable for the distributor to transport beer the length of the state. (Jordan Reply Affidavit, P16).

Jordan rejected the defendants' expert's claim that the existence of price differentials around the state for the same brands of beer prove that **[*27]** local markets exist. Jordan claims these differentials would disappear if the exclusive territories were ended. *Id.* at P17.

Jordan also notes that the license under which the class members are authorized to distribute beer grants them the right to do so anywhere within the state.

The second significant assertion Jordan makes is that the amount of anticompetitive overcharge directly attributable to exclusive territories can be calculated by generally acceptable methods:

> (a) A simple and yet reasonable method of calculating damages would have as its foundation the price structure charged to retailers by a representative group of competitive distributors of each brand product line in a more competitive market such as New York or Indiana. Since in a competitive marketplace the price structure of competing distributors will tend toward uniformity except for differences in transportation costs, calculation of

> this "yardstick" price structure will be straightforward. Differences in state taxes, any transportation cost differences and brewer-to-wholesaler prices can be accounted for without any significant data collection or calculation problem (all of this information is either available from **[*28]** the defendants, public information, or easily estimated). The amount of overcharge by the defendants relative to the competitive price structure could be in dollars per delivery unit, or in percentage terms.
> (b) A second method would compare the price structure charged by price-competitive independent beer distributors in New Jersey relative to those of franchised distributors. Since the independent beer distributors are subject to the same price posting regulation as franchised distributors, publically available data exists at the New Jersey ABC that can serve as a basis for calculation of damages.
>
> (c) These are only two of several ways of determining the magnitude of damages in this case. Additional avenues available for damage calculation include comparing the gross percentage markup over the invoice cost of beer for beer distributors in New Jersey with that in a more competitive market. A comparison of the adjusted percentage difference between the two would provide the basis for a damage estimate. Each distributor's sales would be multiplied by the percentage overcharge to determine his share of total damages. (*Id.* at P13).

The analysis of defendant's economist, William C. Myslinski, **[*29]** is premised on the fact that the territorial restraints at issue must be considered under the rule of reason. Rule of reason analysis, he says, "is fact specific and must be done on a case-by-case basis." (Myslinski Affidavit, P7). Myslinski contends that there are significant differences among the competitors within each of the three levels of the beer distribution system in New Jersey - brewers, distributors and retailers. He also contends that local geographic markets exist in the state and that competition in beer distribution differs from one local market to another. For these reasons, "rule of reason analysis cannot be appropriately applied to a single class of all New Jersey retailers."

The better part of Myslinski's affidavit is devoted to cataloguing the differences among the competitors and competition in the beer distribution business in New Jersey. Competitive factors differ across wholesaler territories because in each wholesaler's territory: 1) the number of competitors differs; 2) the lineup of brands differs; 3) the strengths of different brands differ; 4) the pricing differs; 5) the impact of advertising differs; and 6) demand differs.

Regarding pricing, significant **[*30]** difference exists in pricing of the same brand of beer across wholesaler territories. Myslinski states, "These data seriously undermine a claim that all retailers have been similarly affected by exclusive territories, or that wholesale prices have been inflated by a uniform increment throughout the state." (*Id.* at P30).

Myslinski concludes:

> Separate local markets exist within New Jersey and, as a result, separate analyses must be made of the competitive effects of exclusive territories for each of those markets. As a matter of economic principle, it cannot be expected that the same business practice would have identical effects in separate markets. (*Id.* at P41).

Myslinski also states that significant differences may exist among brewers and their reasons for maintaining exclusive territories. For example, a smaller brewer may use them to facilitate entering a new market, while a large brewer may use them to induce the exclusive distributor to maintain high quality or promote the brewer's brand. (*Id.* at P18).

Differences also exist among retailers which, Myslinski says, must be taken into account in rule of reason analysis. Beer products for on-premise consumption are priced differently **[*31]** than those for off-premise consumption. Therefore, on-premise retailers, such as taverns and restaurants, may have different interests than off-premise retailers, such as the named plaintiff retailers. (*Id.* at PP43-46). Small retailers differ from large retailers, because the small ones cannot utilize the "quantity discounts" which the large ones receive. (*Id.* at PP47-48). Myslinski also distinguishes between retailers who prefer "higher service/higher quality wholesalers even at higher prices" and those who do not. (*Id.* at P49). His inference is that exclusive distributors may provide better services and quality at higher prices, and that retailers who are willing to pay more for additional services and quality are not injured by exclusive distributorships. Plaintiffs' economist Jordan specifically claims that elimination of the exclusive territories will both lower prices and improve services. (Jordan Reply Affidavit, P1(b)).

Myslinski states that a price rise due to exclusive territories does not constitute injury if there have been off-setting non-price benefits or other cost reductions to the retailer. Since different benefits may vary among different territories, brewers and retailers, **[*32]** "it is not at all clear" that a statewide measure of injury common to all proposed class member retailers could be made (*Id.* at P50).

Finally, Myslinski claims there are complexities in calculating damages for which plaintiffs have not provided satisfactory solutions. He claims that wholesale beer prices in New Jersey cannot properly be averaged and compared to prices in a different state because beer wholesalers in New Jersey charge differing prices and the calculating of an average New Jersey price will not be a solution because it will not accurately reflect damages to individual retailers. (*Id.* at PP53-54). He also claims it would be too complicated to account for factors other than exclusive territories which would cause wholesale prices to vary between New Jersey and a "yardstick" state. Myslinski also sees complexities in calculating the non-price factors - the benefits derived from the use of exclusive territories - in calculating damages. (*Id.* at PP 55-58).

Class Action Certification

In order to maintain a class action, plaintiffs must demonstrate compliance with the mandatory requirements of *Rule 23(a)*, which provides that:

> ***HN1***[] One or more members of a class may sue or be sued as **[*33]** 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.

HN2[] If the initial prerequisites of *Rule 23(a)* are met, plaintiffs must additionally meet the requirements of at least one of the three subsections of Rule(b). Primarily plaintiffs here seek certification of the proposed class under ***HN3***[] *Rule 23(b)(3)*, which provides that an action may proceed as a class action if:

> 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. . . .

Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.), *cert. denied, 419 U.S. 885, 95 S. Ct. 152, 42 L. Ed. 2d 125 (1974)*; *Young v. Jo-Ann's Nut House, Inc., 1980-81 Trade Cas. (CCH) P 63,746 at 77,790 (D.N.J. 1980)*. To support certification, common issues need **[*34]** only predominate; they need not be dispositive of the entire litigation. *State of Illinois v. Harper & Row, 301 F.Supp. 484, 489 (N.D.Ill. 1969)*.

HN4[] The burden of demonstrating fulfillment of the conditions outlined in Rule 23 for maintenance of a class action lies with the moving party. *Katz v. Carte Blanche Corp., supra.* The strength of a plaintiff's case on the merits is not to be considered in determining whether a class should be certified. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)*. There is no requirement of a prima facie showing of merit in a class action to support certification. *City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 61 (D.N.J. 1971)*; *accord Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir. 1970)*. However, some analysis of the substantive claims and the essential elements needed to establish those claims is necessary for thorough evaluation of whether the requirements of Rule 23 have been met. *Chmieleski v. City Products Corp., 71 F.R.D. 118, 127 (W.D.Mo. 1976)*. Therefore, "a preliminary hearing addressed not to the merit's of plaintiff's individual claim but to whether she is asserting a claim which, assuming its merit, will satisfy the requirements **[*35]** of Rule 23 has never been regarded as violative of the Rule stated in *Eisen* . . ." *Cobb v. Avon Products, Inc., 71 F.R.D. 652, 654 (W.D.Pa. 1976)*.

Having chosen to seek certification under Rule 23(b)(3), [1] plaintiffs must satisfy the requirements of that rule and the requirements of Rule 23(a)(1)-(4). Since the (b)(3) requirement that common questions predominate presents the most difficult issues in this certification motion, I will turn to it now.

Predominance of Common or Individual Questions

HN5[] In order to determine whether common or individual issues predominate for the purpose of deciding whether a class should be certified under Rule 23(b)(3), the court must first identify the legal and factual issues in the case. *Katz v. Carte Blanche Corp., supra at 756*. **[*36]** **HN6**[] To prevail on the merits of a claim under section 1 of the Sherman Act, a private plaintiff must prove three distinctive elements: 1) a violation (a contract, combination or conspiracy which unreasonably restrains trade); 2) causation (that plaintiff suffered antitrust impact or "fact of injury" as a result of the violation); and 3) amount of damages. *See American Bearing Co., Inc. v. Litton Industries, 729 F.2d 943, 948 (3d Cir. 1984)*.

As noted earlier, plaintiffs have alleged three types of conspiracies: a horizontal conspiracy among the brewer defendants; vertical conspiracies among the brewer and distributor defendants; and horizontal conspiracies among the distributor defendants. In *Illinois Brick v. Illinois, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, the Supreme Court ruled that **HN7**[] an "indirect purchaser" from a supplier - such as the retailers here in relation to the brewers - has no legal right to sue the supplier directly for establishing an illegal restraint. In order to establish the liability of the brewers here for their alleged horizontal conspiracy, plaintiffs must prove that the distributors, with whom plaintiff did deal directly, were involved in the conspiracy with the brewers. [2] Proof of **[*37]** the existence of a horizontal conspiracy among the brewers cannot prove the existence of a vertical conspiracy between the brewers and distributors, *Smith v. Toyota Motor Sales U.S.A., Inc., 1977-1 Trade Cas. (CCH) P61, 252 at 70,764, 1977 U.S. Dist. LEXIS 17968 (N.D.Cal. 1977)*, although it may constitute some evidence of such a vertical conspiracy. *In re Fine Paper Antitrust Litigation, 82 F.R.D. 143, (E.D.Pa. 1979)*, *aff'd*, *685 F.2d 810 (3d Cir. 1982)*, *cert. denied, 459 U.S. 1156 , 103 S. Ct. 801, 74 L. Ed. 2d 1003 (1983)*.

Because of the Supreme Court's ruling in *Illinois Brick v. Illinois, supra*, proof of the alleged vertical agreements between the brewers and distributors is crucial to the claim of horizontal conspiracy among the brewers as well as to the claims of vertical conspiracy between the brewers and distributors. Therefore, the commonality or individuality of issues relating to the vertical restraints is of central importance.

I. Antitrust Violation

A. The Vertical Conspiracies

In *Continental T.V. Inc. v. GTE Sylvania, Inc. 433 U.S. 36, 59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*, **[*38]** the Supreme court held that **HN8**[] vertical restrictions on intrabrand competition would no longer be considered per se violations of section 1 of the Sherman Act and must instead be analyzed under the rule of reason. Under rule of reason analysis, to prove a section 1 violation, a plaintiff must both establish a contract, combination or conspiracy in restraint of trade and also demonstrate that the restrictive practice should be prohibited as imposing an unreasonable restraint on competition. *Continental T.V. Inc. v. GTE Sylvania, Inc., supra, 433 U.S. at 49*.

1. Existence of Restraint.

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[1] Certification under Rule 23(b)(1) or (2), argued for briefly by the plaintiffs without case support, is clearly inappropriate. The discussion which follows should make clear that the risks contemplated by (b)(1) are not implicated by this case and that defendants have not acted or refused to act on grounds generally applicable to the class within the contemplation of (b)(2) (see in particular discussion of rule of reason inquiry, *infra*).

[2] The brewers' liability may also be established by proof that they were responsible for the illegal conduct of the distributors. *See Mekani v. Miller Brewing Co., 93 F.R.D. 506, 509 n.3 (E.D.Mich. 1982)*.

In this case, the first part of plaintiffs' burden of proving an antitrust violation would be to establish the existence of brewer-distributor agreements requiring that the distributors only distribute the brewers' products within exclusive geographic territories. Plaintiffs contend that the existence of the exclusive territorial agreements can be proved on a class-wide basis. Defendants assert that individual issues predominate over common ones whenever a supplier-imposed restraint on wholesalers must be proved by evidence other than an express, written agreement.

The leading case in the Third Circuit regarding **[*39]** the Rule 23 requirement of commonality is *Bogosian v. Gulf Oil Co., 561 F.2d 434 (3d Cir. 1977)*. In *Bogosian,* two independent gasoline service station dealers sued their respective station lessors, two major oil companies, alleging that the lease contracts imposed tie-in arrangements in violation of § 1. They joined as defendants 13 other major oil companies who, they alleged, together with their lessor companies, engaged in concerted action to unlawfully tie the leasing of gas stations, to the purchase of gas supplied by each dealer's lessor. Specifically, plaintiffs alleged that the defendants, "through a course of interdependent, consciously parallel action," required lessees, *inter alia,* to sell only lessors' gas.

The court began its analysis of whether common questions predominated by identifing the elements of a section 1 tying violation. Citing the opinion in *Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211, 1223-24 (3d Cir. 1976)*, the court stated that ***HN9***[] a per se violation is established when a plaintiff proves 1) the existence of a tie, 2) that the seller has sufficient economic power with respect to the tying product to appreciably restrain free competition in the tied **[*40]** product, and 3) that a not insubstantial amount of interstate commerce is affected. The defendants, also relying on *Ungar,* claimed that proof of coercion of the dealer to accept the tie-in is always required to prove a tie-in violation.

However, the *Bogosian* court read *Ungar* to require proof of coercion only when the conditioning of the sale of one product upon purchase of another is not reflected in a written agreement or the express operation of its terms. *Bogosian v. Gulf Oil Co., supra, 561 F.2d at 449-50*.

In *Bogosian,* no single provision of the gas station leases required that the lessees purchase from their lessor all the gas they sold. However, the leases ran for six to 12 months and contained clauses prohibiting lessees from making alterations to the leasehold without the lessor's approval and prohibiting lessees from selling gas other than that provided by the lessor from pumps bearing the lessor's trademark. *Id. at 452*. In addition, there were were over 400 various contractual forms used by the 15 defendants in the leases to the class proposed by plaintiffs of all present and former lessee-dealers of the defendants-lessors.

The district court had denied class certification on **[*41]** the ground that the lack of a single lease provision expressly establishing the tie-in meant that individual factual determinations would have to be made regarding whether: 1) there was economic coercion to agree to the tie-in and 2) each of the 400 contractual forms had the effect of precluding the purchase of gas from others than the lessor.

The court held that under the facts of the case, coercion did not need to be proved. The plaintiffs' claim was not that the defendants pressured them into refraining from selling competing products, but that the leases themselves precluded them from doing so. The court concluded that the "practical economic effect" of the combination of clauses in the leases was to create a tie-in, and render it unnecessary for plaintiffs to establish individual coercion to agree. (No lessee with a lease for only 6 or 12 months was likely to seek or receive permission to construct new pumps so as to be able to sell gas other than the lessor's).

The court acknowledged that plaintiffs would probably have to introduce evidence of the various contractual forms to prove the conspiracy among the lessors. But it held that common issues predominated despite this need for **[*42]** evidence of the over 400 contractual forms. The court's rationale for this conclusion was that the claims advanced by the plaintiffs alleged a conspiracy by all the defendants to create a system of leases tying in gasoline purchases. Therefore, proof of all the various contracts was common to the claim alleged, and certification of a class to pursue that claim would not introduce additional, individual claims not already present. The court stated in reference to the various contractual forms:

> If the action were not sought to be maintained on a class basis, a single plaintiff, in order to prove a conspiracy on this basis, would have to prove this much. When the action is brought by the class, the nature of the proof is no different, however. Plaintiffs' claim is not that each defendant imposed a tie-in on every dealer, but that all defendants conspired to impose tie-in arrangements on each dealer and that without the agreement of all, none could do so successfully. Thus, the district court incorrectly identified the legal issue. While the nature of the claim is such that proof will be detailed and lengthy, the factual and legal questions presented in this phase will be precisely the **[*43]** same in a class action as they would be in an individual suit.

Id. at 453.

This conclusion is consistent with the court's explanation of why each plaintiff-lessee had standing to sue lessors other than the one with which it had a contract:

> The gravamen of the complaint is that defendants jointly imposed a system of lease arrangements which eliminated wholesale price competition among defendants on sales to independent dealer lessees. The fact that each plaintiff and class member had direct business dealings with only one defendant is not dispositive, for plaintiffs allege that it was the joint participation of all defendants in the unlawful scheme which made possible the charging of supracompetitive prices to each dealer by his supplier.

Id. at 447.

As the leading Third Circuit case on the commonality requirement, *Bogosian* is the key reference point for analyzing this case. However, because it is a tie-in case, which at the time was a per se violation, it cannot be wholely determinative here.

Defendants contend that in the Third Circuit, individual issues are held to predominate over common ones whenever a vertical restraint cannot be proved by reference to an express written agreement uniform **[*44]** to all the wholesalers. Defendants largely ignore *Bogosion,* which clearly contradicts their assertion that uniform contracts are required to establish commonality. But they do cite several other tie-in case which hold that where the tie-in cannot be proved by reference to a written agreement, and must be proved by evidence of coercion, class certification is inappropriate. *Ungar v. Dunkin Donuts of America, Inc., supra*; *Young v. Jo-Ann's Nut House, Inc., 1980-81 Trade Cas. (CCH) P63, 746,1980 U.S. Dist. LEXIS 16141 (D.N.J. 1980)*.

In *Nut House,* the defendant was a franchisor and distributor for retail sales of candies, nuts and related products. Plaintiffs were two former franchisees, who alleged that under dealer-management franchise agreements, the defendant engaged in unlawful tying arrangements for equipment and supplies. Prior to the four-year period of antitrust liability, these agreements contained explicit tying provisions for supplies. But during the four years prior to the filing of suit, no such explicit written provisions existed for equipment or supplies.

Having found these facts, this court summarized the principles of *Ungar* and *Bogosian* as follows:

> ***HN10***[] An illegal tying arrangement is made out under *Section 1* **[*45]** of the Sherman Act when the seller of a product over which he has market power conditions its sale upon the purchase of one or more additional items. If such a condition is expressly spelled out in contract or can fairly be inferred from the operation of contractual terms, a plaintiff need prove no more in order to make out the first element of his tying claim. If, however, "a class action tie-in claim is made, without basis in an express agreement, proof of salesmanship coupled with inequality of bargaining power does not prove the existence of a tie, but rather proof of actual coercion on an individual basis is necessary to prove the existance of a tie." *Bogosian, supra, 561 F.2d at 451*. In the former case, the suit may proceed as a class action; in the latter, however, class certification must be denied.

Id. at 77,792. Since plaintiffs' claims could only be established by proof of coercive action by the franchisor and not by any express contractual provisions, I denied class certification.

Defendants also rely on cases denying class certification where vertical price-fixing was alleged. *In re Fine Paper Antitrust Litigation, 82 F.R.D. 143 (E.D.Pa. 1979)*, *aff'd, 685 F.2d 810 (3d Cir. 1982)*, **[*46]** *cert. denied, 459 U.S. 1156, 103 S. Ct. 801, 74 L. Ed. 2d 1003 (1983)*; *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 691 F.2d 1335 (9th cir. 1982)*.

Fine Paper involved two distinct claims. Private parties and five states (the "minority states") alleged that 15 fine paper manufacturers (mills) and co-conspirators including the mills' subsidiaries combined and conspired to raise and fix prices of fine papers. The court certified a class of nationwide direct purchasers regarding this claim because it was susceptible to "generalized proof." The court found that the private plaintiffs and minority states had alleged a course of conduct including exchanges of pricing information, nationwide publication of price announcements and lists, and allocation of markets among defendants. Therefore, the court held that common questions predominated as to whether the defendants had acted in concert.

In contrast, the court refused to certify a class for claims brought by 15 states (the "majority states") alleging a conspiracy involving not only the paper manufacturers but also many of the wholesalers to whom the mills distributed paper. The majority states sought to establish the existence of a conspiracy **[*47]** at two levels of the fine paper distribution systems, through a horizontal combination among the mills and a vertical combination among the mills and wholesalers.

The court noted that proof of the horizontal conspiracy among the mills, while possibly probative of the wholesalers' involvement, was insufficient to establish their participation in a vertical arm of the conspiracy. *Id. at 156*.

The court continued:

> In addition, the defendants must have an opportunity to rebut any inference such proof of a mill level conspiracy establishes with their own evidence that individual merchant houses from whom class members purchased were not involved in the price fixing scheme. *Smith v. Toyota Motor Sales U.S.A., Inc., 1977-1 Trade Cases §61, 252, pp. 70, 763-64, 1977 U.S. Dist. LEXIS 17968 (N.D.Cal. 1977)*. For this reason, common questions do not predominate.

Id.

However, it was significant that the majority states had "not delineated any other method besides proof of a conspiracy among the mills by which the [wholesalers] will be shown to have participated in the conspiracy." *Id.* Therefore the court concluded that no one common set of facts would be sufficent to prove the illegal conduct of the wholesalers and "the majority **[*48]** states [would] have to prove the existence of an implicit agreement to fix prices or 'coercion'" to establish each wholesaler's liability. *Id.*

Finally, defendants rely on *Mekani v. Miller Brewing Co., 93 F.R.D. 506 (E.D.Mich. 1982)*, in which class certification was denied. There two beer retailer sued six major brewers and at least 180 beer distributors who purchased from the brewers. Count I of the plaintiffs' complaint alleged that the distributors engaged in a conspiracy to fix prices and assign territories. Count III alleged that the brewers and distributors engaged in a conspiracy to fix prices and maintain non-competitive territories. The plaintiffs proposed to certify a class of approximately 16,000 retailers, who sold beer in packages in a group of lower Michigan counties.

Although the claims included allegations of territorial restrictions, the court's class certification analysis only addresses the price-fixing allegations. Regarding the Count III claims of brewer-distribution conspiracy, the court refers to affidavits submitted by distributors stating that they would deny that their prices were controlled by agreement with the brewers. There is no indication that there were **[*49]** written agreements of any kind between the brewers and distributors.

The court noted that the "complaint specifically alleged that the brewers, by agreement or coercion, imposed their plan on the distributors." It concluded that in order to prove the existence of the vertical arm of the conspiracy, plaintiffs would "necessarily have to show some sort of agreement or coercion between the brewers and *each* of the

180 distributors." *Id. at 510*. For this reason, the court held that individual issues predominated. Important to the court's decision was the analysis in *Fine Paper* of the vertical conspiracy claims alleged there.

The *Mekani* court stated that the plaintiffs had failed to satisfactorily demonstrate any method by which the distributors' participant could be proved by common set of facts. It also rejected as not addressing the "real issue" the plaintiffs' contention that there were common issues since a single conspiracy was being alleged. *Id. But see Bogosian, supra.*

Relying on these cases, defendants contend that individual issues prevail on the question of the existence of exclusive territorial agreements, the alleged antitrust restraints. There were 54 separate agreements between **[*50]** the five brewers and the 21 distributors during the four-year liability period. These agreements varied from brewer to brewer. They sometimes varied over time within the same single brewer-distributor pair and sometimes varied at a single time between various distributors and a single, common brewer.

Bogosian makes clear that the variations among contractual forms does not necessarily present an insurmountable obstacle to class certification. In that case a class was certified despite the existence of over 400 varying contractual forms. To the extent any prior Third Circuit case required that a uniform agreement applicable to all the parties was necessary, [*see Ungar v. Dunkin' Donuts, supra, 531 F.2d at 1224-26*] it was effectively overruled in *Bogosian.*

Defendants also suggest that a class cannot be certified where the agreement to restrain trade cannot be proved from the express terms of the contract. This contention is also refuted by *Bogosian.* There the court inferred the restraint from the "practical economic effects" of the contract terms, even though it was not expressly stated in those terms.

More significantly, defendants argue that a class should not be certified here because **[*51]** in order to prove the existence of the restraint, plaintiffs must resort to evidence outside the written brewer-distributor agreements. It is admitted by plaintiffs that they must resort to such extrinsic evidence. They state that they will prove the existence of the restraint by introducing the agreements themselves and statistical evidence, derived from the distributors' own records, that no distributor sold beer outside of its assigned territory.

Plaintiffs suggest that in offering the statistical evidence they are merely showing the "practical economic effects" of the agreements, as did the plaintiffs in *Bogosian,* and that they therefore can prove the existence of an agreement by common means. The two situations are not parallel. In *Bogosian,* the court held that the existence of the restraint was clear from the practical economic effects of the operation of the contract terms themselves. By reading the contract terms alone, it was apparant that the gas station lessees would be economically prevented from selling gas other than that of the lessors. In contrast, in this case it is not possible to infer the existence of the restraint from the contract terms themselves. Many of the **[*52]** agreements explicitly deny that they establish exclusive territories. The restraint can only be established by reading the contracts in conjunction with extrinsic evidence.

The crucial questions, then, are whether a restraint can ever be commonly proved when resort must be had to evidence outside the contract and, if so, whether plaintiffs in this case can establish the restraint by extrinsic evidence which is common to the class. Relying chiefly on *Unger, Jo-Ann's Nut House, Mekani* and *Fine Paper,* defendants contend that class certification may never be granted where a plaintiff must resort to evidence outside the contract terms. However, plaintiffs have cited several cases involving claims of vertical restraints in which classes have been certified despite the absence of written agreements establishing the restraint. *City of Philadelphia v. Emhart Corp., 50 F.R.D. 232 (E.D. Pa. 1970)*, involved two suits alleging that the four defendant lock manufacturers 1) entered into unlawful vertical agreements with their distributors providing that the distributors would not sell outside of their allocated territories and 2) entered into a horizontal conspiracy by which they agreed among themselves **[*53]** to carry out the terms of their vertical conspiracy.

In one of the suits, the City of Philadelphia sought to represent a class of all state, county and local governmental authorities and agencies in the United States which had purchased locks with systems made by the defendants. The class numbered over 21,000. In the other case, 46 builder-owners of apartment buildings sought to represent a class, numbering at least in the tens of thousands, of owners and builder-owners who had purchased locks with systems made by the defendants.

The court's opinion contains no reference to the existence of any lock manufacturer-distributor written agreements, but the fact that the plaintiffs alleged that the defendants fraudulently concealed their conspiracies, *id. at 233*, suggests that there were no written agreements or at least that any written agreements did not contain the vertical restriction. However, the defendants had already been sued by the Justice Department for allegedly entering into unlawful vertical agreements and three of them had "elected to terminate their litigation with the Government by entering into consent degrees." *Id.*

The court granted class certification without discussion **[*54]** of the presence or absence of written agreements. The cases were later consolidated in the District of Connecticut with similar claims against the four defendants. There the defendants' motion to decertify the class was denied. *In re Master Key Antitrust Litigation, 70 F.R.D. 23, 28 (D. Conn. 1975)*, app. dismissed, *528 F.2d 5 (2d Cir. 1975)*. Both *Emhart* and *Master Key* upheld class certification of claims alleging vertical restraints on distribution not provable by reference to written agreements.

In *State of Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969)*, plaintiffs, mostly state and local governments, alleged a statewide and a nationwide conspiracy to raise the price of certain library books. They claimed to have been overcharged as a result of "either (1) a horizontal agreement among the industry's book publishers, or (2) a series of vertical conspiracies between each publisher and its wholesalers." *Id. at 486*. In this case as in *Emhart,* one of the allegations was that the defendants had concealed the conspiracies. In the absence of any discussion of written agreements, it again seems fair to conclude that there were no written agreements specifically **[*55]** embodying the alleged restraints. Nevertheless, the court certified both the statewide and nationwide classes.

In *Harper & Row,* as in *Emhart,* the Justice Department had previously brought civil actions alleging the same vertical conspiracies. It obtained consent judgments against 18 publishers, each of which agreed not to fix prices for the following five years. *Id. at 488*. It could be argued that the *Harper & Row* and *Emhart* courts determined that proving the vertical agreements did not present individual issues because these agreements had already been established in the related Justice Department cases. However, there is no indication that the existence of such agreements had been established in the prior cases, since both were terminated by consent judgments. Nor is there a suggestion by either court that it was relying on any such finding.

These cases demonstrate that a class can be certified in a vertical restraint case even when the existence of the restraint must be proved by evidence outside of a written agreement. Plaintiffs have offered such extrinsic evidence of the restraint - the statistical data - by which they say they can commonly prove the existence of exclusive distribution **[*56]** territories. But defendants contend that plaintiffs must prove still more to establish the restraint.

According to defendants, *Emhart, Master Key* and *Harper & Row* are irrelevant to this case because they were decided at a time when vertical distribution restraints were still considered per se violations of *Section 1 of the Sherman Act*. They note that because the Supreme Court in *Continental T.V. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*, overturned the old per se rule established in *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967)*, this case must be analyzed under the rule of reason.

Despite some tentative suggestions of plaintiffs to the contrary, [3] defendants are clearly correct that this is essentially a rule of reason case. The vertical distribution restraints are crucial not only to the vertical conspiracy

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[3] Plaintiffs rely centrally on a law review article which argues that exclusive territories should be per se illegal. *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions,* 78 Col. L. Rev. 1 (1978). While the *Sylvania* Court did expressly leave open the possibility that some vertical restraints might justify application of the per se rule, *Continental T.V. v. GTE Sylvania, Inc., supra, 433 U.S. at 58-59*, no court since has treated vertical distribution restraints as per se illegal.

claims, but also to the brewer horizontal conspiracy claim. As will be discussed later, because this is a rule of reason case, analysis of the reasonableness of the restraint, not required in the *pre-GTE Sylvania* cases, is necessary. But the fact that this additional requirement must be satisfied does not render the *pre-GTE Sylvania* cases irrelevant regarding the question **[*57]** of whether the existence of a restraint may be commonly established when resort must be had to evidence outside of explicit agreements. Those cases show that such common proof is possible.

However, the fact that this is a rule of reason case affects the proofs plaintiffs must make to establish the restraint in another way, apparently overlooked by defendants. ***HN11***[] In order to establish a Section 1 violation, a plaintiff must prove the existence of a contract, conspiracy or combination in restraint of trade and prove either an unlawful purpose or an anticompetitive effect. *McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 243, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980)*; *United States v. United States Gypsum Co., 438 U.S. 422, 436 n. 13, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)*. A plaintiff need only demonstrate unlawful purpose or anticompetitve effect, not both. *Fleer Corp. v. Topps, 658 F.2d 139, 147 (3d Cir. 1981)*, *cert. denied, 455 U.S. 1019, 102 S. Ct. 1715, 72 L. Ed. 2d 137 (1982)* (characterizing *United States v. United States Gypsum Co., supra,* as holding that "purpose and effect are linked disjunctively in antitrust analysis.")

As a general rule, ***HN12***[] the question of whether a plaintiff must show purpose or effect turns on whether the violation alleged falls into the per se or rule of reason category. In a **[*59]** per se case, the plaintiff often need only establish an anticompetitive purpose. Because of the nature of the violation, actual anticompetitive effect need not be shown because such effect is presumed. *Cascade Cabinet Co. v. Western Cabinet & Millwork, 710 F.2d 1366, 1372 (9th Cir. 1983)*, citing *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*; *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 166 (3d Cir. 1979)*. In contrast, to establish a violation in a rule of reason case, a plaintiff usually need only show anticompetitive effect. *Malley-Duff & Associates, Inc. v. Crown Life Insurance Co., 734 F.2d 133 at 139 (1984)*.

This distinction between per se and rule of reason analyses was recently confirmed by the Third Circuit in *Malley-Duff, supra, 734 F.2d at 141*, where the court relied on the reasoning of Judge Posner in *Products Liability Insurance Agency, Inc. v. Crum & Foster Insurance Co., 682 F.2d 660, 663 (7th Cir. 1982)*. The Third Circuit stated:

> In determining whether a §1 violation had been made out, the Seventh Circuit, speaking through Judge Posner, noted that ***HN13***[] "[t]o prove that a conspiracy or other form of agreement violates *section 1* of the **[*60]** Sherman Act, the plaintiff must show *either* that it falls in one of the categories of 'per se' illegality *or* that it has an actual or at least probable anticompetitive effect." [*Products Liability, supra, 682 F.2d] at 663*. (Emphasis added). We have no quarrel with this.

The difference in the elements of proof needed in per se and rule of reason cases is significant for purposes of the *Rule 23(b)(3)* analysis here. As the defendants acknowledge, the antitrust violation at issue in *Bogosian* was a per se offense. At the time that case was decided, tie-in arrangements were analyzed under the per se rule. *Cf. Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2, 52 U.S.L.W. 4385 (U.S. March 27, 1984)* (certain tying arrangments now must be judged on basis of anticompetitive effects and per se rule is inapplicable).

Because *Bogosian* involved a per se violation, the court rightly focused primarily on the question of anticompetitive purpose. It determined that such purpose could be inferred from the operation of the terms of the contracts, and therefore the intent element of the cause of action could be proved by common means. *Ungar* and *Jo-Ann's Nut*

Plaintiffs also contend that because Anheuser-Busch has allocated itself an exclusive distribution territory and thereby maintained a "dual capacity", the conspiracy becomes horizontal and constitutes a per se illegal market allocation. According to defendants, no dual capacity case in the *post-Sylvania* period has applied per se analysis. The Ninth Circuit, in reviewing the only case on which plaintiffs rely, employed rule of reason analysis. *Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348 (9th Cir. 1982)*. **[*58]** Furthermore, even if Anheuser-Busch's conduct were judged under per se standards, the conduct of the rest of the brewers would still require rule of reason analysis.

House similarly dealt with tie-in arrangments judged **[*61]** by per se standards. In these cases, however, no anticompetitive purpose could be inferred from the agreements themselves. Such a purpose had to be proved by evidence outside the agreements - evidence of coercion of the franchisees by the franchisors. Since this proof would have been individualized, the plaintiffs could not satisfy the *Rule 23(b)(3)* commonality requirement. *Fine Paper* also involved allegations of a per se antitrust violation - vertical price-fixing. *See* *Continental T.V. Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 n. 18, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)* ("The per se illegality of [vertical] price restrictions has been established firmly for many years…"). [4] Therefore proof of illegal purpose was necessary, and the court denied class certification because proof of an agreement or coercion to fix prices would have to have been made individually for each paper distributor. *In re Fine Paper Antitrust Litigation, supra, 82 F.R.D. at 156*.

At oral argument, defendants asserted **[*62]** that in order to prove a contract, combination or conspiracy as required by *Section 1*, plaintiffs must establish that there was an intent or a meeting of minds between each brewer-distributor pair to establish exclusive territorial distributorships. Defendants contend that proof of such intent would require individual evidence beyond the common statistical data proffered by plaintiffs, and that therefore plaintiffs cannot meet the *Rule 23(b)(3)* commonality requirement.

In support of their contention that plaintiffs must prove intent, defendants cite the Supreme Court's recent opinion in *Monsanto Co. v. Spray-Rite Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775, 52 U.S.L.W. 4341 (U.S. March 20, 1984)*. In that case, Monsanto, a manufacturer of herbicides, terminated Spray-Rite, one of its distributors, after receiving complaints from other distributors about Spray-Rite's practice of selling at reduced prices. Approximately a year before Spray-Rite's termination, Monsanto had adopted a practice of authorizing one-year distributorships to be renewed only if certain criteria - such as the hiring of trained salespeople - were met.

Spray-Rite filed suit under *Section 1* of the Sherman Act alleging that Monsanto and some of its other **[*63]** distributors had conspired to fix the resale prices of Monsanto herbicides and that Monsanto had terminated Spray-Rite in furtherance of the conspiracy. Monsanto denied the allegations of conspiracy and argued that Spray-Rite was terminated for failure to meet the distributor criteria.

In affirming a jury verdict for Spray-Rite, the Seventh Circuit stated that "proof of termination following competitor complaints is sufficient to support an inference of concerted action." *Monsanto Co. v. Spray-Rite Service Corp., 684 F.2d 1226, 1228 (7th Cir. 1982)*. The Supreme Court rejected the Seventh Circuit's standard.

The Court first emphasized that independent action does not violate *Section 1*, and that a contract, combination or conspiracy is required. The Court then stressed the distinction in distributor-termination cases between concerted action to fix prices and concerted action on non-price restrictions. Since the former are per se illegal, *Monsanto, supra, 52 U.S.L.W. at 4343*, citing *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 404, 409, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*, the Court saw "considerable danger" if such an agreement to fix prices could be inferred from "highly ambiguous evidence." *Monsanto, supra, 52 U.S.L.W. at 4343-44*.

For **[*64]** this reason, the Court held that ***HN14***[] in a distributor termination in furtherance of a price-fixing conspiracy, intent to agree may not be inferred simply from the fact that other distributors complained to the manufacturer prior to termination. Rather:

> There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributor were acting independently. [T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Edward J. Sweeny & Sons [,Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980)*, *cert. denied, 451 U.S. 911, 101 S. Ct. 1981, 68 L. Ed. 2d 300 (1981)]*.

[4] There are some indications now that the Supreme Court may adopt rule of reason analysis for resale price maintenance cases in the future. *See* *Jefferson Parrish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2, 52 U.S.L.W. 4385 (U.S. March 27, 1984)*.

Id. at 4344. In a footnote, the Court elaborated on the concept of a "common scheme" or agreement. The concept:

> …includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.

Id. at 4344 n. 9.

Defendants analogize from *Monsanto* to this case. They argue that just as no inference of **[*65]** agreement can be drawn from a manufacturer's suggestion of a price and a distributor's conformance to that price, so no inference of agreement to observe exclusive territories can be drawn from the brewers' establishment of areas of primary responsibility and the distributors' selling only within those areas.

Though attractive, the analogy is misplaced. As defendants persuasively argue elsewhere, this case primarily involves allegations of vertical restraints which must be analyzed under the rule of reason. For that reason, plaintiffs need only show anticompetitive effect, not anticompetitive intent. The *Monsanto* Court required proof of intent only because that was a per se case. *Monsanto* fell into the per se category because it involved allegations of distributor termination in aid of price-fixing. In fact, the Court stated:

> This case was tried on per se instructions to the jury. Neither party argued in District Court that the rule of reason should apply to a vertical price-fixing conspiracy, nor raised the point on appeal…. We therefore … decide the case in the context in which it was decided below and argued here.

Id. at 4343-44 n. 7.

As is done in other per se cases, the *Monsanto* Court **[*66]** merged its analysis of the Section 1 requirements of proving a combination in restraint of trade and proving intent. The Court in essence held that there could be no combination unless the plaintiffs could prove intent to agree. The defendants in this case would slip an intent requirement into a rule of reason case by arguing that the combination requirement is not satisfied without proof of intent.

HN15[] A finding of a combination, contract or conspiracy can be made in a rule of reason case absent any express proof of intent. *See National Society of Professional Engineers v. United States, 435 U.S. 679, 690, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)* (In a rule of reason case, intent to restrain trade may be inferred from circumstance surrounding the challenged contracts or acts). Plaintiffs can successfully show a combination in restraint of trade by offering evidence of the brewer-distributor agreements and evidence that the distributors, in fact, sold only within their territories. Intent may be inferred from this evidence. The reason plaintiffs may satisfy the combination requirement in this way is that in order to establish liability they must still prove that the restraint is unreasonable. Plaintiffs in a per se case **[*67]** are put to a stricter test in establishing an agreement since they need show nothing further to prove an antitrust violation.

Defendants contend that in this case, as in *Mekani v. Miller Brewing Co., supra*, plaintiffs must prove that the defendant distributors agreed or were coerced to accept the restraint. Despite the allegations of exclusive territorial distributorships, *Mekani* was a price-fixing case, and the court's analysis treats it as such. According to plaintiffs, Michigan law actually required distributor territories to be allocated by agreement between brewers and distributors. *Mich. Comp. Laws Ann. § 436.30a*. As the defendants themselves argued in their opposition to class certification in that case, liability cannot be based on compliance with a state law. (*See* Defendant Brewers' Brief in Opposition to Plaintiffs' Motion for Class Certification, p. 8 n. 11). It appears that the *Mekani* court did not consider the territorial restriction allegations at all.

The *Mekani* plaintiffs alleged that the brewers had engaged in a price-fixing conspiracy among themselves and then either conspired with or coerced the distributors to follow the price-fixing scheme. *Mekani, supra, 93 F.R.D. at 509*. **[*68]** Like the distributor termination in *Monsanto,* the territorial restriction in *Mekani* was alleged not as an independent antitrust violation, but as a mechanism through which a price-fixing conspiracy was carried out. The *Mekani* plaintiffs also alleged a horizontal price-fixing conspiracy among the distributors. Since both vertical and horizontal price-fixing are per se violations, *see, e.g., Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 166 (3d Cir. 1979)*, the *Mekani* court held that plaintiffs had to prove intent to agree or coercion.

In contrast to *Mekani*, this case involves allegations of nonprice vertical restraints, and therefore must be analyzed under the rule of reason. *Monsanto, supra, 52 U.S.L.W. at 4343*. The territorial restraints are alleged as independent antitrust violations, not simply as aids to a price-fixing scheme. Proof of agreement or coercion is not necessary here.

I conclude that as to all the brewers except Schmidt, plaintiffs should be able to present common evidence in trying to establish the existence of exclusive distributor territories. The brewer-distributor agreements in conjunction with the statistical data locating distributor sales would commonly **[*69]** tend to establish the first element of the cause of action and would not require individualized evidence. *Bogosian v. Gulf Oil Co., supra.* Evidence of an express intent to create exclusive territories is not required.

However, I do not believe that plaintiffs can prove an antitrust restraint against Schmidt by common evidence. Generally, Schmidt had no written agreements with its distributors, and dealt with them on an order by order basis. In addition, as the interrogatory answers of its distributors show, the terms of its distribution agreements varied significantly. Only one of Schmidt's distributors believed that its agreement established an area of primary responsibility. None believed they had exclusive territories. Proving that each of Schmidt's agreements set up an exclusive territory would require individualized evidence.

2. Rule of Reason Analysis.

HN16[] In a rule of reason claim such as plaintiffs' vertical distribution claim, the unreasonableness of the restraint as well as the existence of the restraint must be established. Plaintiffs must show that the restraint has an unreasonable anticompetitive effect on competition.

Defendants contend that there is no way that plaintiffs can **[*70]** prove on a common basis that the territorial restraints alleged here are unreasonable. They assert that no class has been certified in any territorial restraint case where the rule of reason applied. The emphasize that the territorial cases relied on by plaintiffs where certification was granted all pre-dated *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*, and so were judged under the per se standard. Defendants conclude that this fact renders *Emhart, Master Key* and *Harper & Row* irrelevant to this case.

Defendants overstate the significance of the change from per se to rule of reason analysis. There is no reason in theory why the reasonableness or unreasonableness of a restraint cannot be established by common evidence. However, defendants are correct that *Sylvania* requires that a question be addressed here that was unnecessary in the cases cited by plaintiffs: can proof that the territorial restraints are unreasonable be made on a common basis?

HN17[] In the context of a restricted disbribution case, establishing the unreasonableness of the restraint entails demonstrating that the restrictions' anticompetitive effects on intrabrand competition are not outweighed by its procompetitive **[*71]** effects on interbrand competition. *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 54-57, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*; *Graphic Products Distributors v. Itek Corp., 717 F.2d 1560, 1572-73 (11th Cir. 1983)*.

Plaintiffs contend that while they must prove unreasonable effects, they need not "conjure up every possible pro-competititve rationale for a vertical restraint, and prove their inapplicability to the restraint in question…." *Graphic Products Distributors v. Itek Corp., supra, 717 F.2d at 1573*; *see also Eiberger v. Sony Corp., 622 F.2d 1068, 1076 (2d Cir. 1980)*. They contend that alleged procompetitive redeeming benefits of the restraint must be raised by the defendants as affirmative defenses and do not have to be taken into consideration in assessing whether unreasonableness can be proved on a common basis. Plaintiffs conclude that the analysis of unreasonableness can be made by common evidence for the purpose of the *Rule 23(b)(3)* inquiry because "a vertical restraint, almost by definition involves some reduction in intrabrand competition." *Graphic Products Distributors v. Itek Corp., supra, 717 F.2d at 1571*.

In opposition to plaintiffs' position, defendants argue that the plaintiffs bear the **[*72]** burden of proving that any countervailing benefits do not render the restraint reasonable. "The plaintiff in a restricted distribution case must show that the restriction he is complaining of was unreasonable because, weighing effects on both intrabrand and interbrand competition, it made consumers worse off." *Valley Liquors, Inc. v. Renfield Importers, Ltd., supra, 678 F.2d at 745*; *Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1005 (5th Cir.)*, *cert. denied, 454 U.S. 827, 102 S. Ct. 119, 70 L. Ed. 2d 102 (1981)*.

Whether proof of the absence of countervailing benefits is an element of plaintiffs' prima facie case or whether defendants must raise countervailing benefits as an affirmative defense may be in dispute. But, as defendants argue, wherever the burden of proof lies, the question whether there are countervailing benefits to interbrand competition rendering the restraints reasonable is crucial to the rule of reason analysis which must be applied in this case and which therefore must be considered in determining commonality. Even if proof of procompetitive effects must be raised as an affirmative defense, this court must consider whether the benefits can be proved (or disproved) on a common basis. **[*73]** No matter where the burden lies, the issue of countervailing benefits presents "questions of law or fact" whose commonality or individuality must be assessed in the class certification determination. *Fed.R.Civ.P. 23(b)(3)*. Even if, as plaintiffs claim, an anticompetitive effect on intrabrand competition could be commonly presumed from the vertical restraint, proofs necessary under the rule of reason would still be missing.

HN18[] In a rule of reason case, "the factfinder weighs all the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T.V., Inc. v. GTE Sylvania, Inc., supra, 433 U.S. at 49*. Defendants contend that the factual complexity of rule of reason analysis renders this case unsuitable for class treatment. ***HN19***[] Mere factual complexity in a rule of reason case is no reason to deny class certification. *In re Alcoholic Beverages Litigation, 95 F.R.D. 321, 326-27 (E.D.N.Y. 1982)*; *see also In re Folding Carton Antitrust Litigation, 75 F.R.D. 727, 734 (N.D. Ill. 1977)*. But defendants' argument is that because of the different relationships between the various brewers and distributors and because **[*74]** of differences among the retailers and among localities, separate, individualized rule of reason analyses must be undertaken for each brewer-distributor agreement.

Defendants cite three major reasons why numerous, individualized rule of reason analyses would be required: (1) there are numerous distinct local markets for defendant-brewers' products in which competitive conditions differ; (2) the vertical restraints' effect on the various types of retailers differ; and (3) the different brewers' reasons for imposing the restraints must be analyzed separately. Defendants conclude that establishing plaintiffs' case will entail separate analysis of each of the challenged 54 brewer-distributor relationships in the context of its allegedly unique competitive environment.

Both plaintiffs' and defendants' economic experts address the question of the relevant geographic market. Plaintiffs assert it is a statewide market; defendants claim that there are numerous local markets. This issue has not been developed to the extent necessary to make an informed ruling. However, defendants have supplied data which bears on the question whether anticompetitive effects can be commonly ascertained for all **[*75]** localities in the state. In his affidavit, Dr. Myslinski states that the competitive effect of the territorial restrictions varies because of differences in competitive conditions from locality to locality. The factors accounting for the allegedly different competitive effects among the localities include: (1) the differing number and strength of competitors; (2) differing prices for the same brands; (3) differing demand; and (4) differing costs and impact of advertising. Defendants persuasively argue that the reasonableness of the vertical restraint may turn on the strength of each brewer's or distributor's competitive position within a particular area.

Differences among types of retailers also may determine whether a territorial restraint has an anticompetitive effect. The two major distinctions among retailers on which defendants focus are those between on-premise and off-premise sellers and between large and small retailers. According to defendants, on-premise retailers such as taverns or restaurants require distributor services, such as the servicing of draught beer equipment, which off-premise retailers do not need. Defendants claim that exclusive distributorships provide needed **[*76]** incentive for distributors to provide these and other services. Defendants also contend that the pricing of products sold to on- and off-premise retailers may vary. Whether the procompetitive effect of such allegedly superior service outweighs the anticompetitive effect of the territorial restraints may turn on the on-premise/off-premise composition of the group of retailers within different areas. (*See* Myslinski Affidavit, P 46).

According to defendants, the territorial restrictions make possible quantity discounts to large retailers. Small retailers, who lack space for large inventories, cannot make use of these discounts. Therefore, defendants argue the competitive effect of the restraints differs between these types of retailers. Somewhat inconsistently, defendants also argue that in the absence of territorial restraints, transshippers, distributors who sell in the exclusive territory of another distributor, would sell only to larger, high-volume retailers. (*See* Brewer Defendants' Appendix to Brief in Opposition to Class Certification, Ex. 1 at 22-23). Under this analysis, exclusive territories might have a greater anticompetitive effect on large retailers than on small ones. Under **[*77]** either theory, the anticompetitive effect of the restraints would allegedly vary depending on the mix of large and small retailers within a territory.

Defendants correctly state that the competitive effect of the restraints will differ for different types of retailers. But contrary to defendants' contentions, the mere fact that there are different types of retailers does not mean that there is no common competitive effect of the restraints, at least within any particular locality. For example, one could ascertain the competitive effect on an area, which would balance the procompetitive effect on on-premise retailers and the anticompetitive effect on off-premise retailers. Assessing competitive effect necessarily entails such balancing. However, if the composition of retailers varies significantly from area to area, separate rule of reason analyses would be necessary.

Finally, defendants argue that the five brewer defendants have different market positions and therefore different reasons for imposing territorial restraints. For example, a small brewer may use the restraint to gain entry into a new market or expand its market share in an existing market. A larger brewer's reason may be **[*78]** to maintain quality or encourage the distributor to pay for advertising or otherwise promote the brewer's products. (Myslinski Affidavit, P 18). The reasons of each brewer must be considered individually to determine if they outweigh the anticompetitive effect of the restraint.

Not only may the reasons for imposing territorial restrictions vary from brewer to brewer, they may vary for a particular brewer among the various localities. A brewer possessing a dominant market position in one area of the state may hold only a small market share in another.

Plaintiffs asserted at oral argument that there are only two arguments defendants can make in defense of exclusive territorial distributorships. One is that the brewers need the incentive of an exclusive distributorship to encourage distributors to maintain quality and freshness of their stock. The other is that the territories are a needed incentive to induce distributors to share advertising costs with the brewers. (In the absence of the restraint unauthorized distributors could get a "free ride" on advertising paid for by the brewer and the authorized distributor.) Plaintiffs contend that the reasonableness of these justifications for **[*79]** the restraints applies uniformly to all distributors and brewers, and therefore can be established by common evidence.

There is no basis to assume that all of the brewers in this case are motivated by these two concerns. But even if they are, it is clear that there are numerous other reasons which have been put forward in justification of the restraints which do not apply to all brewers or to all localities. Taken together, the differences among the brewers and the competitive conditions in the various localities convincingly show that the question of whether procompetitive effects outweigh the anticompetitive effects of the restraints cannot be proved by common evidence. The proofs on this issue of retailers in one geographical area will be likely to differ from the proofs of retailers in other geographical areas. The proofs of certain kinds of retailers in the same geographical area are likely to differ from the proofs of dissimilarly situated retailers in that area.

B. Brewers' Horizontal Conspiracy

Plaintiffs claim that the defendant-brewers "engaged in consciously parallel behavior, resulting in a horizontal conspiracy to increase their prices by elimination of intrabrand competition, **[*80]** and an effective reduction of interbrand competition, by granting exclusive territories." (Plaintiffs' Brief in Support of Class Certification, pp. 77-78).

The Third Circuit has held that*HN20*[] to establish an antitrust violation on a claim of parallel business behavior, there must be "(1) a showing of acts by defendants in contradiction of their own economic interests, [and] (2) satisfactory demonstration of a motivation to enter an agreement." *Venzie Corp. v. United States Mineral Products Co., 521 F.2d 1309, 1314 (3d Cir. 1975)*.

Defendants contend that plaintiffs have failed to allege the acts or motivation necessary to satisfy these requirements, and, further, that plaintiffs have failed to demonstrate that these requirements can be established by common evidence.

Contrary to defendants' suggestion, plaintiffs have articulated a very plausible rationale for brewers' alleged conspiracy. They assert that if any one brewer permitted intrabrand competition for its products, the resulting drop in retail prices for that brewer's products would compel reduction of the prices of products of other brewers. Defendants are correct that *HN21*[] generally a manufacturer has an interest in maintaining intrabrand **[*81]** competition so as to keep retail prices low and sales high. *See Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 56 n. 24, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. But plaintiffs' allegation is that each brewer's efforts to reduce or eliminate intrabrand competition have made it unnecessary for any of them to keep prices low in order to maintain sales.

Defendants also argue that there is no economic benefit to the brewers from a price increase at the wholesaler level, which they claim is where a distributional restraint creates an increase. Defendants ignore the possibility that distributors may be more willing to pay higher prices to brewers if they can in turn sell to retailers at artifically high prices.

Defendants also point out that in discovery plaintiffs admitted having no facts at that time as to whether the brewers had conspired among themselves. This is merely an assertion that plaintiffs will be unable to prove what they propose to prove and it cannot constitute a basis for denying class certification. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)*. Plaintiffs have not yet had the opportunity to obtain discovery on the merits of their case, since such discovery was stayed pending determination **[*82]** of the class certification motion.

Defendants' more serious argument is that plaintiffs will be unable to offer generalized evidence to prove the brewers' motivation on a common basis. Plaintiffs' counter-argument is that proving the motivation of each brewer is essential to the statewide conspiracy they are alleging. The problem with the argument that even the most individualized evidence is common because a conspiracy is charged is that it often proves too much. *See, e.g., Kendler v. Federated Department Stores, Inc., 88 F.R.D. 688, 693 (S.D.N.Y. 1981)* (*HN22*[] "Merely invoking the incantation 'conspiracy' does not insure that common question will predominate...."); *see also In re Hotel Telephone Charges, 500 F.2d 86, 89 (9th Cir. 1974)*. However, at least in certain contexts, the Third Circuit has accepted the argument. *See Bogosian v. Gulf Oil Co., 561 F.2d 434, 447, 453 (3d Cir. 1977)*; *City of Philadelphia v. Emhart, 50 F.R.D. 232, 233 (E.D. Pa. 1970)*. Here, where the proof that the brewers established exclusive territories is common (the agreements and the statistical data) and where plaintiffs allege a common motivation to enter an agreement to establish the territories, I believe the brewers' **[*83]** motivation can be proved on a common basis.

Defendants also claim that plaintiffs have failed to allege acts by the brewers contrary to their economic interest. They assert that any such proof would necessarily be individualized. Defendants themselves argue that manufacturers have an interest in keeping retail prices as low as possible. Yet by establishing exclusive distributorships, they would reduce the intrabrand competition that keeps those prices low. The establishment of exclusive territories therefore constitutes an act in contradiction of the brewers' own economic interests.

Plaintiffs should be able to establish those acts by common evidence. As is discussed above, the proofs needed to establish the territorial agreements can be commonly proved. *Bogosian v. Gulf Oil Co., supra.*

However, as is also discussed earlier, an essential element of retailer-plaintiffs' proof of a horizontal conspiracy at the brewer level is proof of an illegal vertical restraint between the brewers and distributors. *Illinois Brick, supra.*

Since proof of the unreasonableness of the vertical restraint cannot be made by common evidence, the claims based on horizontal brewer conspiracy cannot be established **[*84]** by common evidence either.

C. Distributors' Horizontal Conspiracies

Plaintiffs allege two sets of horizontal conspiracies among the distributor defendants. One is a uniform conspiracy among all the distributors to respect each other's territories. The second is a series of conspiracies among the distributors for each brewer to respect each other's territories for that brewer's products.

Both allegations state claims of horizontal market allocation which constitute per se violations whether or not they are accompanied by price-fixing. *United States v. Topco, 405 U.S. 596, 608-09, 92 S. Ct. 1126, 31 L. Ed. 2d 515 & n. 9 (1972)*. Therefore, to establish a violation, plaintiffs would have to prove that each of the distributors entered an agreement with other distributors to allocate territories. Although it has been held that establishing each distributor's intent to divide the market would entail individualized proof, *see* *Mekani v. Miller Brewing Co., 93 F.R.D. 506, 512 (E.D. Mich. 1982)* (class certification denied on claim of conspiracy among distributors where plaintiffs' obligation to show each distributor's agreement to fix prices and assign territories raised "inherently individual questions"), it appears to me that **[*85]** these are facts which each retailer would have to prove and thus are common to the class members.

II. Antitrust Impact

Even if the plaintiffs could prove the existence of an unreasonable restraint on their various claims, they would still have to prove antitrust impact or injury. ***HN23***[] Proof of impact is an essential element of any antitrust action. *Shumate & Co. v. National Association of Securities Dealers, 1973-1 Trade Cas. (CCH) P 74,512, 1973 U.S. Dist. LEXIS 13876 (N.D. Tex. 1973)*, *aff'd,* *509 F.2d 147 (5th Cir. 1975)*, *cert. denied, 423 U.S. 868, 96 S. Ct. 131, 46 L. Ed. 2d 97 (1975)*. This impact must be provable on a common basis in order for the class to be certified.

HN24[] To prove impact, a plaintiff must show that he suffered some loss in his business or property and that there is a causal relationship between the antitrust violation and the loss. *Bogosian, supra, 561 F.2d at 454*. Impact or causation is a distinct element of liability, independent of proof of a violation. It is also distinct from the matter of individual damages. *Shumate & Co. v. National Association of Securities Dealers, supra,* P 74,512 at 94,298.

In arguing that they can prove impact by common evidence plaintiffs rely heavily on *Bogosian.* At the conclusion of its definition of **[*86]** antitrust impact, the court there stated:

> ***HN25***[] There is absolutely no requirement that the loss be personal or unique to plaintiff, so long as the plaintiff has suffered loss in his business or property… Thus, when an antitrust violation impacts upon a class of persons who do have standing, there is no reason why proof of the impact cannot be made on a common basis so long as the common proof adequately demonstrates some damage to each individual. Whether or not fact of damage can be proven on a common basis depends upon the circumstances of each case.

Bogosian v. Gulf Oil Co., supra, 561 F.2d at 454. The court hypothesized that a plaintiff whose business had been destroyed by an anticompetitive practice would likely have to show individualized impact to recover on the basis of lost profits or going concern. But if a plaintiff charged that defendants have sold an article at supracompetitive prices, the nature of the proof could be common. *Id. at 455*. Regarding the tie-in case before it, the court stated:

> If, in this case, a nationwide conspiracy is proven, the result of which was to increase prices to a class of plaintiffs beyond the prices which would obtain in a competitive regime, an individual **[*87]** plaintiff could prove fact of damage simply by proving that the free market prices would be lower than the prices paid and that he made some purchases at the higher price. If the price structure in the industry is such that nationwide the conspiratorially affected prices at the wholesale level fluctuated within a range which, though different in different regions, was higher in all regions than the range which would have existed in all regions under competitive conditions, it would be clear that all members of the class suffered some damage, notwithstanding that there would be variations among all dealers as to the extent of their damage. "[The] burden of proving the fact of damage under *§ 4 of the Clayton Act* is satisfied by . . . proof of some damage flowing from the unlawful

> conspiracy . . .." *Zenith Radio, supra, 395 U.S. at 114, 89 S.Ct. at 1571 n. 9*. Under these circumstances, proof on a common basis would be appropriate. Even if the variation in price dynamics among regions or marketing areas were such that in certain areas the free market price would be no lower than the conspiratorially affected price, it might be possible to designate subclasses to conform with these variations. **[*88]** *See In Re Antibiotic Antitrust Actions, supra, 333 F.Supp. at 281*.

Id. at 455. The court remanded the case for consideration of whether impact could be proved on a common basis.

Plaintiffs here claim they can prove impact on a common basis by "showing that wholesale prices reached supracompetitive levels through the relevant market (the State of New Jersey)." Plaintiffs' economist suggests several methods for commonly establishing the supracompetitive pricing for the New Jersey market. One is to calculate a "yardstick" price structure based on the prices in a state without territorial restraints, taking account of differences in state taxes and transportation costs, and comparing that competitive pricing structure to New Jersey's. Another suggested method is to compare the price structure charged by independent, price-competitive distributors to those charged by the exclusive distributors. By these or other methods, plaintiffs expect to show that while prices may fluctuate within a range and may differ region to region, they are in a higher range in all regions of New Jersey than they would have been under competitive conditions.

Defendants launch a number of attacks on plaintiffs' argument. **[*89]** First, they assert that plaintiffs must show a uniform impact on prices statewide and that plaintiffs will be unable to do so. *Bogosian* makes clear that proof of uniform prices is unnecessary. Second, they claim that Professor Jordan's "yardstick" approach is unworkable. According to Dr. Myslinski, "New Jersey prices cannot be reasonably compared to prices in any other state without considering factors other than exclusive territories which would cause differences in beer prices across states." (Myslinski Affidavit, P 55). In fact, Jordan specifically proposes to work other factors such as state taxes and transportation costs into his model. I have no basis to conclude at this point that plaintiffs cannot construct a workable pricing structure taking account of the important factors causing price differentials.

Defendants also contend that to prove impact from supracompetitive prices plaintiffs must show that "but for" the alleged restraint they could and would have purchased an equivalent product elsewhere at a lower price. *Plekowski v. Ralston Purina Co., 68 F.R.D. 443, 449-50 (M.D. Ga. 1975)*, *appeal dismissed,* *557 F.2d 1218 (5th Cir. 1977)*; *Wagner v. Central Louisiana Electric Co., 1983-2 Trade Cas. (CCH) P 65,705 at 69,603-05, 1983 U.S. Dist. LEXIS 14299 (E.D. La. 1983)*.

This **[*90]** "but for" requirement has been discarded where common proof of impact can be shown. *See* *Bogosian v. Gulf Oil Co., supra, 561 F.2d at 455*. *Bogosian* held that where plaintiffs can show that prices were higher in all regions than they would have been absent the restraints, impact could be commonly proved. Implicit in this ruling is that if plaintiffs could prove this general rise in prices, they would not have to individually prove that they could have obtained the same product elsewhere at a lower cost. The *post-Bogosian* case of *Wagner, supra,* is distinguishable because it dealt with the heavily regulated electrical power industry in which government regulations may have made it impossible for plaintiffs to obtain the same product elsewhere.

Defendants respond that plaintiffs will be unable to prove that prices were higher in all regions than they would have been absent the restraint. For example, defendants contend that many small or rural retailers may be unable to show that they could have purchased beer at a lower price absent the restraint since transportation costs and low profit margins might make it unprofitable for other distributors to seek their business. Defendants also contend **[*91]** that large retailers who can make use of the quantity discounts offered by the exclusive distributors are not paying higher prices than they would absent the restraint.

Plaintiffs respond that while some retailers may have been hurt more than others, all retailers paid higher prices than they would have absent the restraint.

In *In re South Central States Bakery Products Antitrust Litigation, 86 F.R.D. 407 (M.D. La. 1980)*, plaintiffs alleged that defendant baking companies had conspired to restrain trade in and fix prices of bakery products and had implemented the conspiracy by fixing prices, rigging bids, eliminating or reducing discounts, and by allocating customers and territories.

Defendants in *Bakery Products* argued that impact (as well as conspiracy itself) had to be established on individual grounds because of the complexity of the price structure, trade areas, and types of purchasing arrangements which characterized the baking industry. *Id. at 419*. "Despite the complexity or variety of products, purchasers, pricing methods, and trade areas," the court believed that there was no "reason in doctrine" why impact could not be shown "'on a common basis as long as the common proof adequately **[*92]** demonstrates *some* damage to each individual.'" *Id. at 421*, *quoting* *Bogosian v. Gulf Oil Co., supra, 561 F.2d at 454*; *see also* *In re Fine Paper, supra, 82 F.R.D. at 153-54*. The court then found that plaintiffs' proposed evidence, which was to include the defendant-companies' pricing records and testimony from plaintiffs' economic expert, could establish impact on a common basis. *Id. at 422-23*. The court rejected the defendants' objection to plaintiffs' proposed proof - that the plaintiffs could not prove what they intended to prove - as inconsistent with the rule that a court shall not prejudge the merits of a case in determining class certification. *Eisen, supra.*

As in *Bakery Products,* defendants' contention here that plaintiffs will be unable to prove higher prices in all regions is simply an assertion that plaintiffs will be unable to prove what they propose to prove, and cannot serve as a basis for denying class certification. *Eisen v. Carlisle & Jacquelin, supra.*

However, plaintiffs' case differs from *Bakery Products* in an important respect. That case presented price-fixing allegations which required analysis under the per se standard. The territorial restrictions there were alleged **[*93]** merely as a mechanism by which the price-fixing conspiracy was carried out, not as independent antitrust violations as they are in this case. *Bakery Products, supra, 86 F.R.D. at 411, 421-22*; *see also* *Mekani v. Miller Brewing Co., supra, 93 F.R.D. at 509*.

The distinction between the two cases supports a serious challenge made by defendants to plaintiffs' anaylsis: that plaintiffs have improperly addressed the fact of injury analysis in this case as if this were a per se case instead of as a rule of reason case. As discussed earlier, ***HN26***[] in order to establish that vertical restraints constitute an unreasonable restraint on trade, it must be determined whether the restrictions' anticompetitive effects on intrabrand competition are not outweighed by their procompetitive effects on interbrand competition. *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 54-57, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. In order to establish fact of damage, plaintiffs must show that the anticompetitive effects outweighed the procompetitive effects of the restraint as to each member of the proposed class, since at least some damage to each individual plaintiff must be shown. *Bogosian v. Gulf Oil Co., 561 F.2d 434, 454 (3d Cir. 1977)*. Unless **[*94]** this fact of damage to each class member can be established by common proof, class certification should be denied. *Id.* Therefore, even if plaintiffs can prove supracompetitive prices on a common basis, they cannot prove fact of damage by common means unless they have some common method for proving that procompetitive effects do not outweigh anticompetitive effects for any of the proposed class members.

Defendants suggest that fact of injury can never be proved by common evidence in a rule of reason case. To the contrary, there appears no reason in theory why common proof of impact cannot be proved in a rule of reason case. The crucial question is whether the presence or absence of procompetitive effects can be proved by common means. If, for example, the alleged justification for a restraint was a single countervailing benefit applicable to every member of the industry, the rule of reason aspect of impact would clearly be susceptible to common proof.

However, defendants here argue that for various types of retailers the added cost of beer due to the territorial restraint is outweighed by a number of different benefits from the territorial system which do not apply uniformly to all retailers, **[*95]** For example, for taverns and other draught beer retailers, the benefits of better or more reliable service may outweigh the burden of higher prices. Similarly, benefits may outweigh higher prices for an outlying rural retailer whom an exclusive distributor is now obliged by its brewer to service. In the absence of the exclusive distributorhsip, perhaps no distributor would find it profitable to deliver to such a retailer.

Defendants imply that the exclusive distributorships make possible quantity discounts which only large distributors have the inventory space to use. They argue that large retailers are therefore benefited by the territorial restraints while small retailers are not. This argument is somewhat suspect. Defendants themselves offered evidence that transshippers violating other distributors' exclusive territories are most interested in selling large quantitites to large retailers. (Defendant Brewers' Appendix to Brief in Opposition to Class Certification, Ex. 1 at 22-23). Despite the clear incentive to do so, defendants have not submitted testimony of any distributor who benefits from quantity discounts in support of the exclusive territories. There is no reason to assume **[*96]** at this point that there is a connection between the availability of quantity discounts and the existence of exclusive distributorships.

It might be argued on plaintiffs' behalf that even if some retailers derive some benefits from the restraints, the procompetitive effects of the restraints do not outweigh the anticompetitive effects for any retailer. However, there is no basis on which to draw this conclusion.

Plaintiffs' main response to defendants is to reiterate their contention that proof of the absence of procompetitive effects of a restraint is not a necessary element of their affirmative case and therefore need not be considered in fact of injury analysis. But even if defendants must raise procompetitive effects as a defense, *see* *Graphic Products Distributors v. Itek Corp., 717 F.2d 1560, 1571 (11th Cir. 1983)*; *but see* *Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 745 (7th Cir. 1982)*, plaintiffs cannot prevail unless they can demonstrate that the anticompetitive effect is not offset by procompetitive justifications. *Itek, supra, 717 F.2d at 1573, n. 24*. An individual retailer cannot show fact of injury unless, as applied to it, anticompetitive effects outweigh **[*97]** procompetitive ones. In determining whether this case is certifiable under *Rule 23(b)(3)*, the question of whether impact can be commonly proved is unavoidable. Plaintiffs are wrong in asserting that fact of injury can be determined without ascertaining whether individual retailers are benefited more than they are hurt.

In support of their arguments, both plaintiffs and defendants analogize to per se cases discussing the propriety of class certification where the charging of supracompetitive prices is the sole element of proof of antitrust violation. *Nichols v. Mobile Board of Realtors, 675 F.2d 671 (5th Cir. 1982)*; *Klein v. Henry S. Miller Residential Services, 94 F.R.D. 651 (N.D. Tex. 1982)*; *Davis v. Northside Realty Associates, Inc., 95 F.R.D. 39 (N.D. Ga. 1982)*. These cases, which all involve allegations of conspiracy among real estate brokers to fix prices of commissions, are of very limited value in analyzing the question of whether plaintiffs can establish fact of injury by common evidence in a rule of reason case. Similary, *In re South Central States Bakery Products Antitrust Litigation, 86 F.R.D. 407 (M.D. La. 1980)*, which is essentially a price-fixing case, provides no guidance **[*98]** in a case where one must determine whether at least some class members suffered no injury because of redeeming, competitive effects of the challenged restraints.

As defendants suggest, the cases most analogous to this one may be those brought under the Robinson-Patman Act. ***HN27***[] Because of the requirement that disfavored customers show functional competition between themselves and favored customers, impact in class action claims brought under *§ 2(a) of the Robinson-Patman Act* has been held not provable by common evidence. *See* *Abernathy v. Bausch & Lomb, Inc., 97 F.R.D. 470, 473-75 (N.D. Tex. 1983)*, and cases cited therein. In this case, as in the Robinson-Patman cases, each plaintiff must show from its own competitive circumstances that it suffered at least some injury. This cannot be done on a common basis.

III. Calculation of Damages

HN28[] "[T]he necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate." *Bogosian v. Gulf Oil Co., supra, 561 F.2d at 456*; *accord* *In re Folding Carton Antitrust Litigation, 75 F.R.D. 727, 734 (N.D. Ill. 1977)*; *In re Corrugated Container Antitrust Litigation, 80 F.R.D. 244, 249 (S.D. Tex. 1978)*.

Plaintiffs **[*99]** and defendants dispute whether plaintiffs can prove damages on a classwide basis. However, since it is unnecessary for plaintiffs to do so, I need not address this issue.

IV. Superiority

HN29[] In addition to finding that common questions predominate, *Fed.R.Civ.P. 23(b)(3)* requires that the court determine whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

Several factors suggest that class treatment is superior here. Plaintiffs challenge what they allege to be an industrywide system of territorial restraints; according to their figures over 85% of the beer sold in New Jersey is distributed under this system. ***HN30***[] Efficiency suggests that the claims of all retailers affected by the practice be disposed of in a single lawsuit. *State of Illinois v. Harper & Row, 301 F. Supp. 484, 489-90 (N.D. Ill. 1969)*. "[B]ecause of the trememdous costs of discovery and trial that are presented in any alleged conspiracy among large business coporations, [plaintiffs] might not otherwise be able to pursue their claims." *In re Fine Paper Antitrust Litigation, 82 F.R.D. 143, 155 (E.D. Pa. 1979)*; *accord* *Weeks v. Bareco Oil Co., 125 F.2d 84, 90 (7th Cir. 1941)*. **[*100]** "[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the ***antitrust law***." *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)*.

However,***HN31***[] one important factor in determining whether a class action is superior is the difficulty likely to be encountered in the management of the case. In *Arth Main Street Drugs v. Beer Distributors of Indiana, 1978 Trade Cas. (CCH) P 62,113, 1978 U.S. Dist. LEXIS 17312 (N.D. Ind. 1978)*, plaintiff beer retailers alleged that defendant beer distributors had conspired among themselves to allocate the wholesale beer market in Indiana. Plaintiffs sought to join as defendants all members of an Indiana beer distributors association, and the total number of defendants was estimated as 370 and the number of individual interests as over 150. The court found that the requirement of superiority was not met and so did not address any of the other requirements for certification. The court's concern focused mainly on the manageablity of the trial. It anticipated that a jury might not "be able or willing to apply to each individual defendant **[*101]** only the evidence applicable to him." *Id. at 74,930*. Second, the court noted that certification of a plaintiff class would significantly increase the interest of each defendant in obtaining separate counsel and that it could become impossible to conduct a manageable and fair trial with so "many, many lawyers working the same trial in the same courtroom." *Id. at 74,931*.

Contrary to defendants' argument, the problems encountered in *Arth* are not similar to those which may arise here. There are far fewer parties in this case. But while the number of defendants is manageable here, problems are presented by the need to undertake numerous, individualized rule of reason analyses. Because of a lack of common questions and the need to conduct individualized inquiries, the class action is not superior here.

V. *Rule 23(a)* Requirements

1. Numerosity

It is clear and defendants do not attempt to refute that it would be entirely impracticable to join the approximately 12,000 members of the proposed plaintiff class. Plaintiffs have satisfied the numerosity requirement. *See* *State of Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 486 (N.D. Ill. 1969)*.

2. Common Question of Law or Fact

Plaintiffs **[*102]** have alleged a system of territorial agreements covering the entire state and having a statewide impact on the beer distributor market. There is no doubt that many common questions are presented.

Only the brief submitted by defendant Beer Wholesalers' Association of New Jersey and seven defendant distributors contends that plaintiffs have failed to satisfy the *Rule 23(a)* commonality requirement. The argument made is that plaintiffs' claim of a statewide conspiracy among the distributors is frivolous, and that denial of certification is appropriate where a preliminary inquiry shows that a movant has no case on the merits. Defendants' suggestion that plaintiffs will fail on the merits is not a valid factor in a class certification determination. *City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 61 (D.N.J. 1971)*. Furthermore, even in the light of the evidence now before the court, it is clear that plaintiffs' claims are not frivolous.

3. Typicality

Courts have generally held that the typicality requirement adds little to the class certification analysis not provided for elsewhere in Rule 23. *E.g., In re Master Key Antitrust LItigation, 70 F.R.D. 23, 26 n. 4 (D. Conn. 1975)*. In addressing **[*103]** the typicality requirement the court in *Bogosian v. Gulf Oil Co., supra, 561 F.2d at 449*, stated:

> The claims pressed by the representatives are identical to those which they press on behalf of the class generally. Beyond this general observation there appears to be nothing which would fall under this rubric which is not also covered by one of the other subsections.

In this case, plaintiffs do press the same claims for themselves as they do for the class. Each member of the plaintiff class is precluded from buying defendant brewers' beer from any distributor but the one in whose territory the class member is located. The differences among the retailers do not affect the typicality of the claim. *In re Alcoholic Beverages Litigation, 95 F.R.D. 321, 324 (E.D.N.Y. 1982)*; *City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 52 (D.N.J. 1971)*.

Defendants contend that because Wine & Spirits seeks only injunctive relief, which must be established by different proof than a damage claim, its claims are not typical of those of the class. Wine & Spirits seeks to represent the class only as to the claims for injunctive relief. For this limited purpose, its claims are identical to those which it presses **[*104]** on behalf of the class. The two retailer plaintiffs seek to represent the class on the damage claims (as well as on the injunctive claims).

4. Fair and Adequate Representation

Defendants contend that conflicts within the plaintiff class make it impossible for the named plaintiffs to adequately represent the class.

First, defendants cite an alleged conflict between small retailers like the named plaintiffs who cannot take advantage of quantity discounts and larger retailers who can. Defendants contend that one of the purposes of both named plaintiffs in this suit is to eliminate quantity discounts. In a case challenging a state alcoholic beverage commission regulation prohibiting quantity discounts, class certification was denied because of the possibility of conflicts among class members on the subject. *Miller v. Hedlund, 1983-2 Trade Cas. (CCH) P 65,754 at 69,841, 1983 U.S. Dist. LEXIS 13705 (D. Ore. 1983)*.

On deposition the named plaintiffs did state their views regarding quantity discounts. Package Shop owner Maurice Bierman recited his personal opposition to them. (Bierman Dep. at 86-90). However, Shalbor owner Allen Borsky specifically stated that he did not want to eliminate quantity discounts, but rather wanted **[*105]** to "take advantage of quantity discounts like anybody else." (A. Borsky Dep. at 69).

But whatever the named plaintiffs' personal views, this case challenges the system of exclusive territories, not the system of quantity discounts. No evidence has been submitted establishing that the use of quantity discounts is dependent on the existence of exclusive territories. Defendants have not offered the testimony of any users of quantity discounts that they support exclusive territories. At this point, there is no reason to believe that those who can and cannot make use of the discounts will have adverse interests on the question of exclusive territories. ***HN32***[] Antagonisms within a class justifying denial of certification must relate to the subject matter of the suit. *Sperry Rand Corp. v. Larson, 554 F.2d 868 (8th Cir. 1977)*. If at a later time conflicts appeared between retailers who use the discounts and those who do not, subclasses could be created. *Fed.R.Civ.P. 23(c)(4)(B)*.

Defendants similarly argue that conflicts exist between retailers which prefer higher product quality and reliable service, even at a higher price, and those which would prefer lower prices. Defendants contend that the exclusive **[*106]** distributor system makes possible the higher quality and service and that, consequently, some of the plaintiff class support the exclusive territories. Plaintiffs contend that elimination of the exclusive territories would improve service competition as well as price competition. While such conflicts may well exist, there is no reason to assume at this early stage that price-oriented and service-oriented retailers necessarily have adverse interests with regard to the exclusive territories. Similarly, none of the other distinctions among retailers raised by defendants (cooperative/non-cooperative; rural/urban) have been proved to create adverse interests with regard to exclusive territories. Conflicts which might arise later could be handled through the creation of subclasses.

Defendants also claim that plaintiffs cannot be adequate representatives since their suit is opposed by the "most prominent and credible retail liquor store association in the state," the N.J.L.S.A. This argument is without merit since it is factually inaccurate. Prior to oral argument in this case the N.J.L.S.A. did not take a position against this suit, and, in fact, sought a law firm's opinion regarding whether **[*107]** to enter it. That firm stated there was merit to the case and expressed interest in representing the N.J.L.S.A. in the litigation.

It is apparently true that Leo Bromley, past president of the N.J.L.S.A., opposes this suit. But he has undercut his own credibility by the seriously misleading statements made in his affidavit. Furthermore, the current president of the N.J.L.S.A., Anthony Calvino, fully supports this lawsuit.

Defendants suggest that plaintiffs are not adequate representatives because they lack the financial commitment to see the litigation through. The retailer plaintiffs freely admit that they cannot pay for this litigation. But Wine & Spirits has over $ 350,000 at its disposal and claims to have authorized an unlimited amount of these funds for this case. Plaintiffs' attorneys stated that they are handling the case on a contingency basis; plaintiffs have adequate funds to carry out their obligation to pay the costs of the litigation.

Defendants assert that Wine & Spirits' commitment is not "real". They note that Wine & Spirits' trustees, who apparently authorized this expenditure, have acted in contravention of applicable New Jersey corporation law.

While there are irregularities **[*108]** in how Wine & Spirits is run, the organization has authority to make a financial commitment to this case. The settlement of the liquor distribution suit, in which the organization obtained the funds it plans to use here, clearly provided that the funds could be used for a purpose such as pursuing this case. There seems little doubt that this case would be adequately funded.

Defendants also contend that if Wine & Spirits is dismissed for lack of standing, the remaining named plaintiffs will not be able to make the necessary financial commitment. But if Wine & Spirits authorizes funding of the other named plaintiffs' suit, its dismissal would not alter the adequacy of representation.

VI. Standing

Wine & Spirits Retailers of New Jersey, Inc. does not have standing on its own behalf to seek injunctive relief under *Section 16* of the Clayton Act, *15 U.S.C. § 26*. Wine & Spirits itself cannot show the injury resulting from an antitrust violation which is necessary to have standing. *See* *Hawaii v. Standard Oil Co., 405 U.S. 251, 260-62, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)*. Therefore, to remain a plaintiff in this case Wine & Spirits must show that it has standing to sue for injunctive relief in a representative capacity on **[*109]** behalf of its members.

In *Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977)*, the Supreme Court ruled that ***HN33***[] an association has standing to sue on behalf of its members if:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

HN34[] The *Hunt* standards apply to the question of associational standing in antitrust actions. *E.g.,* *Associated General Contractors of North Dakota v. Otter Tail Power Co., 611 F.2d 684, 690 (8th Cir. 1979)*; *De Gregorio v. Segal, 443 F.Supp. 1257, 1264 (E.D. Pa. 1978)*.

Wine & Spirits clearly meets the first two requirements. Regarding the first criterion, Wine & Spirits' beer retailer members certainly would have standing to sue as long as they bought defendant brewers' beer from any of the defendant distributors. Wine & Spirits contends it has no non-retailer members. But even if it has some non-retailer members or if some of its members do not purchase the defendant brewers' beer from the defendant distributors, Wine & Spirits could **[*110]** still have standing to sue on its members' behalf. In *National Constructors Ass'n v.*

National Electrical Contractors Ass'n, Inc., 498 F.Supp. 510, 520 (D. Md. 1980), *modified on other grounds and aff'd, 678 F.2d 492 (4th Cir. 1982), cert. denied, 463 U.S. 1234 , ___ L. Ed. ___ , 104 S. Ct. 26, 77 L. Ed. 2d 1449 (1983)*, the court did "not read ***HN35***[] *Hunt* to require that each of an association's members have independent standing." It held as sufficient for associational standing purposes that "a significant portion of the association's members" would have had individual standing.

The interests which Wine & Spirits seeks to protect are germane to its purpose. The organization's bylaws provide that its purposes are, inter alia, "(2) [t]o protect and defend the Members from harm or damage … [and] (9) [t]o engage in activities of mutual benefit to the Members." As defined in the stipulation of settlement in the liquor price-fixing litigation, the uses to which Wine & Spirits could put the funds it recovered were fostering the retail alcoholic beverage industry in New Jersey, enforcing laws and otherwise representing the interests of the retail alcoholic beverage industry.

Defendants contend that the interests Wine & Spirits **[*111]** seeks to protect are adverse to the organization's purpose of protecting its members from damage or harm. They allege that members of Wine & Spirits which are large and make use of quantity discounts will be harmed by this lawsuit. This view assumes both a conflict within the membership of Wine & Spirits as to quantity discounts and that the system of exclusive territories affects quantity discounts. At least Maurice Bierman, president of Wine & Spirits, does believe that the small retailers pay for the discounts that the large quantity buyers get. (Bierman Dep. at 86). But defendants have not demonstrated that the system of exclusive distributorship is responsible for the manner in which discounts are handled, and so there is no evidence that this lawsuit raises the potentially divisive issue of quantity discounts. No recipient of quantity discounts, whether a member of Wine & Spirits or not, has submitted evidence that it benefits from the territories because of quantity discounts. Therefore, defendants have failed to show that the purpose of the organization of protecting its members is not served by this lawsuit. *National Constructors Ass'n, supra, 498 F.Supp. at 521*. The fact **[*112]** that Wine & Spirits' primary method of serving the interests of its membership is through litigation does not detract from its argument in support of its standing to sue on the members' behalf. *Consumers Union of the United States v. Miller, 84 F.R.D. 240, 244 (D.D.C. 1979)*.

HN36[] The third criterion of the *Hunt* test requires consideration of two questions: (a) whether the nature of the claims involves individualized proof, and (b) whether the association is competent to speak for its members. *National Constructors Ass'n, supra, 498 F.Supp. at 521*.

Plaintiffs emphasize that Wine & Spirits, unlike the retailer plaintiffs, seeks only injunctive relief. For this reason, they claim the participation of individual members will not be necessary. However, the rule of reason analyses required in this case do necessitate individualized proofs. There is no way that Wine & Spirits can prove the unreasonableness of the vertical restraints without presenting individualized evidence of the various retailers' competitive circumstances showing that the anticompetitive effects of the restraints outweigh the procompetitive effects. Proof of violation and of fact of injury, which would be necessary to obtain **[*113]** even injunctive relief, cannot be made by generalized proof which Wine & Spirits alone could provide.

The question of whether Wine & Spirits can legitimately speak for its members turns on whether the organization, in fact, does have a true membership. In *Health Research Group v. Kennedy, 82 F.R.D. 21 (D.D.C. 1979)*, two public interest organizations brought suit to challenge certain drug regulations of the Food and Drug Administration. The court held that the organization lacked standing to sue because the "contributors" and "supporters" on whose behalf they purported to sue did not have "indicia of membership". *Id. at 26*. In the court's view there was "a material difference of both degree and substance between the control exercised" by contributors or supporters and by members. One key facet of this difference was that members "regularly elect their governing body." *Id. at 27-28*. Another was that the members have "an opportunity to influence their representatives or positions related to the particular injury at issue." *Id.*

The court interpreted *Hunt* to require "some very substantial nexus between the organization and the parties it purports to represent." *Id. at 26*. In *Hunt,* the court **[*114]** was concerned with whether the plaintiff state Apple Advertising Commission actually operated like a "traditional, i.e., a voluntary membership trade organization." In holding that it was like a trade organization, and therefore had standing, the *Hunt* Court relied on three characteristics of the organization. The most relevant of these characteristics was that the apple growers and dealers had "indicia of membership" in the Commission, which therefore "in a real sense … represent[ed] the State's growers and dealers and provid[ed] the means by which they express[ed] their collective views and protect their collective interests." *Hunt v. Washington Apple Advertising Comm'n, supra, 432 U.S. at 345*. The indicia of membership were that (a) the growers and dealers elected the Commission's members, (b) they alone served on the Commission and (c) they financed its activities, including the cost of the particular lawsuit. *Id. at 344-45*.

Wine & Spirits is clearly more of a membership organization than were the two organizations in *Health Research Group v. Kennedy, supra.* In that case, the Public Citizen, the umbrella organization, had no formal continuing relationship with its contributors and **[*115]** supporters, who did not elect its board of directors and who had no direct control over it. In fact, Public Citizen was expressly structured as a non-membership organization to promote efficiency. *Id. at 27*.

In contrast, the president and vice-president of Wine & Spirits were elected at a public meeting when the organization was formed. For its 1979 battle over "deregulation", Wine & Spirits received contributors from 575 retailers, whom it now considers members. Wine & Spirits apparently issues newsletters to members, has represented the retailers' interests at A.B.C. hearings, and has pursued three major pieces of litigation, including this one, on behalf of retailers. As a result of its liquor antitrust settlement 691 retailers recovered damages from the state liquor wholesalers.

However, there is serious question about Wine & Spirits' status as a membership organization. The membership consists exclusively of a group of contributors to the 1979 anti-deregulation effort. No dues have ever been assessed or paid. The members do not finance the organization, except indirectly, through their one-time contribution. But the members have never given money for anything other than the anti-deregulation **[*116]** effort, and I conclude that they do not finance the organization. *Hunt v. Washington Apple Avertising Comm'n, supra, 432 U.S. at 344-45*.

Under New Jersey law, an organization such as Wine & Spirits must govern itself in accordance with its bylaws. *See* N.J.S.A. 15A generally. The Wine & Spirits bylaws call for annual membership meetings. Since the organization's founding in 1979, there have been only three meetings, the last one being in 1980 or 1981. Under the bylaws, officers and the board of trustees are to be elected annually. Aside from an informal election of a few officers at the first meeting in 1979, there have been no elections of either officers or trustees. The organization essentially is run by people who are self-appointed, a fact which weighs heavily against its being considered a membership organization. *Hunt v. Washington Apple Advertising Comm'n, supra, 432 U.S. at 344-45*.

Several Wine & Spirits trustees are not beer retailers. The organization therefore does not possess the third *Hunt* indication of membership: that members alone serve in the organization. *Id.*

Significantly, the alleged members of the organization did not vote to bring this lawsuit. Plaintiffs contend **[*117]** that the organization keeps a regular correspondence with its members, and therefore is in touch with the membership's opinions. It is true that Wine & Spirits sends regular newsletters to members and its officers and trustees receive back letters and telephone calls from them.

Despite this contact there is no evidence that a majority of the membership would have approved this lawsuit. It is admitted that membership approval was not sought before suit was filed. More importantly, it does not appear that the membership can control the actions of the officers and trustees, most of whom they did not elect. There is an important difference between having the opportunity to express opinions through letters or telephone calls and the power to control the activities of an organization. *Health Research Group v. Kennedy, supra, 82 F.R.D. at 27-28*. The alleged members of Wine & Spirits do not have the control over the organization which would give it standing to sue on their behalf.

Conclusion

For the reasons set forth above I conclude that although plaintiffs meet a number of the Rule 23 class action criteria, the necessity to make a reasonableness determination with respect to the most critical **[*118]** conspiracies alleged in this case requires a finding that questions of fact common to the members of the class do not predominate over questions affecting only individual members and that a class action is not superior to other available methods for the fair and efficient adjudication of the controversy. Therefore plaintiffs' motion for class certification will be denied.

Further, for the reasons set forth above defendants' motion to dismiss from the case plaintiff Wine & Spirits Retailers of New Jersey, Inc. will be granted.

Defendants' counsel are requrested to submit an appropriate form of order.

DATED: September 24, 1984

/s/ Dickinson R. Debevoise

DICKINSON R. DEBEVOISE

U.S.D.J.

Auburn ex rel. Board of Public Works & Safety v. Mavis

Court of Appeals of Indiana, Third District

September 25, 1984, Filed

No. 3-883 A 255

Reporter

468 N.E.2d 584 *; 1984 Ind. App. LEXIS 2966 **; 1984-2 Trade Cas. (CCH) P66,219

CITY OF AUBURN, Indiana, acting Through its BOARD OF PUBLIC WORKS AND SAFETY, jointly and severally; and, D & L Communications, Inc., Defendants-Appellants v. Gene MAVIS, Plaintiff-Appellee

Prior History: **[**1]** Appeal from the Whitley Circuit Court The Honorable Edward J. Meyers, Judge Cause No. C-82-268.

Disposition: Affirmed.

Core Terms

bid, antitrust, damages, preparing, motion in limine

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN1[] **Regulated Practices, Price Fixing & Restraints of Trade**

Ind. Code § 24-1-2-3 makes unlawful acts which operate to restrain open and free competition in bidding to obtain contracts for private or public work.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN2[] **Private Actions, Standing**

Under *Ind. Code § 24-1-2-7*, a person injured in his business or property by a violation of this statute may bring a civil action seeking treble damages, costs and attorney fees.

Antitrust & Trade Law > Clayton Act > General Overview

HN3[] **Antitrust & Trade Law, Clayton Act**

In an antitrust action, federal case law requires a plaintiff to prove three essential elements: 1) a violation of the statute, 2) injury to a person's business or property proximately caused by the violation, and 3) actual damages.

Civil Procedure > Pretrial Matters > Motions in Limine > General Overview

HN4[] Pretrial Matters, Motions in Limine

A motion in limine may be used by a trial court to exclude prejudicial matter from a jury.

Counsel: Attorneys for Appellants: Kevin P. Wallace, Auburn, Indiana P. Michael Miller, Miller & Stewart, Fort Wayne, Indiana.

Attorneys for Appellee: David A. Kruse, Kruse, Kruse & Cherry, Auburn, Indiana Mark Paul Smith, Krueckeberg and Smith, P.C., Fort Wayne, Indiana.

Judges: Garrard, J. Staton, P.J., concurs; Hoffman, J., concurs and files separate opinion.

Opinion by: GARRARD

Opinion

[*584] Gene Mavis (Mavis) was a losing bidder for a contract to provide radio communications equipment to the Auburn Fire Department in June 1973. Mavis brought a private action for treble damages pursuant to *IC 24-1-2-3* and *IC 24-1-2-7* against the City of Auburn (city) and D & L Communications, Inc. (D & L). Mavis alleged that prior to open and competitive bidding the city and D & L contrived to develop specifications favoring equipment sold by D & L such that they violated the antitrust statute. Mavis claimed as damages the time spent in preparing his bid. In the second jury trial [1] on this matter, Mavis obtained a **[*585]** verdict of $1,458.00 (three times his actual damages) **[**2]** and $17,092.00 in attorney fees.

Restated, the issues on appeal are:

1) What are the essential elements of a private antitrust action under *IC 24-1-2-3* and -7 and has the plaintiff proven them by a preponderance of the evidence?
2) Did the trial court err in excluding evidence at trial which it had determined to be prejudicial when it granted plaintiff's motion in limine prior to trial?

Issue 1

HN1[] *IC 24-1-2-3* [2] **[**4]** makes unlawful acts which operate to restrain open and free competition in bidding to **[**3]** obtain contracts for private or public work. **HN2[]** Under *IC 24-1-2-7* [3] a person injured in his business or property by a violation of this statute may bring a civil action seeking treble damages, costs and attorney fees.

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[1] Mavis had originally brought suit in 1974 in DeKalb Circuit Court which had entered summary judgment for the city. The Court of Appeals reversed the grant of summary judgment in a memorandum decision, *Mavis v. City of Auburn* (1980), No. 3-*178 A 24*. After a jury verdict for Mavis in Steuben Circuit Court in October 1981, the trial court granted the city's motion to correct errors and ordered a new trial. In March 1983 Mavis received a second verdict which forms the basis for this appeal.

[2] "Restricting competition -- Penalty. -- Any and all schemes, designs, understandings, plans, arrangements, contracts, agreements or combinations to limit, restrain, retard, impede or restrict bidding for the letting of any contract for private or public work, directly or indirectly, or to in any manner combine or conspire to stifle or restrict free competition for the letting of any

Due to the dearth of decisions under *IC 24-1-2-3* & -7, Indiana courts use decisional law under the similar federal ***antitrust law***, Section 4 of the Clayton Anti-Trust Act, ***HN3***[] *15 USC Section 15*. *Sandidge v. Rogers (S.D. Ind. 1958), 167 F. Supp. 553*. Federal case law requires a plaintiff to prove three essential elements: 1) a violation of the statute, 2) injury to a person's business or property proximately caused by the violation, and 3) actual damages. **[**5]** *M.C. Manufacturing Co., Inc. v. Texas Foundries, Inc. (5th Cir. 1975), 517 F.2d 1059*; *Citizens National Bank of Grant County v. First National Bank in Marion (1975), 165 Ind. App. 116, 331 N.E.2d 471*.

The city maintains that Mavis failed to prove an essential element of his claim, i.e. a violation which caused his damages. In addition, they claim that damage claims for lost time in preparing bids are not cognizable under ***antitrust law*** without proof that the plaintiff would have received the contract but for the violation, citing *M.C. Manufacturing Co., Inc., supra; Ovitron Corporation v. General Motors Corporation (2d Cir. 1975), 512 F.2d 442*; *Urban Products International, Ltd. v. National Disposal Service (1975), 32 Ill. App. 3d 299, 336 N.E.2d 138*; and *A.J. Goodman & Son, Inc. v. United States Lacquer Mfg. Corp. (D. Mass. 1949), 81 F. Supp. 890*.

All four of the city's cases cited above are distinguishable on the same ground. In each case the court held that the plaintiff failed to prove it would have received the contract but for the violation. However, **[*586]** each case involves a damage claim for lost profits. Thus, it would be necessary to establish **[**6]** that the claimant would have received the contract except for the violation in order to establish that the sought-for damages were the natural and probable consequence of the violation. Mavis' damage claim is not for lost profits but is premised on a violation of the statute *prior* to the submission of bids and the award of the contract. His damages resulted not from the award of the contract but from the collusion between the city and D & L in establishing specifications favoring D & L's equipment. But for the violation, i.e. the collusion prior to competitive bidding, Mavis' time spent in preparing a bid would not have been wasted.

The purpose of the antitrust act is to:

> ". . . . prevent fraud and collusion in the letting of contracts and to protect trade and commerce against unlawful restraints and monopolies. To accomplish these ends the legislature has seen fit to incorporate into the statute different remedies and drastic measures for the punishment of those who violate its provisions, and for the relief of those who suffer on account thereof."

Royer v. State ex rel. Brown (1916), 63 Ind. App. 123, 112 N.E. 122. As the United States Supreme Court held **[**7]** in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. (1977), 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690*, plaintiffs must prove an:

> ". . . . injury of the type there antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anti-competitive effect either of the violation or of anti-competitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . . would be likely to cause.' *Zenith Radio Corp. v. Hazeltine Research,* 395 U.S. at 125."

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contract for private or public work, are hereby declared illegal, and any person who shall directly or indirectly engage in any scheme, design, understanding, plan, arrangement, contract, agreement or combination to limit, restrain, retard, impede or restrict bidding for the letting of any contract for private or public work, or in any manner combine or conspire to stifle or restrict free competition for the letting of any contract for private or public work, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined in any sum not exceeding five thousand dollars [$5,000], to which may be added imprisonment in the county jail or workhouse for a term of not more than one [1] year, in the discretion of the court or jury trying the cause. [Acts 1907, ch. 243, Sec. 3, p. 490.]" (amended by Acts 1978, P.L. 2, Sec. 2404.)

[3] "Private action -- Damages -- Penalty. -- Any person who shall be injured in his business or property by any person or corporation by reason of the doing by any person or persons, of anything forbidden or declared to be unlawful by this act [Secs. 23-116 -- 23-127], may sue therefor in the circuit or superior court of any county in which the defendant or defendants, or any of them, reside or are found without respect to the amount in controversy, and shall recover a penalty of three-fold the damages which may be sustained, together with the costs of suit, including a reasonable attorney's fee. [Acts 1907, ch. 243, Sec. 7, p. 490.]"

The city and D & L do not dispute the trial court's judgment that a violation of the statute occurred. The city maintains that Mavis' expenses of preparing a bid are the type inherent in any competitive bidding. However, this position ignores the fact that the bidding was no longer competitive after the violation. When the bidding was no longer open and competitive due to collusion between the government and a favored bidder, injury in the form of lost time in preparing a useless bid was a direct result of the antitrust violation. It is the type of injury which the antitrust laws intend to prevent **[**8]** and the type of injury which naturally flows from what makes the defendant's acts unlawful. *Brunswick, supra.*

Issue 2

The city maintains that the trial court erred in granting Mavis' motion in limine and in excluding evidence at trial that the city properly considered various factors which led them to award the contract to D & L.

HN4[] A motion in limine may be used by a trial court to exclude prejudicial matter from a jury. *Beta Alpha Shelter of Delta Tau Delta Fraternity, Inc. v. Strain* (1983), *Ind. App., 446 N.E.2d 626* (transfer denied); *Burrus v. Silhavy (1973), 155 Ind. App. 558, 293 N.E.2d 794*. Mavis sought, *inter alia,* a court instruction to the defendants that they might not interrogate witnesses or refer to the following in the jury's presence. Whether or not:

> "General Electric or D & L Communications, Inc. was the best bid or that plaintiff Mavis' bid was not the best bid. *IC 24-1-2-3* permits no defense based on this fact. The end does not justify the means. The issue is whether the defendants violated the prohibitions in *IC 24-1-2-3* not whether they chose the best bid. Neither is it relevant to show that Mavis was not the best bid by evidence **[**9]** of service dissatisfaction, etc."

Transcript at 31.

The city asserts that Mavis' allegation in his complaint that the city "had a predetermined and fixed disposition to award the **[*587]** bid to D & L" allowed them to defend with evidence that they considered various factors between the date the bids were submitted and the date the contract was awarded. Mavis counters that this would have resulted in prejudice to him by allowing the city to maintain that regardless of any violation they would have given D & L the contract.

Mavis' complaint alleged that the city arranged prior to the bidding to have D & L prepare the equipment specifications with details favoring D & L's equipment. The issues for the jury centered on whether or not there was: 1) a violation of the statute, 2) injury to Mavis' business or property proximately caused by such violation, and 3) damage sustained by Mavis. Thus, the violation, the injury caused thereby and the damages resulting therefrom are all alleged to have occurred prior to the bidding. Therefore, evidence of the factors the city subsequently considered are irrelevant to the issues before the jury and therefore would be prejudicial **[**10]** to Mavis. *Burrus, supra.* Therefore, we affirm the trial court's grant of the motion in limine and its subsequent ruling thereon and affirm the entry of judgment for Mavis.

Affirmed.

STATON, P.J., Concurs; HOFFMAN, J., Concurs and files separate opinion.

Concur by: HOFFMAN

Concur

HOFFMAN, J., CONCURRING OPINION

I concur in the majority opinion on Issue 1 but concur only in the result on Issue 2.

A ruling on a motion in limine raises no issue on appeal. The issue on appeal is the ruling by the court when the evidence is offered at the trial. In this case an offer to prove was made during the trial and refused by the trial court. The ruling was proper and thus the court committed no error.

Hayden v. Bracy

United States Court of Appeals for the Eighth Circuit

June 14, 1984, Submitted ; September 27, 1984, Decided

No. 83-2401

Reporter

744 F.2d 1338 *; 1984 U.S. App. LEXIS 18190 **; 1984-2 Trade Cas. (CCH) P66,212; 40 Fed. R. Serv. 2d (Callaghan) 167

Virgil L. Hayden, M.D., Appellant, v. Calvin Bracy, M.D., T. S. Devi, M.D., S. P. Kaipa, M.D., C. R. Simmons, M.D., R. L. Ross, M.D., John Crenshaw, M.D., L. G. Langston, M.D., W. J. Wilkins, M.D., T. E. Townsend, M.D., J. S. Robinette, M.D., K. L. Bruce-Reid, M.D., R. C. Butler, M.D., J. F. Clark, M.D., E. L. Hutchison, M.D., W. R. Meredith, M.D., M. B. Pearce, M.D., V. B. Perry, M.D., J. W. Nuckolls, M.D., R. Teryl Brooks, M.D., Clarence M. Rittlmeyer, M.D., Oliver C. Raney, M.D., Larry O. Barton, and Jefferson Regional Medical Center (Formerly Jefferson Hospital) a/k/a Jefferson Hospital Association, Inc., Appellees

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Missouri.

Disposition: Affirmed.

Core Terms

district court, proceedings, cesarean, recommended, consultations, patients, interstate commerce, ad hoc committee, Sherman Act, defendants', contends, post-graduate, privileges, conspired, charts, peer, medical record, out-of-state, discovery, interfere, sections, revoked

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Discovery & Disclosure > Discovery > Relevance of Discoverable Information

HN1[] **Standards of Review, Abuse of Discretion**

Determinations of relevance in discovery rulings are left to the sound discretion of the trial court and will not be reversed absent an abuse of discretion.

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > Appeals > Standards of Review

HN2[] **Civil Procedure, Discovery & Disclosure**

A district court's discovery rulings will not be reversed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant.

Civil Rights Law > ... > Elements > Color of State Law > General Overview

Healthcare Law > Healthcare Litigation > Actions Against Facilities > General Overview

HN3[] **Elements, Color of State Law**

A private hospital's disciplinary action against one of its doctors does not constitute state action, notwithstanding the state's extensive regulation and support of the hospital.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Jurisdiction

HN4[] **Regulated Industries, Higher Education & Professional Associations**

Jurisdiction under the Sherman Act arises only when the anticompetitive activity prohibited by the Act occurs in the flow of interstate commerce, or, though wholly local in nature, substantially affects interstate commerce.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Sherman Act, Jurisdiction**

The jurisdictional reach of the Sherman Act, although expansive, is not without limit. For federal jurisdiction to arise, the antitrust plaintiff must show that the alleged restraint would tend, as a matter of practical economics to have a not insubstantial effect on the interstate commerce involved.

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

While some courts hold that antitrust plaintiffs may establish federal jurisdiction merely upon a showing that the defendants' general activities, taken as a whole, occur in or affect interstate commerce, the United States Court of Appeals for the Eighth Circuit holds that the better rule is to require plaintiffs to show that the challenged conduct occurs in or affects interstate commerce.

Healthcare Law > Business Administration & Organization > Peer Review > Organizations

Torts > ... > Defenses > Privileges > Statutory Privileges

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

HN7[] **Peer Review, Organizations**

Under Ark. Code Ann. § 71-5101 (1979), defendants are entitled to qualified immunity for statements made in the course of hospital peer review proceedings. A member of a peer review committee is protected from monetary liability so long as he acts without malice, has made a reasonable effort to obtain the facts of the matter as to which he acts, and acts in reasonable belief that the action taken by him is warranted by the facts known to him after such reasonable effort to obtain facts.

Counsel: House, Wallace & Jewell, P.A., Little Rock, Arkansas, by: Anne Owings Wilson, for Appellant.

Friday, Eldredge & Clark, Little Rock, Arkansas, by: Diane S. Mackey, Bridges, Young, Matthews, Holmes & Drake, Pine Bluff, Arkansas, by: Stephen A. Matthews, for Appellees.

Judges: Bright and McMillian, Circuit Judges, and Limbaugh, * District Judge.

Opinion by: BRIGHT

Opinion

[*1340] BRIGHT, Circuit Judge.

Dr. Virgil L. Hayden brought this action in federal district court against the Jefferson Regional Medical Center (Medical Center), its administrator, and eight doctors on the hospital medical staff. He alleged that in taking disciplinary action against him, defendants 1) denied him equal protection and due process in violation of the *fourteenth amendment* and *42 U.S.C. § 1983*; 2) conspired to form a group boycott against him and combined to assert monopoly power in violation of *sections 1* and *2* of the **[**2]** Sherman Antitrust Act; 3) made defamatory statements about him; and 4) interfered with and conspired to interfere with his business relationships. The district court granted defendants' motion for summary judgment on the *section 1983* and Sherman Act claims and, after a bench trial, entered judgment for defendants on the other claims.

Hayden appeals, contending that the district court erred in 1) denying his motion to discover certain medical records; 2) dismissing his *section 1983* claim for failure to show state action; 3) dismissing his Sherman Act claims for lack of subject matter jurisdiction; 4) finding that defendants' statements were not defamatory; 5) finding that defendants did not interfere with his prospective business relationships; and 6) finding that defendants followed the Medical Center's bylaws in conducting disciplinary proceedings against him. We reject these contentions and affirm the district court.

I. BACKGROUND.

Hayden practiced obstetrical-gynecological medicine at the Medical Center from July 1973 until his resignation on January 15, 1982. The events leading to his resignation began on December 4, 1979 when Dr. Mary Ellen Jenkins, an anesthesiologist, **[**3]** wrote to the Obstetrics-Gynecology (OB/GYN) Department questioning whether a cesarean section Hayden performed had been necessary. Defendant Calvin Bracy, M.D., the chairperson of

* The HONORABLE STEPHEN N. LIMBAUGH, United States District Judge for the Eastern and Western Districts of Missouri, sitting by designation.

OB/GYN Department, appointed a committee consisting of several doctors in the department to review Dr. Jenkins' complaint. The committee concluded that Hayden's performance of two cesarean section operations [1] was inappropriate and, after a meeting of the entire department at which Hayden was present, forwarded their conclusions to the Executive Committee of the Medical Staff.

At the direction of the Executive Committee, an OB/GYN departmental ad hoc committee investigated further to determine whether corrective action should be taken against Hayden. The ad hoc committee notified Hayden of its proceedings and afforded him an opportunity to respond to the charges. **[**4]** On March 11, 1980, the Executive Committee agreed to the ad hoc committee's recommendation of corrective action and required Hayden to obtain mandatory consultations on all cesarean sections **[*1341]** for six months. At Hayden's request, another committee conducted a hearing to consider the propriety of the corrective action and agreed with the Executive Committee's decision.

In September 1980, the members of the OB/GYN Department reviewed the charts for Hayden's cesarean operations for the previous six months. They recommended to the Executive Committee that his probation continue until February 1, 1981 and that he attend two weeks of continuing education in obstetrics. At Hayden's request, the Executive Committee appointed a disinterested expert to review his charts. The expert, Dr. Ralph Wynn, chairperson of the OB/GYN Department at the University of Arkansas Medical School, reported that Hayden's failure to document the need for the cesarean sections that led to the original complaint justified the requirement that he obtain mandatory consultations, but noted that Hayden acted appropriately in performing cesareans during his probation. Dr. Wynn recommended that the compulsory **[**5]** consultations be discontinued so as not to expose the consulting physicians to liability, and suggested that the department monitor Hayden's cesarean patients for six more months. On October 28, 1980, the Executive Committee adopted these recommendations, adding its directive that Hayden obtain voluntary consultations for the next six months and that he voluntarily obtain two weeks of continuing education.

In April 1981, the Executive Committee inquired whether Hayden had complied with its mandates and recommendations. Hayden informed the committee that he did not obtain post-graduate education because he could not find other physicians to cover his patients for him, and that he was no longer seeking consultations on his cesarean cases because only two physicians would provide consultations. At the direction of the Executive Committee, a control committee of the OB/GYN Department reviewed Hayden's cesarean charts for the previous six months. The committee concluded that Hayden had exercised poor medical judgment in six of the thirty cases they examined. On May 18, 1981, after reviewing Hayden's medical charts, the entire OB/GYN Department unanimously agreed with this conclusion. **[**6]** The department members reported that Hayden had met efforts to assist him with hostility and they disassociated themselves from him. On the basis of these reports, the Executive Committee revoked Hayden's privileges, but noted that its decision would not be effective until he exhausted his appeals.

In accordance with the Medical Center's bylaws, the Executive Committee asked Dr. Bracy to form an ad hoc committee to investigate the revocation of Hayden's privileges. The ad hoc committee discussed with Hayden the charts indicating that he had exercised poor medical judgment and recommended that his privileges be revoked. On June 30, 1981, the Executive Committee examined members of the ad hoc committee and Hayden, and agreed once again to revoke Hayden's privileges.

Hayden appealed this decision to another ad hoc committee. The ad hoc committee concluded that the evidence did not support the decision to revoke Hayden's privileges, but recommended that he participate in a post-graduate obstetrics program of not less than thirty days. Based on this report, the Executive Committee recommended that Hayden's privileges not be revoked, but recommended that he obtain ninety days of **[**7]** post-graduate education within the next six months. After the doctors in the OB/GYN Department agreed to provide coverage for Hayden,

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[1] Although Dr. Jenkins' December 1979 letter questioned Hayden's performance of only one cesarean section, she also had questioned his performance in another case.

the Governing Board of the Medical Center affirmed the decision of the Executive Committee on December 17, 1981.

Hayden closed his Pine Bluff practice on January 15, 1982, and relocated in Sidney, Montana. On November 17, 1982, he brought this action in federal district court.

II. DISCUSSION.

A. Discovery Ruling.

Hayden contends that the district court erred in denying his motion to discover **[*1342]** medical records pertaining to cesarean sections performed by other doctors in the OB/GYN Department. He argues that insofar as the medical records show that he performed as well or better than his colleagues, they are relevant to his claim that defendants acted maliciously in disciplining him for exercising poor medical judgment. In denying the motion, the district court ruled that evidence of other doctors' poor judgment is not relevant to Hayden's allegation that defendants misrepresented their conclusions about his performance.

HN1[] **[**8]** Determinations of relevance in discovery rulings are left to the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *See* *Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 898 (8th Cir. 1978)*; *Liew v. Breen, 640 F.2d 1046, 1049 (9th Cir. 1981)*. Although the medical records Hayden sought to discover may have had tangential relevance to his claim, we cannot say the district court abused its discretion in denying the motion. In any event, given the strong evidence supporting the district court's finding that defendants acted without malice, the court's refusal to order discovery of the medical records does not amount to reversible error. *See* *Data Disc., Inc. v. Systems Tech. Associates, Inc., 557 F.2d 1280, 1285 n. 1 (9th Cir. 1977)* ***HN2***[] (district court's discovery rulings "will not be reversed except upon clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant").

B. *Section 1983* Claim.

Hayden next challenges the district court's **[**9]** dismissal of his *section 1983* claim. In his complaint, Hayden alleged that the peer review proceedings leading to the disciplinary action against him deprived him of his right to due process and equal protection. The district court held that defendants did not act under color of state law and dismissed the claim for lack of subject matter jurisdiction.

Hayden contends that although the Medical Center is a private hospital, its close relationship with the state is sufficient for state action to arise. We disagree. In *Lubin v. Crittenden Hospital Associates, Ltd., 713 F.2d 414 (8th Cir. 1983)*, *cert. denied*, *465 U.S. 1025, 104 S. Ct. 1282, 79 L. Ed. 2d 685 (1982)*, we held that ***HN3***[] a private hospital's disciplinary action against one of its doctors did not constitute state action, notwithstanding the state's extensive regulation and support of the hospital. *Id. at 416*. Hayden concedes that his position is contrary to our holding in *Lubin*, but nevertheless asks us to reconsider that decision. We decline to do so. *Lubin* is controlling **[**10]** law in this circuit and, unless overruled by a higher authority, it binds our decision in this case.

C. Sherman Act Antitrust Claims.

Hayden also challenges the summary dismissal of his Sherman Act Claims. He alleged that by requiring him to complete the post-graduate education, defendants conspired to form a group boycott against him in violation of *section 1* of the Sherman Act, and illegally combined to assert monopoly power in violation of *section 2* of the Act. Defendants moved for summary judgment on the ground that Hayden failed to allege that their actions occurred in or affected interstate commerce. After considering the pleadings and affidavits relating to business activities of Hayden and the Medical Center, the district court entered summary judgment against Hayden on these claims.

HN4[] Jurisdiction under the Sherman Act arises only when the anticompetitive activity prohibited by the Act occurs in the flow of interstate commerce, or, though wholly local in nature, substantially affects interstate commerce. *See* *McLain v. Real Estate Board, 444 U.S. 232, 241, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980)*; **[**11]** *Cardio-Medical Association v. Crozer-Chester Medical Center, 721 F.2d 68, 71 (3d Cir. 1983)*. Hayden claims only that defendants' conduct *affects* interstate commerce. He alleged in his amended complaint that defendants' actions 1) substantially raise prices for out-of-state patients obtaining **[*1343]** obstetrical-gynecological services in Jefferson County and 2) substantially increase the costs of out-of-state third parties, such as the federal government and private insurance companies, that pay for patients' medical care. Hayden supported these allegations with an affidavit in which he stated that he annually purchased $6,000 worth of office supplies from out-of-state vendors, and that he annually received over $100,000 (75% of his billings) from out-of-state insurance companies. Further, Hayden refers to the interrogatory answers of the hospital administrator indicating that the bills of 88% of the hospital patients were paid by third-party payors, 33% of which were Medicare payments.

Hayden contends that these allegations, together with other supporting evidence, were sufficient to withstand defendants' motion for summary dismissal. We disagree. **[**12]** ***HN5***[] The jurisdictional reach of the Sherman Act, although expansive, is not without limit. For federal jurisdiction to arise, the antitrust plaintiff must show that the alleged restraint [2] would tend, "'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved." *McLain v. Real Estate Board, supra, 444 U.S. at 246*. *See also* Hospital Building Co. v. Trustees, 425 U.S. 738, 745 and n.3, *48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976)*; *Crane v. Intermountain Health Care, Inc., 637 F.2d 715, 723 (10th Cir. 1980)*; P. Areeda, ***Antitrust Law*** para. 232.1 at 94 (Supp. 1982). The uncontroverted evidence in this case simply shows that defendants required Hayden to attend ninety days of post-graduate education, and that they agreed to provide coverage so that he would be able to do so. As a matter of practical economics, this requirement does not substantially affect interstate commerce. Hayden's attendance at post-graduate courses would not substantially disrupt his practice because his colleagues agreed to cover for his patients. Consequently, medical **[**13]** services provided to Hayden's patients, the purchases of out-of-state office supplies, and the reimbursements from third party payors would not be altered in any substantial amount. Defendants neither excluded Hayden from practice nor permanently denied him a chance to compete effectively. They simply required him to obtain additional training and improve his medical skills. Such a requirement cannot meaningfully be characterized as substantially affecting interstate commerce.

[14] D. Defamation Claims.**

Hayden next challenges the district court's finding that defendants' statements about him were not defamatory. He alleged that in the course of the peer review proceedings, defendants made numerous untrue and adverse statements about his integrity, his mental stability, and his ability to practice medicine. Hayden recognizes that defendants are entitled to qualified immunity for their statements made in the course of hospital peer review proceedings, [3] **[*1344]** but contends that they acted with malice and made no attempt to establish the truth of the charges against him.

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[2] ***HN6***[] We recognize that some courts have held that antitrust plaintiffs may establish federal jurisdiction merely upon a showing that the defendants' *general activities*, taken as a whole, occur in or affect interstate commerce. *See* Western Waste Service Systems v. Universal Waste Control, 616 F.2d 1094, 1097 (9th Cir.), *cert. denied*, *449 U.S. 869, 66 L. Ed. 2d 88, 101 S. Ct. 205 (1980)*; *Hahn v. Oregon Physicians Service, 689 F.2d 840, 844 (9th Cir. 1982)*, *cert. denied*, *462 U.S. 1133, 103 S. Ct. 3115, 77 L. Ed. 2d 1369 (1983)*; *McElhinney v. Medical Protective Co., 549 F. Supp. 121, 127 (E.D. Ky. 1982)*. Nevertheless, we believe that the better rule is to require plaintiffs to show that the *challenged conduct* occurs in or affects interstate commerce. *See* *McLain v. Real Estate Board, supra, 444 U.S. at 246* (defendants' activities infected by alleged price-fixing conspiracy must affect interstate commerce for federal jurisdiction to arise); *Crane v. Intermountain Health Care, Inc., 637 F.2d 715, 723 (10th Cir. 1980)*. For an excellent discussion supporting this position, see P. Areeda, ***Antitrust Law*** para. 232.1 at 94-95 (Supp. 1982).

Although the defendant hospital's general activities may have occurred in interstate commerce, that is insufficient to establish federal jurisdiction. Instead, Hayden must show that the challenged conduct affects interstate commerce.

[3] ***HN7***[] Under Arkansas law, the law governing this diversity claim, defendants are entitled to qualified immunity for statements made in the course of hospital peer review proceedings. A member of a peer review committee is protected from monetary liability so long as he

[15]** After hearing the evidence, the district court found that defendants did not act with malice or bad faith in reviewing Hayden's actions. Indeed, the evidence overwhelmingly shows that defendants made every attempt to give Hayden a fair hearing to determine whether he exercised proper judgment in performing cesarean sections. For nearly two years, they conducted a labyrinthine series of investigations, *de novo* hearings, and appellate hearings. At Hayden's request, his charts were reviewed by a disinterested expert, who, for the most part, agreed with the actions defendants had taken. Throughout the review proceedings Hayden received notice of and an opportunity to respond to the charges against him. The district court found that the peer review committees were fair and impartial, and that they required Hayden to obtain consultations and continuing education in the reasonable good faith belief that his performance was inadequate. Although defendants made several untoward remarks about Hayden in the course of the proceedings, the district court found that, considered in the context of the entire proceedings, the remarks were insignificant and did not affect the outcome. Based **[**16]** on our review of the record, we conclude that substantial evidence supports the district court's finding that defendants acted reasonably and in good faith in conducting the review proceedings. Thus, we reject the defamation claim made in this appeal. [4]

[**17] E. Conspiracy Claims.

Hayden next contends that the district court erred in finding that defendants did not conspire to interfere with his practice. Hayden alleged that defendants had conspired against him by deliberately and maliciously stating that his practice was below medical standards; by preventing him from obtaining adequate coverage for his patients so he could attend continuing education classes; by disciplining him with the knowledge that the charges against him were false; by denying him the real opportunity to be heard; and by singling him out for review. In sum, he contends that the unfairness of the review proceedings leads inescapably to the conclusion that defendants joined together to interfere with his livelihood.

The district court found that Hayden failed to prove that defendants conspired to interfere with his practice. Specifically, the court rejected his contentions that he was singled out for review and denied a fair opportunity to be heard. It also discredited Hayden's excuses for failing to obtain adequate coverage. Finally, the court found that throughout the review **[*1345]** proceedings defendants acted reasonably and in good faith. **[**18]** Again, these findings receive overwhelming support from the record, and we conclude that Hayden failed to establish any unlawful conspiracy. [5]

III. CONCLUSION.

> acts without malice, has made a reasonable effort to obtain the facts of the matter as to which he acts, and acts in reasonable belief that the action taken by him is warranted by the facts known to him after such reasonable effort to obtain facts.

Ark. Stat. Ann. § 71-5101 (1979).

[4] Hayden also contends that defendants made defamatory statements about him outside of the peer review proceedings. He claimed that defendant Ross, a member of the Executive Committee, falsely told a Wyoming hospital recruiter that Hayden was not a good doctor. Hayden also alleged that an unidentified hospital administrator's statement that Hayden might soon lose his privileges was also defamatory.

The district court concluded that neither statement was defamatory. It determined that because the Wyoming hospital administrator recalled only that Dr. Ross had made a negative comment about Hayden, Hayden had failed to prove the statement was defamatory. In concluding that the statement by the hospital administrator was not defamatory, the court found that the administrator had merely acknowledged Hayden's difficulties in response to a question from one of Hayden's patients, and had told the patient to discuss the matter with Hayden. The record amply supports these district court findings also.

[5] Hayden also contends that the district court erred in finding that defendants followed the Medical Center bylaws in the disciplinary proceedings against him. Defendants' alleged failure to comply with the Medical Center bylaws states no independent cause of action, but is relevant only insofar as it bears on Hayden's due process claim under *42 U.S.C. § 1983* and his defamation and conspiracy claims under state law. As we have noted, the district court properly dismissed the *section 1983* claim for lack of jurisdiction, and ample evidence supports its finding that defendants did not defame Hayden or unlawfully interfere with his practice. Thus, we reject Hayden's contention that defendants failed to follow the Medical Center bylaws.

In reviewing the defamation and conspiracy claims, we need not consider whether **[**19]** or not Hayden exercises good medical judgment in performing cesarean sections. That task is best left to the peer review committee members whose training and experience better qualifies them to make such judgments. Our role is simply to ensure that the committee members act within their area of expertise, that their proceedings are fair, and that they act reasonably in imposing sanctions. As Judge Goldberg aptly remarked, "courts must not attempt to take on the escutcheon of Caduceus." *Sosa v. Board of Managers, 437 F.2d 173, 177 (5th Cir. 1971)*.

As noted, the evidence in this case overwhelmingly demonstrates that defendants acted fairly, reasonably, and within their area of expertise in evaluating Hayden. Hayden had many opportunities to explain his conduct to impartial peer review committees that were qualified to judge his performance. The committees made every effort to assess the adequacy of his performance and, upon finding it lacking, imposed consultation and education requirements reasonably related to improving his medical skill and judgment. Under these circumstances, the district court properly entered judgment in defendants' favor in the defamation **[**20]** and conspiracy claims.

Accordingly, for the reasons set forth in this opinion, the judgment of the district court is affirmed.

Kalmanovitz v. G. Heileman Brewing Co.

United States District Court for the District of Delaware

September 28, 1984

Civil Action No. 82-797 (Formerly California Action No. C83 0196); Civil Action No. 82-797 (formerly California Action No. C83 0704

Reporter

595 F. Supp. 1385 *; 1984 U.S. Dist. LEXIS 23178 **; 1985-1 Trade Cas. (CCH) P66,389; Fed. Sec. L. Rep. (CCH) P91,851

PAUL KALMANOVITZ, individually and as a shareholder of Pabst Brewing Company, and S&P COMPANY, a California corporation, Plaintiffs, v. G. HEILEMAN BREWING COMPANY, INC., a Wisconsin corporation, RUSSELL G. CLEARY, HBC ACQUISITION, INC., a Delaware corporation, PABST BREWING COMPANY, a Delaware corporation, WILLIAM F. SMITH, JR., IRWIN L. JACOBS, DENNIS MATHISEN, GERALD A. SCHWALBACH and DANIEL T. LINDSAY, Defendants; PAUL KALMANOVITZ, an individual, and S&P COMPANY, a California corporation, Plaintiffs, v. IRWIN JACOBS, an individual, DENNIS MATHISEN, an individual, GERALD A. SCHWALBACH, an individual, and DANIEL T. LINDSAY, an individual, Defendants

Core Terms

shares, stock, merger, tender offer, shareholder, Exchange Act, stockholder, damages, private right of action, money damages, plaintiffs', per share, offeror, conspiracy, injunction, Counts, indirectly, alleged violation, competitor, enjoin, material fact, Williams Act, circumstances, defendants', misleading, belonging, parties, cases, moot, private cause of action

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Supporting Materials, Affidavits**

Where affidavits have been filed by plaintiffs and defendants in the proceeding, the court will consider a motion to dismiss as one for summary judgment pursuant to *Fed. R. Civ. P. 56*. *Fed. R. Civ. P. 12(b)*. Under *Fed. R. Civ. P.*

56, a court may enter summary judgment only if the pleadings, depositions, answers and admissions, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Any reasonable inferences from the facts must be resolved in favor of the party against whom the judgment may be entered.

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

HN2[] Injunctions, Permanent Injunctions

Courts will not consider granting injunctions when the circumstances are such that the injunction cannot be enforced by the court.

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

HN3[] Injunctions, Permanent Injunctions

It is infeasible to ask the court to enjoin acts which purportedly will violate the federal securities laws and antitrust laws or Delaware state law when these acts have already occurred.

Mergers & Acquisitions Law > Takeovers & Tender Offers

HN4[] Mergers & Acquisitions Law, Takeovers & Tender Offers

See *15 U.S.C.S. § 78n(e)*.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Mergers & Acquisitions Law > Takeovers & Tender Offers

Civil Procedure > Remedies > Damages > Monetary Damages

HN5[] Federal & State Interrelationships, Federal Common Law

Section 14(e) of the Securities and Exchange Act, *15 U.S.C.S. § 78n(e)*, does not create a private right of action for money damages by an unsuccessful competitor for control.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Mergers & Acquisitions Law > Takeovers & Tender Offers

HN6[] Private Actions, Standing

The four factors relevant in determining whether a private remedy is implicit in a federal statute not explicitly providing one are (1) whether plaintiff is one of the class for whose special benefit the statute was enacted, (2) whether the legislature intended to create a private remedy, (3) whether a private right of action would be consistent with the underlying purposes of the legislative scheme, and (4) whether the cause of action is one traditionally relegated to state law.

Mergers & Acquisitions Law > Takeovers & Tender Offers

HN7[] **Mergers & Acquisitions Law, Takeovers & Tender Offers**

Where plaintiff's individual stake in the outcome of the suit as a shareholder is minimal when compared with his interest as a potential offeror, although plaintiff seeks relief as a shareholder, it would be more realistic to characterize him as a competing tender offeror.

Mergers & Acquisitions Law > Takeovers & Tender Offers

Securities Law > Postoffering & Secondary Distributions > Tender Offers > General Overview

HN8[] **Mergers & Acquisitions Law, Takeovers & Tender Offers**

See *15 U.S.C.S. § 78m(e)*.

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Governments > Legislation > Interpretation

Civil Procedure > Remedies > Damages > Monetary Damages

Securities Law > Investment Advisers > General Overview

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

Securities Law > Civil Liability Considerations > Preservation of Remedies & Rights

HN9[] **Federal & State Interrelationships, Federal Common Law**

A private right of action for money damages will not be judicially implied unless there is a clear mandate from congress concerning the relevant statute which either creates or alters civil liabilities in addition to a legislative history which contains some expression of congressional intent to imply a private remedy. If the language of the statute and legislative history is silent, particularly if the statute contains other sections which include express provisions for enforcement and remedies, no right of action for money damages will be implied.

Civil Procedure > Remedies > Damages > Monetary Damages

Mergers & Acquisitions Law > Takeovers & Tender Offers

Securities Law > Civil Liability Considerations > Remedies > General Overview

Securities Law > ... > Securities Act Actions > Civil Liability > General Overview

HN10[] **Damages, Monetary Damages**

No private right of action for money damages exists under § 13(e) of the Securities and Exchange Act of 1934, *15 U.S.C.S. § 78m(e)*.

Securities Law > ... > Securities Exchange Act of 1934 Actions > Implied Private Rights of Action > Deceptive & Manipulative Devices

HN11[] **Implied Private Rights of Action, Deceptive & Manipulative Devices**

See *15 U.S.C.S. § 78j*.

Securities Law > ... > Securities Exchange Act of 1934 Actions > Implied Private Rights of Action > Deceptive & Manipulative Devices

Securities Law > ... > Civil Liability > Fraudulent Interstate Transactions > General Overview

Securities Law > ... > Express Liabilities > Misleading Statements > General Overview

HN12[] **Implied Private Rights of Action, Deceptive & Manipulative Devices**

See *17 C.F.R. § 240.10b-5*.

Civil Procedure > Remedies > Damages > Monetary Damages

Securities Law > ... > Securities Exchange Act of 1934 Actions > Implied Private Rights of Action > Deceptive & Manipulative Devices

Securities Law > Blue Sky Laws > Offers & Sales

Securities Law > ... > Express Liabilities > Misleading Statements > General Overview

HN13[] **Damages, Monetary Damages**

Only actual purchasers or sellers of a security, relying upon an alleged violation of Section 10(b) of the Securities and Exchange Act, *15 U.S.C.S. § 78j(b)*, may bring an action for money damages based upon Section 10(b).

Criminal Law & Procedure > ... > Fraud > Securities Fraud > Elements

Securities Law > ... > Securities Exchange Act of 1934 Actions > Implied Private Rights of Action > Deceptive & Manipulative Devices

Securities Law > Blue Sky Laws > Offers & Sales

HN14[] **Securities Fraud, Elements**

The wording of § 10(b) of the Securities and Exchange Act, *15 U.S.C.S. § 78j(b)*, directed at fraud in connection with the purchase or sale of securities stands in contrast with the parallel antifraud provision of the 1933 Act, §

17(a), as amended, *15 U.S.C.S. § 77q*, reaching fraud in the offer or sale of securities. When congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN15[] **Supplemental Jurisdiction, Pendent Claims**

Where the state and federal claims are derived from a common nucleus of operative fact, the court has the power and may exercise its discretion and consider the pendent state claim even though the federal claims are dismissed.

Business & Corporate Law > ... > Shareholders > Meetings & Voting > General Overview

HN16[] **Shareholders, Meetings & Voting**

See *Del. Code Ann. tit. 8, § 160(c)*.

Governments > Fiduciaries

Labor & Employment Law > Employment Relationships > Fiduciary Responsibilities

Torts > Intentional Torts > Breach of Fiduciary Duty > General Overview

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

HN17[] **Governments, Fiduciaries**

Whether a claim is individual or derivative is determined from the body of the complaint, not the label employed by counsel.

Business & Corporate Law > ... > Actions Against Corporations > Derivative Actions > General Overview

Civil Procedure > ... > Class Actions > Derivative Actions > General Overview

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

HN18[] **Actions Against Corporations, Derivative Actions**

The plaintiffs' standing to pursue derivative claims alleging violations of Delaware common law is also a question of substantive Delaware law. It is well established under Delaware law that a plaintiff who brings a derivative suit on behalf of a corporation must be a stockholder of the corporation at the time he commences the suit and must maintain that status throughout the course of the litigation.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Securities Law > Civil Liability Considerations > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN19[] **Pleadings, Heightened Pleading Requirements**

A general averment of conspiracy or collusion without alleging the facts which constituted such conspiracy or collusion is a conclusion of law and is insufficient. Generally, fraud, conspiracy and collusion must be charged by allegations of fact; and general allegations of fraud, fraudulent intent, and conspiracy or collusion, without a statement of supporting facts, are conclusions of law and are insufficient.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN20[] **Pleadings, Heightened Pleading Requirements**

The plaintiffs must plead with particularity the circumstances of the alleged wrongdoing in order to place the defendants on notice of the precise misconduct with which they are charged. Only allegations of conspiracy which are particularized, such as those addressing the period of the conspiracy, the object of the conspiracy, and certain actions of the alleged conspirators taken to achieve that purpose, will be deemed sufficient.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN21[] **Private Actions, Standing**

In order to have standing to sue under the antitrust laws, generally a plaintiff must adequately allege (1) a violation of the ***antitrust law***; (2) injury to his business or property; and (3) a causal relationship between the violation of his injury, that is, that the injury complained of was caused by the antitrust violation charged.

Civil Procedure > Judgments > Entry of Judgments > Multiple Claims & Parties

Contracts Law > Breach > General Overview

Torts > ... > Commercial Interference > Contracts > General Overview

HN22[] **Entry of Judgments, Multiple Claims & Parties**

It would be unduly harsh and wholly unrealistic to delay an appeal on the major unrelated issues until after trial of the subsidiary breach of contract claim.

Counsel: [1]** Robert K. Payson and Peter M. Sieglaff of Potter, Anderson & Corroon, Wilmington, Delaware, and Joseph L. Alioto, Joseph M. Alioto, John I. Alioto, and Gary D. Elion of Alioto & Alioto, for Plaintiffs.

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Bruce M. Stargatt of Young, Conaway, Stargatt & Taylor, Wilmington, Delaware, Maurice J. McSweeney of Foley & Lardner, Milwaukee, Wisconsin, and Leslie C. Smith of Foley, Lardner, Hollabaugh & Jacobs, for Defendants G. Heileman Brewing Company, Inc., Russell G. Cleary, and HBC Acquisition, Inc.

A. Gilchrist Sparks, III, Eric Howard and Michael Houghton of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, and Willis B. Snell of Sutherland, Asbill & Brennan, Washington, District of Columbia, for Defendants Pabst Brewing Company and William F. Smith, Jr.

Judges: Latchum, Senior Judge.

Opinion by: LATCHUM

Opinion

[*1388] LATCHUM, Senior Judge.

I. BACKGROUND

Plaintiffs, Paul Kalmanovitz [1] ("Kalmanovitz"), individually and as a shareholder of Pabst Brewing **[**2]** Company ("Pabst"), and S&P, a California corporation ("S&P") (collectively "plaintiffs"), brought this action on December 10, 1982, pursuant to (a) Sections 10(b), 13(e), 14(d), and 14(e) of the Exchange Act, *15 U.S.C. §§ 78j(b)*, *78m(e)*, *78n(d)*, and *78n(e)*, and the rules and regulations promulgated by the SEC thereunder; (b) *Section 1* of the Sherman Act, Section 7 of the Clayton Act, *15 U.S.C. §§ 1*, *18*; and *(c)* the laws of the State of Delaware. (Docket Item ["D.I."] 1 at 3.)

Originally, three separate lawsuits were filed, however, the cases have subsequently been consolidated into this present case. This lawsuit began in 1982, the result of the fierce battle for control of Pabst between Kalmanovitz, the Jacobs Group which included Irwin L. Jacobs ("Jacobs"), Dennis Mathisen ("Mathisen"), Gerald A. Schwalbach ("Schwalbach") and Daniel I. Lindsay ("Lindsay"), and G. Heileman Brewing Company, **[**3]** Inc. ("Heileman"). Presently pending before this Court are two motions: (a) defendants' motion to dismiss Counts I through X of the Complaint [2] (D.I. 166); and (b) plaintiffs' motion to certify the antitrust and tortious interference claims for appeal pursuant to *Fed.R.Civ.P. 54(b)*. (D.I. 160.)

[*1389] II. FACTS

Because this Court has already recounted the details of the battle for control of Pabst, [3] this discussion therefore will be limited to a thumbnail sketch of the operative facts.

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[1] Kalmanovitz is a citizen of California and the beneficial owner of twenty shares of common stock of Pabst. (D.I. 1 at 1.)

[2] This Court in *Kalmanovitz v. G. Heileman Brewing Co., Inc., 576 F. Supp. 922 (D.Del. 1983)*, dismissed Counts XI and XII of Kalmanovitz's original, twelve-count complaint in C.A. No. 82-797.

[3] The Court has six prior published opinions concerning this litigation: *Kalmanovitz v. G. Heileman Brewing Co., 576 F. Supp. 922 (D.Del. 1983)*; *United States v. G. Heileman Brewing Co., 563 F. Supp. 642 (D.Del. 1983)*; *Pabst Brewing Co. v. Kalmanovitz, 551 F. Supp. 882 (D.Del. 1982)*; *Jacobs v. G. Heileman Brewing Co., 551 F. Supp. 639 (D.Del. 1982)*; *Pabst Brewing Co. v. Jacobs, 549 F. Supp. 1068* (D.Del.), *aff'd*, ***707 F.2d 1392*** & 1394 (3d Cir. 1982); *Jacobs v. Pabst Brewing Co., 549 F. Supp. 1050 (D.Del. 1982)*.

[4]** On October 26, 1982, Kalmanovitz and Jacobs, along with three of Jacobs' associates (the "Jacobs Group"), entered into a Memorandum of Terms (the "October 26 contract"), by which Kalmanovitz and the Jacobs Group, through JMSL Acquiring Corporation ("JMSL"), [4] agreed to make a tender offer for 3,000,000 Pabst shares at $24 per share. [5] (D.I. 121, Ex. 1 at 2.) Acquisition of these 3,000,000 shares, combined with 1,440,305 Pabst shares the Jacobs Group already owned, would have given the parties to the agreement a majority of outstanding Pabst stock.

[5]** On October 27, 1982, Kalmanovitz and the Jacobs Group made the tender offer for 3,000,000 shares of Pabst stock at $24 per share (the "Jacobs-Kalmanovitz offer"). (*Id*. at Ex. 2.) The Jacobs-Kalmanovitz offer was opposed by the management of Pabst, e.g., William F. Smith, Jr., Pabst's president. As a result of a series of meetings between Smith and the chief executive officer of Heileman, Russell G. Cleary, on November 10, 1982, Heileman commenced a competing tender offer through a wholly-owned subsidiary called "HBC Acquisition, Inc." ("HBC"), a wholly-owned subsidiary of Heileman (the "Heileman offer"). (*Id*. at Ex. 3.) The Heileman offer was for 5,500,000 shares of Pabst stock at $27.50 per share.

On November 18, 1982, the Jacobs-Kalmanovitz offer was amended and increased to $30 per share. This increase in the Jacobs-Kalmanovitz offer was made possible by an amendment to the October 26 contract whereby Kalmanovitz agreed to increase his cash participation in the offer from $26,394,720 to $44,394,720. (*Id*. at Ex. 4.) At the same time, on November 18, 1982, defendant Jacobs promised, on behalf of the Jacobs Group in a letter to Kalmanovitz, that in the event the Jacobs **[**6]** Group decided to sell its 1,140,305 shares of Pabst Stock, rather than continuing to bid higher, it would pay Kalmanovitz 50% of all amounts it received in excess of $24 per share for all the shares in the Group (the "Letter Agreement"). (*Id*. at Ex. 6.)

On November 23, 1982, the Jacobs-Kalmanovitz offer was further amended and increased to $35 per share. This increase in offer was accompanied by the further understanding that Kalmanovitz would increase his cash participation in the offer to $59,394,720. (*Id*. at Exs. 7 & 8.)

On November 24, 1982, this Court denied motions for preliminary injunctions against the Jacobs-Kalmanovitz offer (brought by the Heileman group) and against the Heileman offer (brought by the Jacobs Group and Kalmanovitz). Heileman announced after the hearing that it would reduce the number of shares sought in its offer to 4.25 million and that it had approximately 3.9 million shares already in its depository.

That afternoon, on November 24, 1982, Jacobs telephoned Cleary and expressed concern about his (Jacobs) ability to go ahead financially. Cleary gathered from the conversation that Jacobs felt that he didn't want to go any further from a resources **[**7]** standpoint and he asked for suggestions **[*1390]** to resolve the situation. During this conversation, Jacobs told Cleary that he would withdraw from the bidding for Pabst shares in exchange for $7,500,000.

As a result of the negotiations begun on November 24, 1982, the Jacobs and Heileman groups entered into a contract on November 26, 1982, in which HBC agreed to terminate its old offer and announce a new offer which increased the number of shares to 5,600,000, raised the price to $29, and increased the value of notes to be paid to stockholders in a second-step merger from $20 to $24 per share. (*Id*. at Exs. 9, 10.) The Jacobs Group agreed to tender its shares into the new offer. The parties also agreed to dismiss all outstanding non-derivative litigation and that, upon dismissal, the Jacobs Group would be reimbursed $7.5 million for expenses incurred in its battle for control, this cost to be shared equally by Heileman and Pabst.

Also on November 26, 1982, Jacobs called Kalmanovitz's attorney and stated that "he worked out a deal with Heileman to pay [Kalmanovitz] $5,000,000 if [he] would agree to withdraw from the bidding." This offer to pay

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4 The tender offer was to be made by JMSL Acquiring Corp. ("JMSL"), a Delaware corporation wholly owned by PST Acquiring Corp. ("PST"), another Delaware corporation which was to be owned 50% by the Jacobs Group and 50% by Kalmanovitz. (D.I. 121, Ex. 1 at 3.) As part of the October 26 contract, Kalmanovitz would become a 50% shareholder in PST for $1,000.

5 At the time the parties entered into the October 26 contract, the price for shares of stock in Pabst trading on the New York Stock Exchange was approximately $20 per share.

Kalmanovitz was accompanied **[**8]** by an offer that he might share with Jacobs "in a bargain purchase of Pabst's Milwaukee office building." Kalmanovitz rejected the offer.

On December 2, 1982, HBC made a new tender offer for Pabst shares (seeking 5,600,000 shares at $29 per share) (the "HBC Offer"). (*Id*. at Ex. 11.) Kalmanovitz made a competing offer on December 6, 1982 for 4,150,000 shares at $32 per share. (*Id*. at Ex. 13.) On December 10, 1982, Kalmanovitz filed this action and moved for a preliminary injunction to stop the HBC Offer.

On December 20, 1982, this Court denied Kalmanovitz's motion. HBC increased its offering price to $32 per share on December 15, 1982. On December 22, 1982 -- the withdrawal date for the HBC Offer -- Kalmanovitz increased his offering price to $40 per share. (*Id*. at Ex. 16.) On December 23, 1982, Heileman accepted for payment 5,600,000 shares of Pabst and the contest for control of Pabst ended.

III. DEFENDANTS' MOTION TO DISMISS

Because ***HN1***[] affidavits have been filed by plaintiffs and defendants in this proceeding, the Court will consider defendants' motion to dismiss as one for summary judgment pursuant to *Rule 56*. *Fed.R.Civ.P. 12(b)*. Under *Rule 56*, a court may enter summary **[**9]** judgment only "if the pleadings, depositions, answers and admissions, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Any reasonable inferences from the facts must be resolved in favor of the party against whom the judgment may be entered. *Peterson v. Lehigh Valley Dist. Council, United Bhd. of Carpenters and Joiners, 676 F.2d 81, 84 (3d Cir. 1982)*.

1. *Plaintiffs' Claims for Injunctive Relief*

HN2[] Courts will not consider granting injunctions when "the circumstances are such that the injunction cannot be enforced by the court." 43 C.J.S. *Injunctions* § 34; *Penn Central Co. v. Buckley & Co., 293 F. Supp. 653 (D.N.J. 1963)*, *aff'd*, *415 F.2d 762 (3d Cir. 1969)*.

HN3[] It is presently infeasible to ask this Court to enjoin acts which purportedly will violate the federal securities laws and antitrust laws or Delaware state law when these acts have already occurred. *See Kauffman v. Johnston, 454 F.2d 267 (3d Cir. 1972)* (petition to enjoin deprivation of religious rights in connection with 1969 Passover mooted by passing of the holiday); *Tymiak v. Omodt, 676 F.2d* ***[**10]*** *306 (8th Cir. 1982)* (plaintiff's request for injunction to prevent his ejectment was rendered moot by his ejectment); *Mougios v. W.R. Grace & Co., 52 F.R.D. 576 (S.D.N.Y. 1971)* (request to enjoin stockholders meeting was rendered moot by the holding of the meeting); *see also Friends of the Earth Inc. v. Bergland, 576 F.2d 1377 (9th Cir. 1978)*; *Marchand v. Director, U.S. Probation Office, 421 F.2d 331 (1st Cir. 1970)*.

A review of plaintiffs' request for relief illustrates the complete impracticality **[*1391]** of the request in light of the events of the past two years. Plaintiffs ask that Heileman be enjoined from voting its Pabst shares (D.I. 1 at 34, para. B); that the asset transfer be stopped (para. C); and that the solicitation and purchase of Pabst shares (paras. D, E) and the implementation of the merger be stopped (para. F). Plaintiffs also ask that the defendants be enjoined from violating federal and state law. (*Id*., PP G, H, J, K, O.) The solicitation and purchase of shares, the vote, the merger and the asset transfers have, however, all occurred. This Court, therefore, cannot retroactively prohibit acts which are finished and which this Court refused **[**11]** to primarily enjoin on December 23, 1982.

2. *Standing To Maintain Action For Damages*

Plaintiffs allege in Counts I through IV of the Complaint that defendants, in connection with the HBC Offer, violated Sections 13(e), 14(d) and 14(e) of the Securities and Exchange Act of 1934 (the "Exchange Act"), *15 U.S.C. §§ 78m(e)*, *78n(d)*, and *78n(e)*. (D.I. 1 at 16-20.) The defendants argue that because the purpose of the Williams Act was to protect investors faced with an offer for the purchase of their shares and not to provide a money damages remedy to unsuccessful contestants for control of a corporation, plaintiffs lack standing to maintain any action for money damages based on alleged violations of Sections 14(d), 14(e) or 13(e), of the Exchange Act.

a. *Count I - Fraud In Connection With a Tender Offer: Section 14(e) of the Exchange Act*.

Section 14(e) of the Exchange Act is a general anti-fraud statute in connection with a tender offer which provides in part:

> **HN4**[] (e) It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which **[**12]** they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

15 U.S.C. § 78n(e).

Kalmanovitz argues that he has standing to bring this suit because he "brings suit individually and as a shareholder of Pabst, the target corporation." (D.I. 1, para. 16.) Kalmanovitz emphasizes that point in the hope of circumventing the holding of the United States Supreme Court in *Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 51 L. Ed. 2d 124, 97 S. Ct. 926 (1977)*. In that case, the Court held that a tender offeror, suing in its capacity as a takeover bidder, does not have standing to sue for damages under section 14(e). That case arose out of a contest between Chris-Craft Industries, Inc. ("Chris-Craft") and Bangor Punta Corp. ("Bangor") for control of Piper Aircraft Corp. ("Piper"). In that contest, Bangor, with the support of Piper, was successful, through a tender offer and over-the-counter purchases, in acquiring a majority of Piper's outstanding **[**13]** stock. During the course of the struggle for control, Chris-Craft filed an action against Bangor, Piper, and The First Boston Corp. (Bangor's underwriter in its tender offer), claiming that Bangor's tender offer violated Section 14(e) of the Exchange Act.

After the Court denied the requests for injunctive relief, Bangor acquired a majority interest in Piper and Chris-Craft sought to press its claim for money damages. The Court, in applying the analysis of *Cort v. Ash, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975)*, [6] held that Section 14(e) **HN5**[] does *not* **[*1392]** create a private right of action for money damages by an unsuccessful competitor for control.

[14]** The Court in *Piper v. Chris-Craft* began its analysis by framing the issue before it as:

> whether tender offerors such as Chris-Craft, whose activities are regulated by the Williams Act, have a cause of action for damages against other regulated parties under the statute on a claim that anti-fraud violations by other parties have frustrated the bidder's efforts to obtain control of the target corporation.

430 U.S. at 24.

In holding that there was no such private remedy for money damages, the Court relied in part on the following findings:

> The purpose of the Williams Act is to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information. *We find no hint in the Legislative history, on which respondent so heavily relies, that Congress contemplated a private cause of action for damages by one of several contending offerors against a successful bidder or by a losing contender against a target company*.

430 U.S. at 35 (emphasis added).

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[6] Because the Exchange Act does not expressly provide a private remedy for alleged violations of Section 14 or 13, any private right of action arising from violations of those sections must be implied. In *Cort v. Ash*, the Supreme Court set forth four factors relevant in determining whether a private remedy is implicit in a federal statute not explicitly providing one. **HN6**[] Those four factors are (1) whether plaintiff is one of the class for whose special benefit the statute was enacted, (2) whether the legislature intended to create a private remedy, (3) whether a private right of action would be consistent with the underlying purposes of the legislative scheme, and (4) whether the cause of action is one traditionally relegated to state law. Cort v. Ash, 422 U.S. at 78.

Kalmanovitz attempts to avoid the holding in *Piper* by claiming that he brought this suit individually in his capacity as **[**15]** a stockholder of Pabst and not as a competing tender offeror. The Court finds this argument to be without merit.

A cursory review of the facts will demonstrate why the Court cannot accept Kalmanovitz's argument. First, Kalmanovitz entered into an agreement with the Jacobs Group to purchase 3,000,000 shares of Pabst stock. As part of the October 26 contract, Kalmanovitz was to become a 50% shareholder in PST, the parent company to JMSL, the maker of the tender offer.

On October 27, 1982, the Jacobs-Kalmanovitz tender offer was made for 3,000,000 shares at a total price of $72,000,000. Kalmanovitz, pursuant to the October 26 contract and the subsequent amendments, agreed to a cash participation in the offer up to $59,394,720. (D.I. 121 at Ex. 8.) When Jacobs wished to withdraw from the offer, Kalmanovitz not only refused to withdraw, he subsequently made a competing tender offer for 4,150,000 shares at $32 per share (Kalmanovitz later increased his offering price to $40 per share). Then during his competing tender offer, on December 10, 1982, Kalmanovitz filed this action seeking a preliminary injunction to stop the HBC Offer.

Finally, Kalmanovitz alleged ownership of only 20 shares **[**16]** of Pabst stock. Given this miniscule stake in any possible recovery, his assertion of standing on the basis of a shareholder is without merit. *See also Luptak v. Central Cartage Co.*, [1981 Transfer Binder] Fed.Sec.L.Rep. (CCH) P 98,034 (E.D.Mich. 1979), *aff'd*, *647 F.2d 165 (6th Cir. 1981)*, where the court noted that ***HN7***[] "plaintiff's individual stake in the outcome of the suit as a shareholder is minimal when compared with his interest as a potential offeror. Thus, although plaintiff seeks relief as a DIBC shareholder, it would be more realistic to characterize him as a competing tender offeror. . . ." *Id. at P 91,352*. [7]

[17]** In *Piper v. Chris-Craft*, the Court addressed this exact problem and it specifically rejected the notion that Chris-Craft could sue as a disappointed Piper stockholder. As the Court noted:

> As a tender offeror *actively* engaged in competing for Piper stock, Chris-Craft was not in the posture of a target shareholder **[*1393]** confronted with the decision of whether to tender or retain its stock.

430 U.S. at 35 (emphasis added).

Because Kalmanovitz was actively engaged in competing for control of Pabst, Kalmanovitz has no standing to sue for damages based on a section 14(e) violation.

b. *Count II: Fraudulent, Misleading and Incomplete SEC Filings: Section 14[d] of the Exchange Act*

Kalmanovitz alleges in Count II of his complaint that all of the defendants "have filed and have caused Heileman to file, a Schedule 14D-1 and Offer to Purchase and have caused Pabst to file a Schedule 14D-9, which contain statements which are false and misleading with respect to material facts and which omit to state the material facts necessary in order to make the statements therein not false or misleading, in violation of Rules 14d-6(e)(1) and 14d-9." [8]

[18]** Section 14(d), like Section 14(e), was enacted as a part of the Williams Act, and imposes upon tender offerors various disclosure and reporting requirements. The defendants argue and Kalmanovitz concedes that the same analysis applied by the Supreme Court in *Piper v. Chris-Craft* dictates whether or not Kalmanovitz can

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[7] *See also* *Pabst Brewing Company v. Kalmanovitz, 551 F. Supp. 882 (D.Del. 1982)* where this Court found that the "facts clearly indicate that Kalmanovitz and Jacobs . . . have personally invested substantial capital in order to capitalize the tender offer by the acquiring corporations. Thus, there is no question that Kalmanovitz and Jacobs are the dominating and motivating principals behind the JMSL tender offer." *551 F. Supp. at 892-93*.

[8] Kalmanovitz argues that he has standing to bring an action for money damages for violations of Section 14(d). However, he fails to cite and the Court has not found any authority to support his claim.

maintain claims predicated on alleged violations of Section 14(d). Like subsection (e), subsection (d) was enacted to provide adequate protection for investors, and not to enrich disappointed competing tender offerors. In *Luptak v. Central Cartage Co*., [1981 Transfer Binder] Fed.Sec.L.Rep. (CCH) P 98,034 (E.D.Mich. 1979), *aff'd*, *647 F.2d 165 (6th Cir. 1981)*, plaintiff was an unsuccessful competitor for control of Detroit International Bridge Company ("DIBC") who brought suit against other bidders who had obtained control over DIBC. In disposing of plaintiff's claims based on Section 14(d) as well as Section 14(e), the Court held:

> Under the Supreme Court's rationale in *Chris-Craft*, emphasizing that section 14 and other provisions of the Williams Act were intended to benefit shareholders rather than competing offerors, Luptak would appear to **[**19]** have no standing to bring a private action for money damages under any subdivision of section 14. *See* *430 U.S. at 35*.
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> * * * *
>
> Because this Court has found both that plaintiff has no standing to assert his claims under section 14 of the Exchange Act and that Cartage's market purchases of DIBC stock did not constitute a tender offer under section 14, it must determine that defendants Cartage and Centra are entitled to judgment as a matter of law on those portions of plaintiff's complaint alleging violations of section 14(d) and (e) of the Act and the rules promulgated thereunder.

Id., P 98,034 at 91,352-54.

Thus, for the same reasons plaintiffs lack standing to maintain an action under Section 14(e), plaintiffs likewise have no standing to bring an action for damages under Section 14(d) and Count II will be dismissed as well.

c. *Counts III and IV: No Private Right of Action For Damages Under Section 13(e)*

In Counts III and IV of the Complaint, Kalmanovitz alleges violations of Section 13(e) of the Exchange Act, *15 U.S.C. § 78m(e)*. (Count III - Disguised Issuer Tender: Section 13(e) of the Exchange Act and Rule 13e-4; Count IV - Disguised "Going Private" Transaction: **[**20]** Section 13(e) and Rule 13e-3.) (D.I. 1 at 17, 19.) The defendants argue that Kalmanovitz lacks standing to seek money damages for the alleged violations of Section 13 because under Section 13 there is no private right of action for *money damages*. Kalmanovitz disagrees.

Section 13(e) of the Exchange Act provides in pertinent part:

> **[*1394]** ***HN8***[] It shall be unlawful for an issuer . . . to purchase any equity security issued by it if such purchase is in contravention of such rules and regulations as the Commission, in the public interest or *for the protection of investors*, may adopt (A) to define acts and practices which are fraudulent, deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices. (Emphasis added.)

Section 13(e), like any other section of the Williams Act (*15 U.S.C. § 78m(d)-(e)*, *78n(d)-(f)(1976)*), does not *expressly* afford a private right of action for enforcement of its provisions. Thus, this Court is again faced with the issue: whether or not there is an implied private right of action for *money damages* under Section 13(e) of the Exchange Act. Neither the United States Supreme Court nor the **[**21]** Third Circuit Court of Appeals has determined whether an implied private right of action exists under Section 13(e). As a result, both Kalmanovitz and the defendants look to the case law under Section 13(d) for guidance.

This Court, in *Jacobs v. Pabst Brewing Co., 549 F. Supp. 1050 (D.Del. 1982)*, a case arising out of the same battle for control of Pabst, presented a comprehensive analysis of Section 13(d) which included an exhaustive list of cases from various jurisdictions which stated that parties may and may not pursue a claim under Section 13(d). [9] This Court then reviewed the case history and the legislative history of Section 13(d) before concluding that "Congress intended to preserve a private cause of action which had been judicially created." *549 F. Supp. at 1062*.

[9] *549 F. Supp. 1050, 1054, n.3, 4*.

Having determined that an implied right of action for *injunctive relief* exists under Section 13(d) and 13(g), the Court went on to determine whether the Jacobs Group, as shareholders, has standing to bring an action for injunctive relief against an investment adviser.

[22]** In the present action, however, this Court must decide whether or not an implied private right of action for *money damages* under Section 13(e) exists before it reaches the issue of standing.

When other courts have faced the issue of whether there is an implied private right of action for damages, they have determined that none exists. In *duPont v. Wyly, 61 F.R.D. 615 (D.Del. 1973)*, Judge Stapleton determined that no implied right to recover damages existed when he stated: "By including an express and expressly limited private remedy in *Section 18*, [*15 U.S.C. § 78r*] I think Congress clearly negated the existence of a further implied remedy for violation of Section 13. I agree that 'where Congress has specifically authorized a remedy for violation of an act, the courts should not nullify the congressional scheme by implying a right of action on behalf of those not otherwise entitled to recover. '" *61 F.R.D. at 628* *citing* *In re Penn Central Securities Litigation, 347 F. Supp. 1327, 1340 (E.D.Pa. 1972)*, *modified*, [1973 Transfer Binder] Fed.Sec.L.Rep. (CCH) P 93,980 (E.D.Pa. 1973). *See also* *Schnell v. Schnall, 550 F. Supp. 650* [1981 Transfer Binder]Fed.Sec.L.Rep. **[**23]** (CCH) P 97,927 at 90,715-16 (S.D.N.Y. 1981), and *Berman v. Metzger*, [1981 Transfer Binder]Fed.Sec.L.Rep. (CCH) P 97,857 at 90,293-94 (D.D.C. 1981) (federal courts applied the rationale of *Piper v. Chris-Craft* and held that Section 13 does not provide a private right of action for money damages); *Myers v. American Leisure Time Enterprises, Inc., 402 F.Supp 213 (S.D.N.Y. 1975)*, *aff'd*, *538 F.2d 312 (2d Cir. 1976)*; *Crane v. Harsco, 511 F. Supp. 294 (D.Del. 1981)* (tender offeror possessed no private cause of action for an injunction under 13(e) *as a stockholder* since he was not a stockholder to whom a tender offer had been made and, thus, not an intended beneficiary of the Williams Act).

In recent decisions, the United States Supreme Court has clearly stated that a ***HN9***[] private right of action for money damages will *not* be judicially implied unless there is a clear mandate from Congress concerning the relevant statute which either creates or alters civil liabilities in addition to a legislative history which contains some expression of Congressional **[*1395]** intent to imply a private remedy. If the language of the statute and legislative history is silent, **[**24]** particularly if the statute contains other sections which include express provisions for enforcement and remedies, no right of action for money damages will be implied. *See* *Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979)* (no private right of action for damages under the Investment Advisers Act of 1940, *15 U.S.C. § 80b-1 (1976)*); and *Touche Ross & Co. v. Redington, 442 U.S. 560, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979)* (no private right of action under Section 17(a) of the Exchange Act, *15 U.S.C. § 78q(a) (1976)*).

Because the legislative history of the 1934 Exchange Act is silent on the issue of whether a private cause of action for damages should be available under Section 13(e) [10] **[**25]** and in light of the recent Supreme Court decisions which refuse to imply a private right of action for damages, the mandate to this Court is clear. Moreover, because Courts imply equitable remedies under the securities laws more readily than money damage remedies, [11] this Court finds that ***HN10***[] no private right of action for money damages exists under Section 13(e).

d. *Count V: Fraud in Connection with the Purchase and Sale of Securities: Section 10(b) of the Exchange Act*

In Count V of the Complaint, Kalmanovitz alleges that:

> The defendants have knowingly, by instrumentalities of interstate commerce, employed devices, schemes and artifices to defraud; made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; engaged in acts, practices and a course of business which operate and will operate as a fraud and deceit upon the Pabst stockholders and others in connection with each and every purchase and sale of securities contemplated by the Heileman Offer and the Agreement in Principle, which purchases and sales will ultimately

[10] *See* *Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 31-32, 51 L. Ed. 2d 124, 97 S. Ct. 926 (1977)*.

[11] *See* *Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11, 18-19, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979)*.

be paid for with assets belonging to Pabst stockholders which have been wrongfully and fraudulently misappropriated by the defendants.

(D.I. 1, para. 69.) Section 10 of **[**26]** the Act, *15 U.S.C. § 78j*, provides:

HN11[] It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange --
* * * *
(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 of the Commission, *17 C.F.R. § 240.10b-5* provides:

HN12[] It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
(1) to employ any device, scheme, or artifice to defraud,
(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in **[**27]** 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.

[*1396] The defendants argue that because Kalmanovitz did not tender his shares pursuant to the HBC Offer, he is neither a purchaser nor seller of securities and therefore lacks standing to maintain an action for damages under either Section 10(b) or *Rule 10b-5*. In support of its position, defendants rely on *Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 44 L. Ed. 2d 539, 95 S. Ct. 1917 (1975)*, where the United States Supreme Court held that one who does not buy or sell stock in connection with an offer cannot maintain an action under Section 10(b) for alleged misstatements made by the offeror. Conceding that he must comply with the purchaser/seller requirement of *Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 44 L. Ed. 2d 539, 95 S. Ct. 1917 (1975)*, Kalmanovitz contends that the words "in connection with the purchase or sale of any security" in Section 10(b) are to be construed so liberally as to encompass the conversion of his stock in the March, 1983 merger, which occurred more than four **[**28]** months after his complaint was filed. Relying upon the "forced seller" exception established in *Vine v. Beneficial Finance Company, 374 F.2d 627 (2d Cir. 1967)*, Kalmanovitz argues that a merger following a tender offer in which the majority stockholder may eliminate the minority stockholders without their approval relieves a stockholder of the need to plead "purchase or sale" of securities or "reliance." Because *Vine v. Beneficial Finance Company* was decided by the Second Circuit Court of Appeals prior to the 1974 Supreme Court decision of *Blue Chip Stamps v. Manor Drug Stores*, and because *Vine* is not the law in this Circuit, the Court is not persuaded by Kalmanovitz's argument.

In *Blue Chip Stamps*, the complaint alleged that the offeror had intentionally made the prospectus "overly pessimistic in order to discourage [complainant] and other members of the allegedly large class whom it represents from accepting what was intended to be a bargain offer, so that the rejected shares might later be offered to the public at a higher price." *421 U.S. at 726*.

The Supreme Court held that the issue before it was: "whether respondent may base its action on Rule 10(b)-5 **[**29]** of the Securities and Exchange Commission without having either bought or sold the securities described in the allegedly misleading prospectus." *421 U.S. at 727*.

In a comprehensive opinion which traces the purpose of Section 10(b) and Rule 10(b)-5 and the judicially created cause of action to which they give rise, the Supreme Court, adopting the rationale of *Birnbaum v. Newport Steel Corp., 193 F.2d 461* (2d Cir.), *cert. denied*, *343 U.S. 956, 96 L. Ed. 1356, 72 S. Ct. 1051 (1952)*, held that ***HN13***[] *only actual* purchasers or sellers of a security, relying upon an alleged violation of Section 10(b), may bring an action for money damages based upon Section 10(b). (Emphasis added.) *See* Shivers v. Amerco, 670 F.2d 826, 829 (9th Cir. 1982); Sanders v. Thrall Manufacturing Co., 582 F. Supp. 945 [1983 Transfer Binder] Fed.Sec.L.Rep. (CCH) P 99,500 (S.D.N.Y. 1983); *see also* Landy v. Federal Deposit Ins. Corp., 486 F.2d 139, 156-58 (3d Cir. 1973), *cert. denied*, *416 U.S. 960, 40 L. Ed. 2d 312, 94 S. Ct. 1979 (1974)*.

The Court in *Blue Chip Stamps* stated very clearly the guidelines [12] for Section 10(b). **HN14**[] "The wording of § 10(b) directed at fraud 'in connection with the **[**30]** purchase or sale' of securities stands in contrast with the parallel antifraud provision of the 1933 Act, § 17(a), as amended, 68 Stat. 686, 15 U.S.C. § 77q, reaching fraud 'in the offer or sale' of securities. . . . When Congress wished to provide a remedy to those who neither purchase nor sell securities, it had little trouble in doing so expressly." 421 U.S. at 734 (citations omitted).

The Court also stated that underlying policy considerations of the *Birnbaum* **[*1397]** Rule advocate adherence to the rule. The Court then expressed its concern that the failure to follow the rule may result in "vexatious litigation" **[**31]** caused by a "widely expanded class of plaintiffs" bringing "strike" suits under Section 10(b) and Rule 10b-5. 421 U.S. at 737-41. In recent Supreme Court decisions, the Court has refused to ignore the literal, "operative language" of the securities statutes and has denied plaintiffs the statutory construction which they desired but which conflicted with that literal language. *See* Chiarella v. United States, 445 U.S. 222, 63 L. Ed. 2d 348, 100 S. Ct. 1108 (1980); Santa Fe Indus. v. Green, 430 U.S. 462, 97 S. Ct. 1292, 51 L. Ed. 2d 480 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 47 L. Ed. 2d 668, 96 S. Ct. 1375 (1976). Furthermore, the Court has refused plaintiffs' requests that it supplement the existing securities statutes by providing a private right of action by implication where the statute itself said nothing about such a right. *See, e.g.,* Touche Ross & Co. v. Redington, 442 U.S. 560, 568-78, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979) (construing Securities Exchange Act § 17(a)); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 19-24, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979) (construing Investment Advisors Act § 206, 15 U.S.C. § 80b-6 (1976)); **[**32]** Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 24-42, 97 S. Ct. 926, 51 L. Ed. 2d 124 (1977) (construing Securities Exchange Act § 14(e)). While it is true that in many of these cases the Court supported its decisions with policy arguments and legislative history analyses, in most of them the Court emphasized that the language of the statute was at least the starting place of the Court's inquiry. *See, e.g.,* Chiarella v. United States, 445 U.S. 222, 226, 63 L. Ed. 2d 348, 100 S. Ct. 1108 (1980); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 16, 62 L. Ed. 2d 146, 100 S. Ct. 242 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 24, 97 S. Ct. 926, 51 L. Ed. 2d 124 (1977); Santa Fe Indus v. Green, 430 U.S. 462, 472, 97 S. Ct. 1292, 51 L. Ed. 2d 480 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197, 47 L. Ed. 2d 668, 96 S. Ct. 1375 (1976). In a number of these cases, the Court intimated that the statutory language alone could determine the meaning of the statute, at least where the construction sought by the plaintiff conflicted with the precise **[**33]** literal language of the existing statute. Thus, in *Blue Chip Stamps*, Justice Powell, concurring, said:

> The courts already have inferred a private cause of action that was not authorized by the legislation. In doing this, however, it was unnecessary to rewrite the precise language of § 10(b) and Rule 10b-5. This (rewriting of the statutory language, which the Court refused to permit) is exactly what respondent . . . sought in this case.

421 U.S. at 759 (footnote omitted). The majority opinion in *Blue Chip Stamps* also recognized that in some circumstances the statutory language itself could be dispositive: "If Congress had legislated the elements of a private cause of action for damages, the duty of the judicial branch would be to administer the law which Congress enacted." Id. at 748.

When the Third Circuit Court of Appeals was faced with this issue, it refused to expand the rule beyond the exceptions noted by the Supreme Court. *See* Pittsburgh Terminal Corp. v. Baltimore and Ohio Railroad Company,

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[12] The Court also noted that those who have a contractual right to purchase or sell securities have also been recognized as "purchasers" or "sellers" of securities for purposes of Rule 10b-5, not because of judicial conclusion that they were similarly situated to "purchasers" or "sellers" but because the definitional provisions of the 1934 Act grant them such a status. 421 U.S. at 751.

680 F.2d 933 (3d Cir. 1982) (the Court held that the conversion option in a convertible debenture qualifies as a contract for the purchase or sale of security). **[**34]**

Therefore, in the present case, this Court finds that Kalmanovitz failed to either purchase or sell any shares pursuant to the HBC Offer, and as a result, he lacks standing to maintain an action for money damages under either Section 10(b) or Rule 10b-5. [13]

[*1398] e. *Count VI: Illegal Agreement to Vote Pabst Treasury Stock*

Although the parties did not address the issue, because ***HN15***[] the state and federal claims are derived from "a common nucleus of operative fact," this Court has the power and may exercise its discretion and consider the pendent state claim even though the federal claims are dismissed. *See generally* United Mine Workers v. Gibbs, 383 U.S. 715, 16 L. Ed. 2d 218, **[**35]** 86 S. Ct. 1130 (1965), and Paine, Webber, Jackson & Curtis, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 587 F. Supp. 1112 (D.Del. 1984).

In Count VI of his Complaint, Kalmanovitz alleges that: "If the terms contemplated by the Agreement in Principle and the Heileman Offer are consummated, the tendered shares of Pabst common stock will belong to Pabst or will be under the control of Pabst within the meaning of Section 160(c)." (8 *Del.C*. § 160) (D.I. 1, para. 73.)

Defendants argue that the tendered shares belonged to HBC at the time they were voted and because the plaintiff failed to allege that the Pabst shares HBC agreed to vote in the merger did not "belong to" Pabst, directly or indirectly, the plaintiff has failed to allege any basis for a violation of Section 160. (D.I. 166 at 32.)

Section 160(c) states:

> ***HN16***[] (c) Shares of its own capital stock *belonging to the corporation or to another corporation*, if a majority of the shares entitled to vote in the election of directors of such other corporation is held, *directly or indirectly*, by the corporation, shall neither be entitled to vote nor be counted for quorum purposes. Nothing in this section shall be **[**36]** construed as limiting the right of any corporation to vote stock, including but not limited to its own stock, held by it in a fiduciary capacity.

8 *Del.C*. § 160(c) (emphasis added). Although the language of 8 *Del.C* § 160(c) is unambiguous, there is a question as to the exact meaning of "directly or indirectly" and unfortunately the case law provides little guidance. In Italo Petroleum Corp. v. Producers' Oil Corp. of America, 20 Del.Ch. 283, 174 A. 276 (1934), the court was faced with an issue which arose under the predecessor to Section 160. [14] In that case, the court noted:

> The statute prevents the voting either directly or indirectly by a corporation of its own stock belonging to it. What can "indirectly" mean unless it be some such thing as having stock belonging to the corporation held in some third party's name and having that third party vote it? It requires some moments of reflection to discover any other possible device of indirection which the corporation could conjure up. The thought I have given to the matter, which I confess has not been lengthy, has failed to suggest any other. There may be other methods. But the one suggested is so obvious **[**37]** that it is reasonable to suppose that it certainly was dominant in the legislative mind when the section was enacted.
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> There can be no doubt that if a corporation acquired its own stock and caused it to be held in the name of an individual who would vote it as ordered by the corporation's directors, the vote of the individual would be the vote, indirectly given, of the corporation. Nor can there be any doubt that if a corporation planned to buy its own

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[13] The defendants also argue that: (a) plaintiff has failed to make his allegations with the requisite specificity and; (b) plaintiff failed to plead reliance. (D.I. 166 at 25-28.) Because the Court found that Kalmanovitz lacks standing to sue as a "purchaser or seller," the Court need not reach defendants' other arguments.

[14] Although *Italo Petroleum Corp*. deals with a statute which was later amended to the current edition of Section 160, subsection (c) existed in the wording of the statute *prior to* the amendment.

> stock and its directors, desiring to vote that stock in violation of the statutory inhibition, organized a wholly owned subsidiary to hold the stock and vote it, the scheme would prove abortive. It would be so crude as to lack even the merit of cleverness. The fiction of the corporate entity would in that case be brushed aside and the device unhesitatingly pronounced but **[*1399]** a mere scheme for the indirect voting by the corporation of its own stock in violation of the statute.

174 A. at 278.

[38]** It is defendants' position that there is nothing in the Complaint to support the allegation that Pabst directly or indirectly owned or controlled the shares purchased by Heileman and subsequently cancelled in the merger. Although there are allegations of an agreement between Pabst and Heileman, the agreement does not rise to the level of control, domination and dictation consistent with a parent-subsidiary relationship noted in *Italo Petroleum Corp*.

As a result, plaintiffs' claim that the defendants have violated 8 *Del.C*. § 160(c) of the Delaware Corporation Law will be dismissed.

f. *Count VII: Smith's Breach of Fiduciary Duty*

In Count VII of the Complaint (D.I. 1, paras. 76-82), plaintiffs allege that defendant Smith, the Chief Executive Officer of Pabst, breached his duty to the Pabst shareholders under Delaware law. Before reaching the merits, the Court must first determine whether the plaintiff has standing to bring this action.

(1) *Derivative Nature of the Action*.

HN17[] Whether a claim is individual or derivative is determined from the body of the complaint, not the label employed by counsel. Crane v. Harsco, 511 F. Supp. at 304. Plaintiffs' claim here is **[**39]** that Smith breached his fiduciary duties to Pabst and its shareholders "through the mismanagement, waste and conversion of assets." (D.I. 1, para. 82.)

Although Kalmanovitz purports to bring these claims both individually and derivatively on behalf of the corporation, it is clear from every claim alleged by Kalmanovitz under Count VII that it constitutes a derivative claim because each alleged injury is one which would be suffered by all the stockholders of Pabst due to their status as stockholders and not as the result of any unique relationship with the corporation. *See* Elster v. American Airlines, 34 Del. Ch. 94, 100 A.2d 219, 222 (1953); *Bokat v. Getty Oil Company, 262 A.2d 246, 249 (Del.Supr. 1970)*.

HN18[] The plaintiffs' standing to pursue derivative claims alleging violations of Delaware common law is also a question of substantive Delaware law. *See* Crane v. Harsco, 511 F. Supp. at 304 (alleged violations of Delaware law in connection with a tender offer were reviewed under Delaware law). It is well established under Delaware law that a plaintiff who brings a derivative suit on behalf of a corporation must be a stockholder of the corporation at the time he commences **[**40]** the suit and must maintain that status throughout the course of the litigation. Lewis v. Anderson, 453 A.2d 474 (Del.Ch. 1982), *aff'd*, 477 A.2d 1040 (Del. 1984); Heit v. Tenneco, 319 F. Supp. 884 (D.Del. 1970).

In *Lewis v. Anderson*, the Delaware Supreme Court held that "a plaintiff who ceases to be a shareholder, whether by reason of a merger or for any other reason, loses standing to continue a derivative suit. . . ." 477 A.2d at 1049. *Lewis v. Anderson*, a suit by a Conoco stockholder alleging derivative claims was dismissed when, subsequent to the filing of the suit, a third party (DuPont Holdings, Inc., a wholly-owned subsidiary of E.I. duPont de Nemours and Company) acquired all of the outstanding stock of Conoco through a tender offer followed by a merger. The court, in its analysis, stated:

> The right to a pending cause of action is an asset of the merged corporation which passes to the corporation surviving the merger. Under the facts of this case, any right to equitable relief possessed by the original Conoco against the individual defendants, its officers and directors, passed to Du Pont Holdings, and thus to the present Conoco, by virtue of the **[**41]** merger. Likewise, by the terms of the same merger, the plaintiff

> Lewis ceased to be a shareholder of Conoco -- either new or old -- and instead became a shareholder of Du Pont. The company of which the plaintiff is now a shareholder, Du Pont, now owns all of the stock of **[*1400]** the present Conoco and, if the original Conoco had a claim for relief against its former officers and directors for the reasons set forth in the Complaint in this action, that claim is now owned by the present Conoco. The shareholder beneficiary of such a claim is now Du Pont, and not the plaintiff Lewis and the other shareholders of the original Conoco as was the situation when the suit was filed.

477 A.2d at 1043.

The court recognized only two exceptions to this rule -- where the merger itself is the subject of a claim of fraud (i.e., a device to eliminate the derivative litigation) or where the merger is a holding company reorganization which does not affect plaintiff's ownership of the business enterprise. *477 A.2d at 1046, n. 10*. Neither exception is applicable in this case. As in *Lewis*, "plaintiff has not asserted that the merger was perpetrated [to deprive Pabst] of its claim **[**42]** against the individual defendant and the merger was clearly not a reorganization resulting in a holding company. . . ." *Id. See also Schreiber v. Carney, 447 A.2d 17, 21-22 (Del.Ch. 1982)*.

The plaintiffs also allege in a conclusory fashion that unlike the plaintiff in *Lewis*, Kalmanovitz attacks the fairness of the merger and wrongdoing by the acquiring corporation. In addition, after stating the two exceptions to the rule regarding standing and mergers, Kalmanovitz concludes:

> These exceptions are both applicable to this case. Plaintiff here possesses the same equitable derivative standing as the plaintiffs in the above cited cases. The plaintiff should have standing to maintain a derivative suit to correct an alleged breach of fiduciary duty.
>
> Plaintiff possesses equitable derivative standing to bring this claim against defendants Smith. Plaintiff falls within the standing exception of both *Bokat* and *Schreiber*. Accordingly, defendants' motion to dismiss must be denied.

(D.I. 168 at 30.) Needless to say, without any factual support, this Court is not persuaded by plaintiffs' "arguments."

However, the Court does find that as a result of the merger, **[**43]** Kalmanovitz has ceased to have any equity interest, direct or indirect, in Pabst. Plaintiffs' claims do not fit within either exception to the broad rule that a plaintiff who, as a result of a merger, loses his stockholder status, loses his standing to pursue derivative claims. As a result, Count VII must be dismissed due to plaintiffs' lack of standing. [15]

g. *Count VIII: Conspiracy*

Count VIII of the Complaint alleges *in toto*:

> 83. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 82 as if **[**44]** fully set forth herein.
> 84. Each defendant has agreed and conspired with one or more of the other defendants to violate the laws of the United States and the State of Delaware, as set forth above.

(D.I. 1, paras. 83-84.) It is a longstanding rule in the Third Circuit that a mere ***HN19***[] general allegation of conspiracy is insufficient. *Black & Yates, Inc. v. Mahogany Assoc., 129 F.2d 227 (3d Cir. 1942)*; *Leeward Petroleum, Ltd. v. Mene Grande Oil Co., 415 F. Supp. 158 (D.Del. 1976)*. A general averment of conspiracy or collusion without alleging the facts which constituted such conspiracy or collusion is a conclusion of law and is insufficient. As has been noted:

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[15] Because the Court finds that Kalmanovitz no longer has standing to pursue the claim that defendant Smith had breached his fiduciary duty to the Pabst shareholders, this Court need not reach defendants' other arguments that the derivative claims must be dismissed because: "(a) of plaintiff's unexcused failure to make a demand on the Pabst Board of Directors and; (b) plaintiff could not adequately represent the interest of the other stockholders." (D.I. 166 at 37-41.)

> Generally, fraud, conspiracy and collusion must be charged by allegations of fact; and general allegations of fraud, fraudulent intent, and conspiracy or collusion, without a statement of supporting facts, are conclusions of law and are insufficient.

[*1401] 71 C.J.S. *Pleading* § 21. ***HN20***[] The plaintiffs must plead with particularity the "circumstances" of the alleged wrongdoing in order to place the defendants on notice of the precise misconduct with which they are charged. *See Seville Industrial* **[**45]** *Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786 (3d Cir. 1984)*. Only allegations of conspiracy which are particularized, such as those addressing the period of the conspiracy, the object of the conspiracy, and certain actions of the alleged conspirators taken to achieve that purpose, will be deemed sufficient. *See, e.g., James Julian, Inc. v. Raytheon, Co., 499 F. Supp. 949, 955 (D. Del. 1980)*. To establish the specificity of their conspiracy allegations, plaintiffs do no more than refer the Court to the eighty-one paragraphs included, by reference, in Count VIII and state that they "give rise to an inference of conspiracy." [16] (D.I. 168 at 34.) Such an inference, even if it could be gleaned from the Complaint, would be no substitute for the requirement that the circumstances of the conspiracy be plead with specificity.

[46]** As a result, Count VIII will be dismissed.

h. *Count IX: Purported Threat to Competition -- Claims Are Moot*

In Count IX of his Complaint, Kalmanovitz contends *inter alia* that "unless enjoined, the effect of the Heileman/Pabst Offer challenged herein will be substantially to lessen competition or tend to create a monopoly" in the malt beverage business due, essentially, to the combined resources of Pabst, Olympia and Heileman and the elimination of Pabst from the market. (D.I. 1, paras. 116-19.) The claim is brought pursuant to Section 7 of the Clayton Act, *15 U.S.C. § 18*, which prohibits corporate mergers or acquisitions the effect of which "may be to substantially lessen competition, or tend to create a monopoly." Plaintiffs unsuccessfully attempted to enjoin the HBC Offer in December of 1982. (D.I. 167, Ex. H.) Subsequently, the Pabst/Heileman transaction was consummated and both Heileman and HBC were removed from any stock ownership position in either Pabst or Olympia.

The sole basis of the plaintiffs' Count IX was plaintiffs' apparent apprehension of the imminent injury that Heileman's control of Pabst would purportedly cause in the market for malt beverages. [17] As **[**47]** this Court noted:

> Movants [Kalmanovitz and two of his brewing companies] have argued . . . that the proposed Final Judgment [i.e., consent decree] would not effectively prevent Heileman from exercising control over all the assets of Pabst and Olympia. This contention, however, has by time gone by the board. With the consummation of the exchange transaction on March 19, 1983, Heileman has transferred all of its Pabst and Olympia stock to Pabst in exchange for the retained assets and Pabst *again has become an independent company beyond Heileman's*

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[16] In support of the allegations in Count VIII, Kalmanovitz in a conclusory manner and without reference to any specific part of the Complaint states:

> Plaintiff has pleaded conspiracy with great specificity. Plaintiff sets forth 81 paragraphs covering some 21 pages of specific facts before setting forth the conspiracy allegation. Plaintiff has set out the parties to the conspiracy, the period of the conspiracy, the object of the conspiracy and numerous certain actions of the conspirators taken to achieve that purpose. The allegations are precise enough to give rise to an inference of conspiracy and therefore defendants' motion to dismiss must fail.

(D.I. 168 at 34.)

[17] For example, in D.I. 1, para. 104, plaintiffs allege that "a recent proposed Consent Decree between Heileman and the Department of Justice will probably be rejected. . . ." The Consent Decree was not rejected. In para. 109, plaintiffs allege "there is no assurance that the Pabst or Olympia mergers will be consummated on any basis or upon the same terms as described in the HBC/Heileman Offer." These mergers were consummated substantially in accordance with the terms of that offer with Heileman relinquishing all control over the operations of Pabst and Olympia. Again, in paras. 113-16, plaintiffs contend that various regional markets will be seriously altered by "Heileman control of Pabst and Olympia" and offer figures demonstrating how the "combination" of these three impacts on the markets to lessen competition. No such "combination" ever occurred.

> *control.* At that point, any **[*1402]** previous concern about the adequacy of the proposed judgment in precluding Heileman from exercising any control over, or retaining any interest in, the non-retained assets has become moot. (emphasis added)

United States v. G. Heileman Brewing Co., 563 F. Supp. 642, 651 (D.Del. 1983). The consent decree, as suggested, prevented Heileman from retaining any interest in or control over Pabst and Olympia assets except for specific assets acquired without governmental objection. (*Id. at 644*.)

[48]** Plaintiffs also argued that Count IX is not moot on the ground that post-acquisition evidence is "significant in determining the validity of the merger." However, plaintiffs ignore the fact that the post-acquisition evidence here conclusively demonstrates that the very basis for the Section 7 claim -- that Heileman would continue to control all Pabst/Olympia assets -- has evaporated. As this Court found in connection with the government consent decree proceedings, any claim based on that theory is now moot. *United States v. Heileman Brewing Co., 563 F. Supp. 642, 650 (D.Del. 1983)*.

i. *Count X: Lack of Standing to Assert Violation of Section 7 of the Clayton Act*

In Count X, Kalmanovitz again claims the right to sue the defendants under Section 7 of the Clayton Act, i.e., *15 U.S.C. § 18*. Count X is based on a claim that, subsequent to a successful completion of the HBC/Heileman tender offer and the exchange of shares for assets with Pabst, what remains of Pabst/Olympia "will not be viable as a competitor" in the production, distribution and sale of malt beverages in the United States. (D.I. 1 at 31-32.) ***HN21***[] In order to have standing to sue under the antitrust laws, generally **[**49]** a plaintiff must adequately allege (1) a violation of the ***antitrust law***; (2) injury to his business or property; and (3) a causal relationship between the violation of his injury, that is, that the injury complained of was caused by the antitrust violation charged. *See* Von Kalinowski, *Antitrust Laws and Trade Regulation, § 101.02, Standing to Sue* (1983 ed.); *see, e.g., Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910)*.

Kalmanovitz's role as a competitor does not give him automatic standing to sue under the antitrust laws. *Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300* [1984-1] Trade Cases (CCH) P 65,866 (5th Cir. 1984); *Pennzoil Co. v. Texaco Inc*., [1984-1] Trade Cases P 65,848 (N.D.Okla. 1984). Appropriate injury must be pleaded and the plaintiffs have failed to cogently claim how the alleged non-viability of the post-merger Pabst would in any manner *injure them*. Plaintiffs claim only that, as competitors, the "six separate and distinct injuries" contained in Paragraph 120 of Count IX, and incorporated by reference in Paragraph 120 of Count X, constitute the injury necessary to confer standing. (D.I. 168 at 36.) The alleged injuries set forth **[**50]** in Paragraph 119, however, are all premised on Heileman's continued ownership of Pabst, and are therefore inapposite to the Count X claim that competition will be lessened because the Pabst that remains, after the transactions with Heileman are completed, will not be a viable competitor.

With respect to the remaining effects alleged in paragraph 121 of Count X, there has been *no* attempt to show that *plaintiffs* have suffered any injury at all, let alone to make the required showing that plaintiffs have suffered "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*. Indeed, there is no way that plaintiffs could make the required showing, since the alleged antitrust violation is Pabst's weakness as a competitor and since such weakness would benefit, not hurt, its competitors such as Kalmanovitz. See *Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205 (3d Cir. 1980)*.

Plaintiffs' theory of injury under Count X does not meet the threshold standing **[**51]** **[*1403]** requirements, therefore, Count X will be dismissed. [18]

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[18] Plaintiffs' answering memorandum cites *Blue Shield of Virginia v. McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*, for the general proposition that "competitors *may* be able to prove antitrust injury and thus have standing." (D.I. 168 at 36; emphasis added.) The parties do not disagree with this general proposition. However, in some circumstances, such as a

[52]** Accordingly, the Court finding that Counts I through X are without merit, those counts will be dismissed and summary judgment entered thereon in favor of defendants and against plaintiffs.

IV. PLAINTIFFS' *RULE 54(b)* MOTION TO CERTIFY

This consolidated litigation as above captioned originally consisted of three separate law suits. The first was the twelve count complaint filed in this Court as C.A. No. 82-797. The second was the two count complaint brought by plaintiffs in the United States District Court for the Northern District of California (the "California District Court"). (D.I. 41.) The third was brought by the plaintiffs in the Superior Court of California for the County of Marin (the "California State Court action"). Defendants thereafter removed the latter action to the California District Court, consolidated with the second action, and then upon defendants' motion transferred to this Court pursuant to *28 U.S.C. § 1404(a)*. (D.I. 70.) Upon the transfer of California actions here, those actions were consolidated with C.A. No. 82-797.

In *Kalmanovitz v. G. Heileman Brewing Co., Inc., 576 F. Supp. 922 (D.Del. 1983)*, this Court dismissed Counts XI and XII of the complaint **[**53]** in C.A. No. 82-797 and both Counts of the California District Court complaint against all of the named defendants. (D.I. 139.) In accordance with this opinion, the Court will enter an order dismissing all of the remaining counts (Count I through X) of the complaint in C.A. No. 82-797 against all of the named defendants. These dismissals result in leaving only one claim outstanding and unresolved. The unresolved claim is found in the complaint originally filed by the plaintiffs in the California State Court action against only defendants Irwin Jacobs, Dennis Mathisen, Gerald A. Schwalbach and Daniel T. Lindsay (the "Jacobs Group") for breach of contract. (D.I. 71, Ex. A.) In that complaint plaintiffs allege that the individuals of the Jacobs Group by a letter dated November 18, 1982, unconditionally bound themselves to pay plaintiffs fifty percent of all proceeds should the Jacobs Group sell its Pabst shares to others for more than $24 per share. [19]

[54]** Since plaintiffs' breach of contract claim against the Jacobs Group is the only one which remains unresolved in this consolidated litigation, the Court finds no just reason exists for delay in entering a final judgment on all claims which were dismissed on November 21, 1983, or by the order to be entered today. This is so because the major claims involving federal securities violations, antitrust violations and tortious interference with contract claims have already been timely decided. The sole remaining breach of contract claim is subsidiary and unrelated to those issues and it involves fewer than all the multiple parties to this suit. ***HN22***[] It would be unduly harsh and wholly unrealistic to delay an appeal on the major unrelated issues until after trial of the subsidiary breach of contract claim. Accordingly, the Court will enter a *Rule 54(b)* certification on the claims already decided.

[*1404] An order will be entered in accordance with this Opinion.

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boycott directed against a competitor of one of the parties to a conspiracy, the competitor is injured by the violation and has standing. *See, e.g., Klor's, Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*. Such is not the case here. Neither this general proposition nor *McCready* suggests that Kalmanovitz has standing on the facts which he alleges. Indeed, *McCready*, which held that a customer had sustained antitrust injury, did not in any way alter, but rather reaffirmed, the requirement of *Brunswick* that plaintiffs have suffered antitrust injury in the particular case in order to have standing. *See 457 U.S. at 482-84*.

[19] On November 21, 1983, the Court denied plaintiffs' motion for summary judgment on their breach of contract claim because material facts were in dispute. *Kalmanovitz v. G. Heileman Brewing Co., Inc., 576 F. Supp. at 930-31*.

Pa. Dental Ass'n v. Med. Serv. Ass'n

United States Court of Appeals for the Third Circuit

August 14, 1984, Argued ; October 1, 1984

No. 84-5004

Reporter
745 F.2d 248 *; 1984 U.S. App. LEXIS 18067 **; 1984-2 Trade Cas. (CCH) P66,214; 16 Fed. R. Evid. Serv. (Callaghan) 1263

PENNSYLVANIA DENTAL ASSOCIATION, DELAWARE COUNTY DENTAL SOCIETY, ERIE COUNTY DENTAL ASSOCIATION, HARRISBURG AREA DENTAL SOCIETY, LUZERNE COUNTY DENTAL SOCIETY, MONTGOMERY-BUCKS DENTAL SOCIETY, ODONTOLOGICAL SOCIETY OF WESTERN PENNSYLVANIA, SCRANTON DENTAL SOCIETY, and YORK COUNTY DENTAL SOCIETY, (Third Party Plaintiffs) v. MEDICAL SERVICE ASSOCIATION OF PENNSYLVANIA, d/b/a PENNSYLVANIA BLUE SHIELD, and DONALD S. MAYES, D.D.S., IN HIS INDIVIDUAL CAPACITY, (Third Party Defendants), COUNTERCLAIM Defendants, York County Dental Society, Fifth District Dental Society, Dennis W. King, D.D.S., Charles M. Ludwig, D.D.S., Theodore R. Paladino, D.D.S., Thomas L. Perkins, D.M.D., and Kay F. Thompson, D.D.S. Pennsylvania Dental Association, Delaware Valley Dental Society, Erie County Dental Association, Inc., Harrisburg Area Dental Society, Luzerne County Dental Society, Montgomery-Bucks Dental Society, Odontological Society of Western Pennsylvania, Scranton District, Dental Society, Charles M. Ludwig, D.D.S., Dennis W. King, D.D.S., Theodore R. Paladino, D.D.S., Thomas L. Perkins, D.M.D., Appellants

Prior History: [1]** Appeal from the United States District Court for the Middle District of Pennsylvania - Scranton.

Core Terms

dentists, dental, participating, monopolize, charges, price-fixing, district court, provider, conspiracy, subscriber, appellants', Sherman Act, horizontal, boycott, non-participating, purchaser, dental services, subclass, reimbursement, allowance, vertical, per se violation, summary judgment, cooperating, certify, screen, concerted action, associations, contracts, parties

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN1[] **Entitlement as Matter of Law, Materiality of Facts**

Although summary judgment should be used sparingly in complex antitrust litigation, its use is not forbidden.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN2[] Standards of Review, Abuse of Discretion

As to a district court's refusal to certify a subclass, the reviewing court must affirm in the absence of an abuse of discretion.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Sherman Act, Claims

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, prohibits every contract, combination, or conspiracy, in restraint of trade or commerce among the several states. To establish a violation of that section, a plaintiff must show evidence of concerted action that unreasonably restrains trade. If an agreement is manifestly anticompetitive, it is conclusively presumed to be unreasonable and therefore deemed illegal per se. Otherwise, the agreement must be analyzed under the rule of reason, which requires the factfinder to determine whether, under all the circumstances of the case, the restrictive practice imposes an unreasonable restraint on competition. Essential to a finding of a violation is concerted action; unilateral action is not proscribed.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

Energy & Utilities Law > Pipelines & Transportation > Eminent Domain Proceedings

International Trade Law > General Overview

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN4[] **Vertical Restraints, Resale Price Maintenance**

Any combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*. Pursuant to this rule, the United States Supreme Court has condemned horizontal agreements among competitors to fix prices, as well as vertical resale price maintenance agreements.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN5[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The per se rule applies to an agreement to fix the price to be charged in transactions with third parties, not between the contracting parties themselves.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

HN6[] **Vertical Restraints, Price Fixing**

The United States Supreme Court has not condemned vertical price-fixing outside of the resale price maintenance context.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN7[] **Price Fixing & Restraints of Trade, Vertical Restraints**

Resale price fixing is a per se violation.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN8[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act, *15 U.S.C.S. § 1*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing

To establish proof of an illegal boycott under the Sherman Act, *15 U.S.C.S. § 1*, a plaintiff must show concerted action with a purpose either to exclude a person or group from the market, or to accomplish some other anti-competitive objective, or both.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN10[] Practices Governed by Per Se Rule, Boycotts

Some evidence of concerted activity directed at the alleged victims of the boycott must be offered for the case to survive summary judgment.

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

HN11[] Monopolies & Monopolization, Actual Monopolization

See the Sherman Act, *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN12[] Monopolies & Monopolization, Actual Monopolization

To establish the offense of monopolization under the Sherman Act, *15 U.S.C.S. § 2*, a plaintiff must show: (1) the possession of monopoly power in the relevant geographic and product markets; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen or historic accident. The relevant geographic market is the area in which a potential buyer may rationally look for the goods or services he or she seeks; boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN13[] **Monopolies & Monopolization, Actual Monopolization**

Monopoly power is generally defined as the power to control prices or to exclude competition, and the size of market share is a primary determinant of whether monopoly power exists.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

HN14[] **Scope, Monopolization Offenses**

To establish the offense of an attempt to monopolize under the Sherman Act, *15 U.S.C.S. § 2*, a plaintiff must show: (1) a specific intent to monopolize; and (2) the consequent dangerous probability of success within the relevant geographic and product markets. In proving specific intent, a mere intention to prevail over rivals or improve market position is insufficient. Even an intent to perform acts that can be objectively viewed as tending toward the acquisition of monopoly power is insufficient, unless it also appears that the acts were not predominantly motivated by legitimate business aims. Direct evidence of specific intent need not be shown; it may be inferred from predatory or exclusionary conduct.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN15[] **Testimony, Expert Witnesses**

See *Fed. R. Evid. 703*.

Evidence > ... > Testimony > Expert Witnesses > General Overview

HN16[] **Testimony, Expert Witnesses**

The factual predicate of an expert's opinion must find some support in the record.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN17[] **Prerequisites for Class Action, Adequacy of Representation**

According to *Fed. R. Civ. P. 23(a)*, a class member cannot serve as a representative party on behalf of the entire class unless, inter alia, he or she will fairly and adequately protect the interests of the class. Adequate representation depends on two factors: (1) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation; and (2) the plaintiff must not have interests antagonistic to those of the class.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Special Proceedings > Class Actions > Judicial Discretion

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN18[] **Standards of Review, Abuse of Discretion**

Where the district court appropriately applies the criteria of *Fed. R. Civ. P. 23(a)*, it has broad discretion in determining whether the action may be maintained as a class action, and it is subject to reversal only for an abuse of that discretion.

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Judges: Aldisert, Chief Judge, Weis, Circuit Judge, and Re, Judge. [*]

Opinion by: ALDISERT

Opinion

[*251] OPINION OF THE COURT

ALDISERT, Chief Judge.

This appeal requires us to decide whether Blue Shield's prepaid dental service program in Pennsylvania violates the antitrust laws. Several Pennsylvania dental associations and individual dentists appeal from a summary judgment dismissing their antitrust and state law claims brought against the Medical Service Association of Pennsylvania, doing business **[**2]** as Pennsylvania Blue **[*252]** Shield. [1] Appellants argue that Blue Shield

[*] Honorable Edward D. Re, Chief Judge of the United States Court of International Trade, sitting by designation.

[1] We have jurisdiction under *28 U.S.C. § 1291* because the district court entered a final judgment certified pursuant to *Rule 54(b), F.R. Civ. P.* That rule provides in relevant part:

engaged in a price-fixing conspiracy and a group boycott in violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1*, attempted to monopolize and monopolized in violation of *§ 2* of the Act, *15 U.S.C. § 2*, and that the district court abused its discretion in refusing to certify a subclass of cooperating dentists for treble damages purposes. We conclude that appellants' contentions are without merit, and therefore affirm the judgment of the district court.

[3]** I.

This lawsuit is a vestige of an ill-fated action brought by the Commonwealth of Pennsylvania against nine dental associations in the state charging that they ran afoul of antitrust laws and Pennsylvania law by discouraging dentists from participating in the Blue Shield program. Essentially, the complaint accused the dentists of restraining trade under *§ 1* of the Sherman Act. The associations, however, countered with an antitrust action of their own, filing a third-party complaint against Blue Shield charging violations of *§§ 1* and *2* of the Sherman Act, alleging that the determination of fees paid dentists by Blue Shield constitutes price fixing and a boycott, and further, that with its market power and through anticompetitive acts, Blue Shield is attempting to or is monopolizing certain relevant Pennsylvania markets and submarkets. They also asserted state law claims and requested treble damages, injunctive relief and punitive damages.

After extensive discovery, the state dismissed the Commonwealth's complaint against the associations over the objections of Blue Shield, leaving only the third-party action to survive. Blue Shield then counterclaimed against the original **[**4]** defendants, an additional dental society and five individual dentists, asserting a violation of *§ 1* of Sherman and alleging a conspiracy to boycott Blue Shield's dental programs by causing their members to terminate their participating agreements with Blue Shield, to fix charges for services paid under Blue Shield's dental program, to impede Blue Shield's cost containment efforts and to discourage dental insurance purchasers from enrollment or continued enrollment in Blue Shield's dental programs. This counterclaim also asserted causes of action under state law including tortious interference with contractual relations, civil conspiracy and trade libel. But there was more to come. Four of the five individual dentists then filed a class action in the form of a counterclaim against Blue Shield, and, like the dental associations, alleged Sherman *§§ 1* and *2* violations. Remaining are the litigants presently before us. Arrayed on one side are the Pennsylvania Dental Association, Delaware County Dental Society, Erie County Dental Association, Harrisburg Area Dental Society, Luzerne County Dental Society, Montgomery-Bucks Dental Society, Odontological Society of Western Pennsylvania, **[**5]** Scranton Dental Society, York County Dental Society, Dennis W. King, Charles M. Ludwig, Theodore R. Paladino, and Thomas L. Perkins. On the other side are Blue Shield and Donald S. Mayes, one of its officers, being sued in his own right. [2]

We consider in this appeal, in its *Rule 54(b)* context, only the summary judgment entered in favor of Blue Shield in the third-party complaint and in the class action counterclaim asserted against it. Not before us, and presumably still very much **[*253]** alive in the district court, is Blue Shield's counterclaim against the appellants.

II.

The controversy concerns Blue Shield's prepaid dental service program in Pennsylvania. Under that program, Blue Shield purchases dental services from providers in bulk and sells them to group subscribers only. It does this through a series of provider and subscriber contracts, covered by what is known as its Penn Dental I program. Blue Shield **[**6]** also markets an indemnity dental program known as Penn Dental V. Dentists who choose to participate with Blue Shield enter into provider contracts that obligate them to accept a set fee from Blue Shield as their sole payment for providing services to Blue Shield subscribers. The reimbursement system establishing that

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(b) **Judgment Upon Multiple Claims or Involving Multiple Parties**. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

[2] For the purpose of this opinion we will refer to both appellees as Blue Shield.

set fee is based on the "usual, customary, and reasonable" (UCR) fees charged by Pennsylvania dentists for specific dental procedures.

Blue Shield enters into subscriber contracts with patients that provide that if covered services are obtained from a participating dentist, the subscriber will not be required to pay any additional or out-of-pocket amounts. Payment is made directly to the participating dentists by Blue Shield because participating dentists have agreed to accept the UCR fee for their services.

The subscriber contracts also cover dental services performed by dentists who do not participate in the Blue Shield program (non-participating dentists). But Blue Shield subscribers are not assured of paid-in-full service benefits if they obtain services from non-participating dentists. Blue Shield will pay only the predetermined UCR fee. Moreover, payment **[**7]** for non-participating dental services is made directly to the subscriber and not to the dentist.

Thus, generally speaking, the essential difference between participating dentists and non-participating dentists in the Blue Shield program is twofold: where the dentist participates, he is paid directly by Blue Shield and he agrees to accept the UCR fee as payment in full for services rendered a subscriber. Dentists who do not participate do not agree to be bound by the UCR fee; subscribers are personally responsible for any amount charged by such dentists in excess of this fee; moreover, the Blue Shield reimbursement is paid directly to the subscriber and not to the dentist. [3]

[8]** The thrust of appellants' price fixing complaint focuses primarily on Blue Shield's method of determining the UCR fee. It therefore becomes necessary to discuss first the relationship of participating dentists to the Blue Shield structure and second the mechanics of determining the UCR charge.

A.

Blue Shield's by-laws provide that its business shall be managed by a board of directors and that lay persons shall constitute one-half of the board. That provision is in accordance with *40 Pa. Cons. Stat. Ann. § 6328(b)(1)*, which requires that at least 50% of Blue Shield's board consist of lay persons. The board consists of 32 members, 16 lay persons and 16 doctors. Only two members of the board are dentists.

Standing committees of various composition exist within the Blue Shield corporate structure to consider matters referred to them by the board or management of Blue Shield. Committee members are appointed by the chairman of the board. Two of these committees, of which dentists constitute a majority, command our interest.

The Dental Policy Committee (now known as the Dental Affairs Committee) considers matters referred to it by the board or by management and forwards its **[**9]** recommendations to the board for approval. The specific functions and responsibilities of the policy committee include: (1) examination and determination of the validity **[*254]** of new dental procedures; (2) review and reappraisal of current payment policies; (3) development of guidelines for maintaining a UCR mechanism; (4) development of guidelines for establishing fee schedule allowances; (5) provision of guidance to enhance provider participation; (6) review and reappraisal of the *Regulations for Participating Doctors*; and (7) review and appraisal of new health delivery systems. Many of these matters may reasonably be considered only by dental practitioners. Although the Blue Shield staff selects the majority of items on the committee's agenda, items are placed on it pursuant to requests from non-participating dentists as well as the public.

The Dental Review Committee is responsible for reviewing and making recommendations on matters affecting the status of dentists who participate in the Blue Shield program. These matters relate to conduct incompatible with participating dentist status, such as failing to verify charges with Blue Shield. The committee also considers **[**10]**

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[3] Other differences between participating and non-participating dentists include Blue Shield's refusal to grant non-participating dentists "excepted" dentist status, thereby requiring them to get pre-approval for new, expensive treatment, and its refusal to allow non-participating dentists to use the simpler claim forms used by participating dentists.

disputes between Blue Shield and dentists involving questions of professional ethics. The composition of the review committee is established pursuant to Blue Shield's by-laws in accordance with state statute, *40 Pa. Cons. Stat. Ann. § 6324(c)*.

B.

The parties do not dispute the mechanics of determining UCR charges. Under this system, when Blue Shield receives a bill with a dentist's fee, or charge, for a covered service, Blue Shield does not automatically allow payment of the full charge. Rather, the "allowance" may be different from the dentist's fee because of the operation of the three separate "screens" or artificial calculations -- usual, customary, and reasonable.

The "usual charge" screen looks at the fees that an individual dentist most frequently charges patients for the procedure performed (*e.g.*, a particular type of filling or crown) during a specific time period in the past (base period). These usual charges (sometimes referred to as a dentist's profile) range from low to high, and the "usual charge" screen will set the maximum allowance at a specific percentile of the past charges. Since 1979, Blue Shield's usual charge screen has been the 75th percentile.

[11]** The "customary charge" for a particular procedure is measured as a function of all the "usual charges" of all dentists in Pennsylvania in the same speciality classification (of which there are five) during a designated base period. Since at least 1975, Blue Shield limits its allowance for any particular procedure to the 90th percentile of those charges. In recent years it has used the "usual charges" of the preceding calendar year as the base period.

The reasonable charge screen applies only in special circumstances, *e.g.*, when a dental procedure involves unique problems that require more time by the dentist. When special circumstances exist, Blue Shield might pay a larger percentage of the fee than would normally be allowed under the usual and customary charge screens. The extra allowance is determined by referring the claim to one of Blue Shield's dental advisors -- a practicing dentist who works part-time for Blue Shield. The reasonable charge screen apparently is relevant to only a small percentage of claims; the usual and customary charge criteria come into play much more often.

III.

It bears emphasis that the state initiated this action in 1981 by filing a complaint **[**12]** against the dental associations charging the associations with violating the antitrust laws by encouraging dentists to terminate their Blue Shield provider contracts. With the dispute of those particular parties behind us, and limited to a *Rule 54(b)* determination, we must now consider the reverse argument: whether Blue Shield has violated the federal antitrust laws.

Appellants first argue that Blue Shield engaged in a price-fixing conspiracy and an illegal group boycott in violation of *§ 1* of the Sherman Act. They then argue that Blue Shield monopolized and attempted to **[*255]** monopolize certain Pennsylvania dental services markets in violation of *§ 2* of the Sherman Act. Finally, four of the individual dentist appellants argue that the district court erred in refusing to certify a subclass of cooperating dentists for treble damages purposes.

Our standard of review follows settled precepts. Because the district court rejected appellants' Sherman *§§ 1* and *2* arguments on summary judgment, we must affirm if we determine that there are no disputed issues of material fact and that Blue **[**13]** Shield is entitled to judgment as a matter of law. *Coastal States Gas Corp. v. Department of Energy, 644 F.2d 969, 978-79 (3d Cir. 1981)*. ***HN1***[] Although summary judgment should be used sparingly in complex antitrust litigation, *Poller v. Columbia Broadcasting System, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*, its use is not forbidden, *see* *Harold Friedman, Inc. v. Kroger Co., 581 F.2d 1068, 1071 (3d Cir. 1978)*. ***HN2***[] As to the district court's refusal to certify the subclass, we must affirm in the absence of an abuse of discretion. *Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 245* (3d Cir.), *cert. denied*, *421 U.S. 1011, 44 L. Ed. 2d 679, 95 S. Ct. 2415 (1975)*.

IV.

As can be immediately perceived, appellants' arguments do not follow a narrow compass. They range far and wide through a thicket of ***antitrust law***. We are required to discuss in one opinion such diverse concepts as horizontal and **[**14]** vertical price-fixing agreements, group boycotts, attempts to monopolize and actual monopoly in alternative markets, and, as a separate issue, the question of certifying a class action. All of this demands a discussion much more extensive and prolonged than that which we prefer to set forth in a typical decision of this court.

We turn first to appellants' restraint of trade arguments. ***HN3***[] *Section 1* of the Sherman Act prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. To establish a violation of *§ 1*, plaintiff must show evidence of concerted action that unreasonably restrains trade. *Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*. If an agreement is manifestly anticompetitive, it is conclusively presumed to be unreasonable and therefore deemed illegal *per se. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49-50, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*; *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. **[**15]** Otherwise, the agreement must be analyzed under the rule of reason, which requires the factfinder to determine whether, under all the circumstances of the case, the restrictive practice imposes an unreasonable restraint on competition. *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918)*. Essential to a finding of a *§ 1* violation is concerted action; unilateral action is not proscribed. *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 79 L. Ed. 2d 775, 104 S. Ct. 1464 52 U.S.L.W. 4341, 4343 (1984)*; *Malley-Duff & Associates, Inc. v. Crown Life Insurance Co., 734 F.2d 133, 141 (3d Cir. 1984)*. Here, appellants argue that Blue Shield's conduct can be condemned as either illegal price-fixing or an illegal boycott, both *per se* violations of Sherman *§ 1*. [4] We proceed to consider first appellant's price-fixing allegations and then their boycott claim.

[16]** **[*256]** V.

To determine whether Blue Shield has engaged in illegal price-fixing, we must decide whether Blue Shield may, consistent with the Sherman Act, establish a "usual, customary, and reasonable" reimbursement system and enter into bilateral provider agreements with individual dentists that obligate them to accept that reimbursement as payment in full for their services. Appellants contend that such an arrangement is illegal *per se* because Blue Shield did not act unilaterally in setting the reimbursement formula. They maintain that those dentists participating in the Blue Shield program and competing with them conspired and acted through Blue Shield, as their agent, to establish and implement the UCR system. This argument appears to be based on a theory of structural horizontal conspiracy with a vertical link. It is dependent upon proof that participating dentists, through their majority membership on the two Blue Shield committees, actually controlled the establishment of the UCR system implemented by Blue Shield.

Appellants also contend that the arrangement with Blue Shield is illegal *per se* because the dentists did not decide independently to participate. **[**17]** They argue that Blue Shield economically coerced them to enter into the provider agreements and accept the UCR reimbursement formula contained therein. This argument advances a theory of vertical restraint. It is dependent upon proof that the provider agreements themselves were the product of coercion or collaboration rather than merely bilateral contracts for the sale and purchase of services at a price unilaterally fixed by the purchaser and individually agreed to by the seller. Under either theory -- structural horizontal conspiracy or vertical restraint -- appellants argue that the UCR reimbursement formula, the subject of concerted action, is the type of pricing restraint condemned by the *per se* rule.

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[4] Appellants appear to have abandoned the rule of reason in this appeal, contending instead that "The Rule of Reason Does Not Apply Here," "The District Court was wrong in applying the rule of reason at all," and "use of the rule of reason was error as a matter of law." Brief for appellants at 35, 40. Notwithstanding this express disclaimer of application of the rule of reason, appellants made further reference to the rule in their brief, arguing that the district court's rule of reason analysis, even if appropriate, was incorrect. *Id. at 35-36, 40*. Appellants discussion was so cursory, however, that this court is led to believe that appellants are not pursuing the rule of reason on appeal.

The Supreme Court has held that ***HN4***[] any combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se* under *§ 1* of the Sherman Act. *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*. Pursuant to this **[**18]** rule, it has condemned horizontal agreements among competitors to fix prices, *see id.; Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 64 L. Ed. 2d 580, 100 S. Ct. 1925 (1980)* (holding horizontal agreement among competitors to fix credit terms *per se* violation of *§ 1*), as well as vertical resale price maintenance agreements, *see Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259 (1951)* (holding distillers' agreement on maximum resale price of liquor sold by distributors *per se* violation of *§ 1*) and *Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)* (holding publisher's establishment of maximum resale price of newspaper sold by carriers *per se* violation of *§ 1*). These decisions make clear that ***HN5***[] the *per se* rule applies to "an agreement to fix the price to be charged in transactions with third parties, not between the contracting parties themselves." *See Sitkin Smelting & Refining Co. v. FMC Corp., 575 F.2d 440, 446* (3d Cir.), **[**19]** *cert. denied*, *439 U.S. 866, 58 L. Ed. 2d 176, 99 S. Ct. 191 (1978)*.

If we characterize the provider agreements at issue here as "merely arrangements for the purchase of goods and services by Blue Shield," *Group Health & Life Insurance Co. v. Royal Drug Co., 440 U.S. 205, 214, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979)*, Blue Shield can be viewed as a purchaser of dental services. As such, its establishment of the price it will pay the participating dentists with whom it contracts, as distinguished from the price it will charge third parties, is not price-fixing within the scope of the *per se* prohibition of *§ 1*. *See Sitkin, 575 F.2d at 446*. Yet because Blue Shield is a purchaser that only partially reimburses the participating dentists for each sale of services, the participating dentists, in effect, are making one sale to a two-sided buyer composed of the insurer and the subscriber. It **[*257]** is probably more accurate, therefore, to characterize Blue Shield as an indemnitor or third-party payor -- the ultimate payor -- rather than as a purchaser. Thus, we must proceed to analyze Blue Shield's conduct under the traditional **[**20]** notions of horizontal and vertical price-fixing.

A.

Most recently, in *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*, the Supreme Court found a medical insurance plan to be illegal *per se* as a horizontal price-fixing conspiracy. Defendants there were non-profit foundations composed of medical doctors. The member physicians, by majority vote, set maximum fees limiting the amount that they could recover as payment for services performed for patients insured under the approved insurance plans. These plans obtained foundation approval by agreeing to pay the doctors' charges up to a scheduled amount in return for the physicians' agreement to accept that amount as payment in full. The Court held that an agreement among competing physicians setting the maximum fees that may be claimed in full payment for health services provided to policyholders of specified insurance plans constitutes a *per se* violation of *§ 1*. *Id. at 335-36*.

With respect to the case at bar and appellants' theory of horizontal conspiracy, however, there is no overt agreement among competing health care providers to establish **[**21]** or to fix prices as was the situation in *Maricopa*. That distinction, however, does not necessarily preclude a finding of a horizontal price-fixing agreement. To the extent that Blue Shield's establishment of the UCR reimbursement system might disguise or embody an agreement among competing providers, its actions would come within the purview of *§ 1*. *See United States v. Paramount Pictures, Inc., 334 U.S. 131, 92 L. Ed. 1260, 68 S. Ct. 915 (1948)*; *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 624 F.2d 476 (4th Cir. 1980)*; *see also Maricopa, 457 U.S. at 352 n.26* (reserving question of whether insurer, who may be under control of providers, can lawfully fix the fee schedule and enter into bilateral contracts with individual providers).

Several recent cases have dealt with a concept that seeks to prove a horizontal agreement by a theory of structural conspiracy. In *Virginia Academy*, the Fourth Circuit found that Blue Shield plans were combinations of physicians operating under the direction and control of their physician members. *624 F.2d at 481*. In that case, the plans' by-laws required **[**22]** that a majority of the board of directors be physicians, and there was evidence in Blue Shield documents and statements tending to show physician control. In *Human Resource Institute of Norfolk, Inc. v. Blue*

Cross of Virginia, 498 F. Supp. 63, 66 (E.D. Va. 1980), the court applied the "walking conspiracy" theory of *Virginia Academy* and found no provider control of Blue Cross, noting that Blue Cross's enabling statute required that a majority of a plan's board of directors be subscribers; that the board in fact had a subscriber majority, and that there was no direct evidence of member control of Blue Cross. [5]

[23]** **[*258]** We reject appellant's theory of structural horizontal conspiracy because the uncontroverted facts furnish no support for it. There is no genuine issue of material fact concerning Blue Shield's corporate and operational structure. The board of directors has the ultimate responsibility for Blue Shield's business decisions and only two members of its 32-member board are dentists. Health care providers do not constitute a majority on the board. The district court found that "only one-sixteenth of the persons responsible for making the decisions which [appellants] claim[] to be potentially and in fact anti-competitive are themselves competitors in the relevant market." Mem. op. at 15, *reprinted in* App. at 3386.

Appellants' structural conspiracy argument seems to ignore the construction of Blue Shield's board and focuses instead on the functions and composition of the review and policy committees. These facts are essentially not disputed. Admittedly, dentists constitute a majority on each of these committees. But majority membership on a committee, without more, does not make out a prima facie case of structural horizontal conspiracy. The power and the authority **[**24]** of that committee must be analyzed. As did the district court, we conclude that these committees were advisory only, that they were constituted and utilized as a resource to the board, that they participated in no activities anathematic to antitrust precepts, and rendered advice only when particularly solicited by the board. Appellants appear to concede that the policy committee does not approve policies for the board, but merely makes recommendations to it. We are not impressed by appellants' specific contentions in this respect, including its emphasis on the statement of one Blue Shield official that he could not remember any occasion when the policy committee's recommendation was not accepted by the board. Appellants argue that the committee developed, voted on, and specifically approved Blue Shield's system for calculating the customary charge screen, as well as the switch to the 10% differential (or 90% performance level) and the use of statewide classes for calculating the customary charge. But it is not controverted that the use of statewide charge classes and the goal of seeking to allow at least 90% of aggregate charges were concepts developed and urged by management. **[**25]** Approval of these concepts by the policy committee was simply an approval of a management decision. Nor do appellants deny that the policy committee simply followed the recommendation of another committee in suggesting the allowance of the percentage of aggregate charges reported to the dental program. Action taken to find a market price so that a purchaser-insurer does not overpay does not constitute price-fixing.

Nor do we accept the notion that the review committee participated in price-fixing when it refused to update profiles of dentists who refused to verify their usual charges pursuant to Blue Shield procedures that called for "in-office reviews" of charges. The following factors strongly militate against appellants' argument: Blue Shield's requirement that dentists certify that their fees submitted to Blue Shield have not been inflated because of insurance coverage is consistent with the ethical rules of the dental profession, Blue Shield's in-office review experience showed that about one-half of the dentists who agreed to verify their usual charges had charged inflated fees to Blue Shield and

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[5] Appellants argue that the decisions in *Glen Eden Hospital, Inc. v. Blue Cross & Blue Shield of Michigan, 740 F.2d 423 (6th Cir. 1984)*, and *Ratino v. Medical Service of the District of Columbia (Blue Shield), 718 F.2d 1260 (4th Cir. 1983)*, which applied the "walking conspiracy" theory of *Virginia Academy*, militate in favor of finding provider control in the case at bar. We find both cases distinguishable. The Sixth Circuit in *Glen Eden* reversed the district court's conclusion that there was no provider control of Blue Cross. In *Glen Eden*, however, appellant-hospital was allowed only severely limited discovery and its requests for information directly related to the theory that participating hospitals either controlled or greatly influenced the reimbursement policy of Blue Cross were denied. For this reason, the *Glen Eden* court concluded that the grant of summary judgment was premature. In the case before us, unlike *Glen Eden*, the parties have completed extensive discovery.

In *Ratino*, the Fourth Circuit reversed a summary judgment in favor of Blue Shield. There, the district court had concluded that the UCR plan fell within the McCarran-Ferguson Act's "business of insurance" exemption, *see* 15 U.S.C. §§ 1011-1015, thereby shielding the plan from antitrust scrutiny. Holding the McCarran-Ferguson Act inapplicable, the *Ratino* court remanded the case for fact findings and a determination as to whether Blue Shield's challenged practices constitute a price-fixing conspiracy or an illegal boycott.

that about one-third of the dentists contacted refused to verify their usual **[**26]** charges, the state health department has approved the concept of Blue Shield conducting in-office reviews to verify dentists' usual charges, and profile updates were not withheld until the board of directors authorized such action.

Distilled to its essence, the question comes to this. Blue Cross, as a purchaser **[*259]** of or ultimate payor for dental services, sought advice on the design and operation of its dental program from committees composed primarily of practicing dentists. To give advice when asked by the decisionmaker is not equivalent to being the decisionmaker itself. We see no dispute of material fact on this issue and we conclude that there was no support for appellants' structural horizontal conspiracy argument. [6]

[27]** B.

Once appellants' horizontal theory of concerted action is eliminated, they are left with trying to prove that the provider agreements themselves evidence an unlawful vertical restraint. ***HN6***[] The Supreme Court has not condemned vertical price-fixing outside of the resale price maintenance context. *See Albrecht v. Herald Co., 390 U.S. 145, 151, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968)* (***HN7***[] resale price fixing is a *per se* violation); *Kiefer-Stewart Co. v. Joseph Seagram & Sons, 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259 (1951)*. As the Blue Shield provider agreements here differ greatly from the vertical arrangements to restrict resale prices invalidated in *Albrecht* and *Kiefer-Stewart*, we should be hesitant to condemn them under a *per se* rule. *See United States v. Topco Associates, Inc., 405 U.S. 596, 607-08, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972)* ***HN8***[] ("it **[**28]** is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act"); *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc., 675 F.2d 502, 505 (2d Cir. 1982)* (holding similar provider-insurer agreements valid under *per se* rule of vertical price-fixing). Moreover, if we were to extend *Albrecht* and *Kiefer-Stewart* to the facts in this case, there would have to be evidence of some collaboration or coercion to find an unlawful price-fixing agreement. Appellants cannot prove that Blue Shield collaborated with the participating dentists unless it can prevail in its claim that the dentists really control Blue Shield. As we have already shown, this claim fails.

Appellants also advance an economic coercion conspiracy theory, arguing that Blue Shield's UCR system and administrative practices pressure dentists economically to participate. Undisputed facts give no support to this theory as a matter of law. First, Blue Shield also pays for services rendered by non-participating dentists and determines its payment allowance for services uniformly -- regardless **[**29]** of participation status. Moreover, its dental plan covers no more than 35% of the privately insured population and purchases less than 9% of the dental care in Pennsylvania. We conclude that there is no basis for an inference that dentists are coerced to participate with Blue Shield.

VI.

We turn now to appellants' contention that Blue Shield's UCR reimbursement system and related administrative practices, as well as its Dental Plus program, constitute an illegal boycott of non-participating dentists under *§ 1* of the Sherman Act. Dental Plus is a Blue Shield health maintenance organization program available to U.S. Steel employees at a certain plant that involves only participating dentists. Those dentists agree to provide all covered services to certain employee subscribers in return for a fixed fee per subscriber per month.

HN9[] To establish proof of an illegal boycott under *§ 1*, a plaintiff must show "concerted action with 'a purpose either to exclude a person or group from the market, **[*260]** or to accomplish some other anti-competitive objective, or both.'" *Malley-Duff & Associates, Inc. v. Crown Life Insurance Co., 734 F.2d 133, 140 (3d Cir.*

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[6] Appellants argue that *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 72 L. Ed. 2d 330, 102 S. Ct. 1935 (1982)*, is controlling. We disagree. In *Hydrolevel*, the Supreme Court held that standard-setting organizations may be liable under the antitrust laws for the actions of their agents committed with apparent authority. In that case, committee members had conspired to restrain trade unreasonably through a misinterpretation of the Boiler and Pressure Vessel Code. As we have concluded here, however, neither the policy nor review committees have engaged in conduct that runs afoul of the antitrust laws. Hence, there is no illegal conduct that may be imputed to Blue Shield.

1984) **[**30]** (quoting DeFilippo v. Ford Motor Co., 516 F.2d 1313, 1318 (3d Cir.), *cert. denied*, *423 U.S. 912, 96 S. Ct. 216, 46 L. Ed. 2d 141 (1975))*. In the context of addressing appellants' *per se* price-fixing contention, we have already demonstrated that Blue Shield's actions in setting the UCR reimbursement fee and entering into the provider agreements were purely unilateral. Accordingly, the concerted action necessary for Blue Shield to succeed with its primary boycott claim is missing, and that claim must fail.

Appellants' Dental Plus claim must also fail for lack of concerted action because there is no evidence that Blue Shield conspired with any dentists to establish Dental Plus criteria that would exclude non-participating dentists. *See* Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau, 701 F.2d 1276, 1291 (9th Cir.) ("**HN10**[] Some evidence of concerted activity directed at the alleged victims of the boycott must be offered for the case to survive summary judgment"), *cert. denied*, *464 U.S. 822, 104 S. Ct. 88, 78 L. Ed. 2d 96 (1983)*. **[**31]** Thus, as with their price-fixing claims, appellants' boycott claims fail to establish a *per se* violation under § 1. We now turn to the monopolization claims asserted under § 2 of the Sherman Act.

VII.

Appellants argue that Blue Shield violated § 2 of the Sherman Act by attempting to monopolize and monopolizing the Pennsylvania market for the sale of prepaid dental care programs to group purchasers (Market I) and the Pennsylvania market for the quantity purchase of dental services (Market II).

Section 2 of the Sherman Act provides in pertinent part:

> **HN11**[] Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony. . . .

15 U.S.C. § 2. **HN12**[] To establish the offense of monopolization under § 2, plaintiff must show: (1) the possession of monopoly power in the relevant geographic and **[**32]** product markets; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen or historic accident. United States v. Grinnell Corp., 384 U.S. 563, 570-71, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966). The relevant geographic market is the area in which a potential buyer may rationally look for the goods or services he or she seeks, id. at 575-76; boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand, 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)*; *see also* Larry V. Muko, Inc. v. Southwestern Pennsylvania Building & Construction Trades Council, 670 F.2d 421, 434 (3d Cir.), *cert. denied*, *459 U.S. 916, 74 L. Ed. 2d 182, 103 S. Ct. 229 (1982)*. **HN13**[] Monopoly power is generally defined as the power to control prices or to exclude competition, **[**33]** United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956), and the size of market share is a primary determinant of whether monopoly power exists, United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (2d Cir. 1945).

HN14[] To establish the offense of an attempt to monopolize under § 2, plaintiff must show: (1) a specific intent to monopolize; and (2) the consequent dangerous probability of success within the relevant geographic and product markets. Lorain Journal Co. v. United States, 342 U.S. 143, 96 L. Ed. 162, 72 S. Ct. 181 (1951); Swift & Co. v. United States, 196 U.S. 375, 49 L. Ed. 518, 25 S. Ct. 276 (1905). In proving specific intent, a mere intention to prevail over rivals or improve market position is insufficient. Even an intent to perform **[*261]** acts that can be objectively viewed as tending toward the acquisition of monopoly power is insufficient, unless it also appears that the acts were not "predominantly motivated by legitimate business aims." Times Picayune Publishing Co. v. United States, 345 U.S. 594, 627, 97 L. Ed. 1277, 73 S. Ct. 872 (1953). **[**34]** Direct evidence of specific intent need not be shown; it may be inferred from predatory or exclusionary conduct. Interstate Circuit, Inc. v. United States, 306 U.S. 208, 83 L. Ed. 610, 59 S. Ct. 467 (1939); United States v. Jerrold Electronics Corp., 187 F. Supp. 545, 567 (E.D. Pa. 1960), *aff'd*, *365 U.S. 567, 5 L. Ed. 2d 806, 81 S. Ct. 755 (1961)*.

A.

The parties agree to define Market I as the market for the statewide sale of prepaid dental services in which Blue Shield competes with a commercial insurer, Delta Dental, and other insurers. They further agree that Blue Shield's share of this market is 32-35%. The district court concluded that Blue Shield's market share was insufficient as a matter of law to establish monopolization of Market I, a conclusion appellants seem not to contest on appeal. We determine that this is entirely consistent with case law. *See Alcoa*, 148 F.2d at 424; *see also* Twin City Sportservice, Inc. v. Charles O. Finley & Co., 512 F.2d 1264, 1274 (9th Cir. 1975). In addition, appellants' claim that Blue Shield attempted to monopolize Market I must fail as there is **[**35]** no evidence of specific intent. They point to the alleged § 1 violations of price-fixing and boycott as proof of this intent, but we have already rejected those claims. Absent evidence of specific intent, we need not reach the question of whether Blue Shield's market share constitutes a "dangerous probability of success."

B.

The parties disagree over the definition of Market II. Appellants define Market II as the statewide market for the purchase of dental services in bulk pursuant to participating dentist agreements in which Blue Shield and Delta Dental are the only purchasers. They argue that in this market Blue Shield has a 91% market share. Blue Shield would define the statewide market more broadly. It contends that this market should include all purchasers of dental services in bulk, and not only Blue Shield and Delta Dental. Affidavits of chief executive officers of Blue Shield's competitors for dental insurance business and affidavits of 12 persons who arrange for the purchases of dental insurance plans for Pennsylvania businesses and companies support Blue Shield's contention that from the perspective of purchasers of dental care coverage, Blue Shield, Delta Dental, **[**36]** other health services corporations, and commercial carriers are all in direct competition with each other. The district court noted that appellants "present[ed] no conflicting evidence to establish a material fact in dispute." Mem. op. at 31, *reprinted in* App. at 3402. But for their part, appellants relied solely on an affidavit by Dr. Comanor, an economist, for their definition of Market II -- an affidavit that expressed an opinion based on factual assumptions for which appellants cited no support in the record and that was discredited by the district court. [7]

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[7] The district court commented:

> The Comanor affidavit refers to many factual assumptions for which plaintiffs have cited no support in the record: "In the approximately 13 years that prepaid dental care and dental insurance have existed in Pennsylvania, it has become apparent that the commercial insurers are unwilling to supply programs which involve direct provider contact." (No basis for these statements and conclusions is cited.) "Moreover, while Blue Shield offers a dental indemnity program (Penndental V), this product appears to have been relatively unsuccessful in Market I." (The plaintiffs have cited no evidence to permit the characterization of an objective on the part of Penndental V to compete in plaintiffs' Market I and a lack of success in that objective.) "On this basis, there appear to be factors which limit in Market I the degree of substitutability in production between prepaid service benefit dental programs and dental insurance or indemnity programs." (The language, "on this basis, there appears to be factors . . ." is an inadequate foundation for the conclusion which follows.) ". . . Various large employers, as well as governmental bodies and unions themselves, desire only prepaid service benefit dental programs." (No factual basis for this statement is cited.) "For these groups, who are on the buying side of Market I, the degree of substitutability in use between prepaid service benefit dental programs and dental indemnity programs may be quite low." (This statement on its face is surmise.) "Fluctuations in price will not cause them to switch from a prepaid service benefit dental program to a dental indemnity program to the extent that they are committed, whether because of union pressures or some other reason, to provide fully prepaid dental care." (There is no factual basis cited for this statement. Further, it is a conditional statement and can not on its face support the conclusion that follows.) "For other purchasers, however, the degree of substitutability in use between prepaid service benefit dental programs and dental indemnity programs may be relatively high." (This statement on its face is surmise.) "In conclusion, the cross-elasticities of supply and demand in Market I suggest that it can be viewed as a market with two distinct sub-markets." (Considering the lack of a factual basis for the propositions leading to this conclusion and the tentative nature of this statement, the conclusion is not established for purposes of this motion.)
>
> In establishing the existence of two markets of purchasers of dental services in Pennsylvania, Dr. Comanor views the relevant issue as "whether, in response to any possible price cuts by Blue Shield or Delta Dental, dentists will shift their output from the production of pre-paid dental care to individual dental care." If so, Dr. Comanor says, these two markets

[37]** **[*262]** To put Dr. Comanor's affidavit in proper perspective, reference must be made to expert testimony and especially to *Rule 703, F.R.Evid.*, which provides:

> ***HN15***[] The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

In *Merit Motors, Inc. v. Chrysler Corp., 187 U.S. App. D.C. 11, 569 F.2d 666 (D.C. Cir. 1977)*, the court, speaking through Judge J. Skelly Wright, emphasized that ***HN16***[] the factual predicate of an expert's opinion must find some support in the record. We agree with that court's decision and its reasoning:

> To hold that *Rule 703* prevents a court from granting summary judgment against a party who relies solely on an expert's opinion that has no more basis in or out **[**38]** of the record than . . . theoretical speculations would seriously undermine the policies of rule 56. We are unwilling to impose the fruitless expenses of litigation that would result from such a limitation on the power of a court to grant summary judgment.

569 F.2d at 673. We therefore agree with the district court's determination of this issue in two important respects: the Comanor affidavit did not raise an issue of material fact and, in discrediting this affidavit for lack of critical factual support, the court did not err in accepting the factual averments in Blue Shield's submissions that defined the boundaries of Market II. We also agree with the district court and conclude that appellants' monopoly argument, which hinged on their definition of Market II, must fail. Moreover, their argument that there was an attempt to monopolize must fail on the same grounds that it failed vis-a-vis Market I.

VIII.

This brings us to the summary judgment entered in behalf of Blue Shield on the class action claim asserted by the individual dentists. ***HN17***[] According to *Rule **[**39]** 23(a), F.R. Civ. P.*, a class member cannot serve as a representative party on behalf of the entire class unless, *inter alia*, he or she will "fairly and adequately protect the interests of the class." Adequate representation depends **[*263]** on two factors: (1) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation; and (2) the plaintiff must not have interests antagonistic to those of the class. *Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968)*. ***HN18***[] Where the district court appropriately applies the criteria of *Rule 23(a)*, it has broad discretion in determining whether the action may be maintained as a class action, and it is subject to reversal only for an abuse of that discretion. *Katz v. Carte Blanche Corp., 496 F.2d 747, 757* (3d Cir.)(in banc), *cert. denied*, *419 U.S. 885, 42 L. Ed. 2d 125, 95 S. Ct. 152 (1974)*.

In their class action counterclaim against Blue Shield, the individual dentists alleged two distinct subclasses of dentists: (1) a subclass of cooperating **[**40]** dentists, consisting of participating and non-participating dentists, who accept Blue Shield's allowances as full payment for their services; and (2) a subclass of non-cooperating dentists, all non-participating dentists, who bill Blue Shield subscribers for the balance between their current fees and Blue Shield's allowances. Of the four class plaintiffs, three are non-cooperating dentists and one, Dr. King, is a cooperating one. The subclass of cooperating dentists seeks damages in the amount of the difference between

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> would effectively be one, but if not, there are really two separate and distinct markets. Dr. Comanor then concludes that whether "dentists will shift" depends upon whether dentists are at full capacity. If the dentist is not at full capacity, Dr. Comanor says, he is not likely to shift in response to price differences and there are therefore two markets. Dr. Comanor states that, "The fact that substantial excess capacity exists among Pennsylvania dentists suggest the finding of separate markets." The plaintiffs have cited no facts supporting the proposition that substantial excess capacity exists among Pennsylvania dentists.

Mem. op. at 28-30, *reprinted in* App. at 3399-401.

Blue Shield's allowances to them and the competitive price for their services. The district court refused to certify the subclass of cooperating dentists because (1) there are inherent conflicts between the participating and non-participating dentists, and (2) as a non-participating dentist, Dr. King cannot fairly and adequately represent the participating members of the subclass. The district court properly applied *Rule 23(a)* to the undisputed facts of the case and determined that Dr. King's interests, as a non-participating dentist, were antagonistic to those of participating dentists who were also part of the subclass of cooperating dentists. We cannot say that **[**41]** the district court abused its discretion in finding him to be an inadequate class representative and refusing to certify the subclass on that basis.

IX.

We have considered the many contentions raised by appellants. We have concluded that the district court did not err as a matter of law or impermissibly resolve any disputed issue of fact in determining that Blue Shield did not engage in an illegal price-fixing conspiracy or boycott in violation of *§ 1* of the Sherman Act, in determining that Blue Shield did not attempt to monopolize or monopolize in violation of *§ 2* of the Sherman Act, and that the district court did not abuse its discretion in refusing to certify a subclass of cooperating dentists for treble damages purposes.

The judgment of the district court will be affirmed in all respects.

De Modena v. Kaiser Found. Health Plan

United States Court of Appeals for the Ninth Circuit

November 7, 1983, Argued and Submitted ; October 2, 1984, Decided

Nos. 83-5720, 83-5721

Reporter

743 F.2d 1388 *; 1984 U.S. App. LEXIS 18046 **; 1984-2 Trade Cas. (CCH) P66,216

MARIO DE MODENA, dba SIXTH AVENUE PHARMACY, et al., Plaintiffs-Appellants, v. KAISER FOUNDATION HEALTH PLAN, INC., et al., Defendants-Appellees. PORTLAND RETAIL DRUGGISTS ASSOCIATION, INC., Plaintiff-Appellant, v. KAISER FOUNDATION HEALTH PLAN, INC., et al., Defendants-Appellees

Prior History: **[**1]** On Appeal from the U.S. District Court for the Central District of California. Hon. Irving Hill, Senior U.S. District Judge, Presiding.

Disposition: Affirmed in part, reversed in part, and remanded.

Core Terms

Nonprofit, Institutions, sales, drugs, Robinson-Patman Act, own use, exempt, charitable, medical group, organizations, healthcare, consumers, charitable institution, district court, sale of drugs, tied product, health plan, fee-for-service, monopolize, resale, retail, medical care, pharmaceutical, qualify, prices

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

Antitrust & Trade Law > Exemptions & Immunities > 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

Antitrust & Trade Law > Exemptions & Immunities > Robinson-Patman Act Exemptions

Governments > Local Governments > Libraries

HN1[] **Regulated Industries, Higher Education & Professional Associations**

The Nonprofit Institutions Act, *15 U.S.C.S. § 13c*, provides that nothing in the Robinson-Patman Act, *15 U.S.C.S. § 13* shall apply to purchases of supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit. Institutions can qualify for this exception if they are 1) non-profit institutions; 2) eligible institutions under the act; and 3) made the purchases in question for their own use.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN2[] **Robinson-Patman Act, Claims**

The Robinson-Patman Act, *15 U.S.C.S. § 13(a)* governs only those who buy and sell at discriminatorily low prices, and not those who indirectly benefit from such purchases.

Antitrust & Trade Law > Exemptions & Immunities > Robinson-Patman Act Exemptions

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN3[] **Exemptions & Immunities, Robinson-Patman Act Exemptions**

The Nonprofit Institutions Act, *15 U.S.C.S. § 13c*, explicitly lists hospitals as eligible organizations.

Estate, Gift & Trust Law > Trusts > Charitable Trusts

Healthcare Law > ... > Requirements for Tax Exempt Status > Charitable Purpose Requirement > Nonprofit Hospitals

Tax Law > State & Local Taxes > Estate & Gift Taxes > General Overview

Healthcare Law > Business Administration & Organization > Tax Exemptions > General Overview

Tax Law > Federal Taxpayer Groups > Exempt Organizations > Conditions & Restrictions

HN4[] **Trusts, Charitable Trusts**

All non-profit organizations that promote health are considered charitable under the law of charitable trusts. Further, a number of courts have specifically held that health maintenance organizations are charitable institutions for tax purposes.

Antitrust & Trade Law > Exemptions & Immunities > Robinson-Patman Act Exemptions

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN5[] **Exemptions & Immunities, Robinson-Patman Act Exemptions**

The phrase "their own use" in the Nonprofit Institutions Act, 15 U.S.C.S. § 13c, means what reasonably may be regarded as use by the hospital in the sense that such use is a part of and promotes the hospital's intended institutional operation in the care of persons who are its patients.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN6[] **Antitrust & Trade Law, Robinson-Patman Act**

The term de minimis generally refers to the effect of a violation, not to the proportion of a party's conduct which violates the law as compared to that which does not.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Monopolies & Monopolization, Attempts to Monopolize**

To establish a claim for attempted monopolization, a plaintiff must show that the defendant had a specific intent to monopolize the market, that there was a dangerous probability that the attempt might succeed, and that the defendant committed acts designed to achieve the illegal objective of creating a monopoly.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN8[] **Price Fixing & Restraints of Trade, Tying Arrangements**

To establish a tying claim, a plaintiff must first demonstrate that the defendant is selling two distinct products as a package. He must then show that the defendant has sufficient power in the market for one product (the tying product) to encourage consumers to buy the other product (the tied product) when they might not ordinarily do so.

Counsel: Roger Tilbury, Esq., Portland, Oregon, for Appellant/Petitioner.

Jesse Grove, III, Esq., San Francisco, California, for Appellee/Respondent.

Judges: Browning and Norris, Circuit Judges, and King, District Judge. *

Opinion by: NORRIS

Opinion

[*1390] NORRIS, Circuit Judge:

I. FACTS

* Honorable Samuel P. King, Chief U.S. District Judge for the District of Hawaii, sitting by designation.

Appellants are retail pharmacies located in Oregon and California. Appellees are the related corporations -- including regional health plans, regional medical groups, and non-profit hospitals -- that make up the Kaiser-Permanente Medical Care Program.

Appellees provide health care in a manner substantially different from the traditional fee-for-service method of health care in which a consumer pays a separate charge for each medical service or good provided by the doctor or hospital. The regional Kaiser Health Plans (HP's) contract with consumers who wish to become members and provide **[**2]** them with medical care in return for monthly dues. Each HP provides this care through two related organizations: Kaiser Foundation Hospitals, a California non-profit corporation which operates the Kaiser hospitals, and one of the eight regional Permanente Medical Groups. In addition, the HP's provide interested members with a "drug plan." Under this plan, for an additional monthly charge, members obtain the right to purchase drugs at little or no cost. They can purchase these pharmaceuticals at a Kaiser hospital or at a pharmacy at a non-hospital location operated by an HP. [1]

[3]** In this antitrust action, appellants advance three discrete claims concerning appellees' provision of drugs to HP members. First, they argue that appellees violated the Robinson-Patman Act, *15 U.S.C. § 13*, by buying drugs at discriminatorily low prices from pharmaceutical companies and dispensing these drugs to HP members. Second, appellants maintain that appellees are attempting to monopolize the retail drug market in violation of *section 2* of the Sherman Act, *15 U.S.C. § 2*. Third, they contend that appellants violated section 3 of the Clayton Act, *15 U.S.C. § 14*, by tying the sale of drugs to the sale of other health services.

Appellees moved for summary judgment below, and the district court granted the motion on all three claims. [2] Appellants then brought this timely appeal.

[4]** II. THE ROBINSON-PATMAN ACT CLAIM

The district court ruled that appellees were not liable for violating the Robinson-Patman Act -- even assuming they bought drugs at discriminatorily low prices -- because they fall within an exception to that Act created by the Nonprofit Institutions Act.

[*1391] The Nonprofit Institutions Act ***HN1***[] provides, "Nothing in the [Robinson-Patman Act] shall apply to purchases of supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit." *15 U.S.C. § 13c*. Appellees can thus qualify for this exception if they

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[1] Before 1977, the Kaiser appellees were organized in a slightly different manner. The pharmacies located outside of the hospitals were not operated by the regional HP's but by regional Permanente Service Corporations. These nonprofit corporations were formed because the Internal Revenue Service stated that the regional health plans would not be considered charitable organizations under the Internal Revenue Code if they ran the pharmacies. The Permanente Service Corporations, however, returned all receipts to the HP's less costs and a rate of return on capital. The Service Corporations paid taxes on the amount allocated for rate of return on capital and then paid the amount remaining to the HP's.

In 1977, the Internal Revenue Service declared that its denial of charitable status to health plans which operated pharmacies was erroneous. The Service Corporations were then disbanded and control of their pharmacies transferred directly to the HP's.

Because the Internal Revenue Service stated that the Service Corporations should have been treated as charities for purposes of the Internal Revenue Code and because the Service Corporations engaged only in activities that the HP's currently engage in, we believe the analysis under the Robinson-Patman Act for sales by the Service Corporations is the same as that for sales by the HP's. Consequently, we will treat all sales at pharmacies located outside Kaiser hospitals as being sales made by the HP's even if some of those sales occurred before 1977 and were thus actually made by Service Corporations.

[2] Actually, the summary judgment before us is the second one granted by the district court in this case. We reversed the first one -- granted in 1978 -- on the ground that appellants should have received additional time for discovery before the motion for summary judgment was granted. *Portland Retail Druggists Ass'n v. Kaiser Foundation Health Plan, 662 F.2d 641 (9th Cir. 1981)*. On remand, the district court permitted discovery for as long as appellants requested.

are 1) non-profit institutions; 2) eligible institutions under the Act; and 3) made the purchases in question for their "own use."

A

The HP's and Kaiser Hospitals are organized as non-profit institutions and would thus appear to meet the first of the Act's requirements. Appellants argue, however, that these institutions are not really non-profit because they are controlled by Permanente Medical Groups, which are for-profit corporations **[**5]** consisting of doctors who provide medical care for members. [3]

We disagree. Both the Internal Revenue Service and the district court found that the Medical Groups do not exert control over the HP's, and given the financial arrangements between the Medical Groups and the HP's, we believe that this conclusion is persuasive. The Medical **[**6]** Groups do not set their own fees. The HP's pay the Medical Groups an agreed upon amount per member per month, and this amount does not vary with the volume of service the group provides to the membership. [4] This fact greatly limits the amount of control the Medical Groups can exercise over the HP's. That the HP's and Kaiser Hospitals must fulfill their need for certain medical services by contracting with doctors who seek a profit does not make the HP's and Kaiser Hospitals themselves for-profit organizations.

[7]** B

We next consider whether the HP's and Kaiser Hospitals are eligible institutions under the Nonprofit Institutions Act. With respect to Kaiser Hospitals this question is easily answered. ***HN3***[] The Act explicitly lists hospitals as eligible organizations. In the case of the HP's, however, the answer is not as simple. The Act does not explicitly list HP's. Thus, we must determine whether such organizations are charitable institutions within the meaning of the Act.

There is no case law concerning which institutions are considered charitable for purposes of the Nonprofit Institutions Act. There is, however, a substantial body of precedent defining the term charitable for purposes of the tax code and the law of charitable trusts. Because the drafters of the Nonprofit Institutions Act wished to protect the same eleemosynary institutions that are given special consideration under the tax and charitable trusts laws, *see* S. Rep. No. 1769, 75th Cong. 3rd Sess. 1 (1938); H.R. Rep. No. 2161, 75th Cong., 3rd Sess. 1 (1938), we believe it is appropriate to refer to these precedents here. Thus, we **[**8]** look to this body of case law for guidance in determining whether the HP's are charitable institutions within the meaning of the Nonprofit Institutions Act.

"The definition of the term 'charitable' has never been static and has been broadened in recent years." *Eastern Kentucky Welfare Rights Org. v. Simon, 165 U.S. App. D.C. 239, 506 F.2d 1278, 1286 (D.C. Cir. 1974)*, *modified on other grounds*, **[*1392]** *426 U.S. 26, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976)*, *cited with approval*, *Abbott Laboratories v. Portland Retail Druggists Assn., 425 U.S. 1, 11, 47 L. Ed. 2d 537, 96 S. Ct. 1305 (1976)* (concept of the non-profit hospital has expanded over the years). In earlier times, health organizations were recognized as charitable only if they were supported primarily by donations and used those donations to provide health care for the indigent. *Id.* With the emergence of social welfare, insurance, and municipal hospitals, however, the number of poor requiring free or below cost medical services was drastically reduced. This reduction eliminated the rationale

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[3] As already indicated, appellants assert a Robinson-Patman Act claim against all appellees, including the regional Permanente Medical Groups. The Medical Groups, however, do not sell drugs to members. Rather, they prescribe drugs which members purchase at one of the pharmacies operated by either an HP or Kaiser Hospitals. Because the Robinson-Patman Act ***HN2***[] governs only those who buy and sell at discriminatorily low prices, and not those who indirectly benefit from such purchases, *see* *15 U.S.C. § 13 (a)*, appellants' claim against the Medical Groups must fail.

[4] A small portion of the payment to the Medical Groups -- generally around five percent of the total payment -- does not depend solely upon the number of members in the Medical Group's region. This portion is withheld by the HP and paid to the Medical Groups only if appellees meet their yearly financial goals. This system of payment is designed to give the doctors in the Medical Groups an incentive to keep costs low, and it is required by regulations promulgated pursuant to the Health Maintenance Organizations Act. 42 C.F.R. § 110.104(b)(1)(v).

upon which the traditional, limited definition of charitable was predicated, **[**9]** resulting in a move towards a less restrictive interpretation of the term in recent years. *Id. at 1288-89*. Now ***HN4***[] all non-profit organizations which promote health are considered charitable under the law of charitable trusts. *Restatement (Second) of Trusts § 368*, at 246 (1959); G. Bogert & G. Bogert, *Law of Trusts* § 62 (1973). Further, a number of courts have specifically held that health maintenance organizations, such as the HP's, are charitable institutions for tax purposes. *Sound Health Ass'n v. Commissioner, 71 T.C. 158, 177-81 (1978)*. Indeed, both the HP's and Kaiser Hospitals are exempt from income taxes as charitable institutions. Given this increasingly liberal interpretation of the term, we conclude that the HP's are charitable institutions within the meaning of the Nonprofit Institutions Act.

C

Finally, we must determine whether the purchases here in question were made for the HP's and Kaiser Hospitals' "own use." [5] Appellants contend that the HP's and Kaiser Hospitals purchased drugs not for their own use, but for the use of others, namely **[**10]** their members. Appellees contend, by contrast, that what they purchase for the use of their members is purchased for their "own use" within the meaning of the Act.

[11]** The "own use" issue is conceptually the most challenging aspect of this case because there is so little law in this area; the only relevant case is *Abbott Laboratories v. Portland Retail Druggists Ass'n, 425 U.S. 1, 47 L. Ed. 2d 537, 96 S. Ct. 1305 (1976)*. In *Abbott Labs*, the Court addressed the question whether sales of drugs purchased at discriminatorily low prices by non-profit, fee-for-service hospitals -- hospitals which were not part of a health maintenance organization such as Kaiser -- were exempt under the Nonprofit Institutions Act.

In resolving this questions, the Court was torn between two competing concerns. On the one hand, the Court was interpreting an explicit exemption from the Robinson-Patman Act that reflected Congress' desire to aid non-profit institutions even when those institutions fulfilled needs beyond those traditionally fulfilled by charities. *Id. at 13*. On the other hand, the Court reiterated the maxim that exceptions to the Robinson-Patman Act are to be construed narrowly and emphasized that this exemption in particular was not "to be applied and expanded automatically to whatever new venture the nonprofit hospital **[**12]** finds attractive in these changing days." *Id.*

[*1393] The Court resolved this tension by formulating a test which it found "inherent in the language of the statute." *Id. at 14*. Under this test, ***HN5***[] "'their own use' is what reasonably may be regarded as use *by the hospital* in the sense that such use is a part of and promotes the hospital's intended institutional operation in the care of persons who are its patients." *Id.* (emphasis in the original).

The Court applied this test to ten separate categories of drug sales. The Court exempted sales of drugs to in-patients, emergency room patients, and out-patients for use on hospital premises. The Court also exempted sales to both in-patients and out-patients for take home use, sales to hospital employees and students for their personal use or use by their dependents, and sales to the hospital's medical staff for their personal use or use by their dependents. The Court declined to exempt sales on prescription refills, sales to the hospital's medical staff for resale in private practice, and sales to walk-in customers **[**13]** who were not being treated at the hospital. [6]

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[5] At this point, we can treat the HP's and Kaiser Hospitals as one organization for analytical purposes because whatever is in the "own use" of one part of a health maintenance organization would be in the "own use" of another. After all, whether a member purchases his drugs from a pharmacy run by a regional HP or one run by Kaiser Hospitals doubtless depends on the fortuity of which location is more convenient for the member.

Appellants argue, in effect, that we cannot consider the interest of Kaiser Hospitals in serving members because membership is a matter between the consumer and his regional HP and because the HP's and Kaiser Hospitals are distinct corporations. Appellant's Opening Brief at 12. But appellants have misapprehended the legal relevance of corporate structure. The cases they cite merely stand for the proposition that the presence of two or more corporations acting together is sufficient to satisfy the "combination, contract, or conspiracy" requirement which triggers the substantive provisions of section 1 of the Sherman Act.

[6] The language of the Nonprofit Institutions Act speaks only to purchases by institutions for their own use. It says nothing about sales by such institutions. *Abbott Labs*, however, implicitly decided that whether an item purchased at a discriminatorily low

Appellants ask us to adopt the categorical rules set forth in *Abbott Labs* wholesale and apply them to this case. This suggestion, however, ignores the manner in which these rules were originally derived and would, if adopted, violate the spirit, if not the letter, of the Supreme Court's decision. In *Abbott Labs*, the Court generated its categorical rules by first determining the basic institutional function of a non-profit, fee-for-service hospital and then deciding which sales fit within this institutional function **[**14]** and which did not. Thus, to follow the true mandate of *Abbott Labs* we should not simply adopt the categorical rules set forth in that decision, but should instead determine the basic institutional function of the Kaiser-Permanente Medical Care Program and then decide which sales are in keeping with this function.

Health maintenance organizations (HMO's), such as Kaiser-Permanente, are designed to provide a complete panoply of health care to their members. *See* S. Rep. No. 129, 93rd Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 3033, 3040. *See generally II Report of the National Advisory Commission on Health Manpower* (1967). Whereas fee-for-service hospitals provide health care on a temporary and usually remedial basis to their patients, HMO's provide continuing and often preventive health care for their members. *See* *42 U.S.C. § 300e(b)(1)-(2)* (describing a HMO's continuing obligations to its members). Given this extraordinary broad institutional function, any sale of drugs by an HMO to one of its members falls within the basic function of the HMO. Consequently, we must conclude that drugs purchased by an HMO, such **[**15]** as Kaiser-Permanente, for resale to its members are purchased for the HMO's "own use" within the meaning of the Nonprofit Institutions Act and thus qualify for protection under the Act. [7]

[16] [*1394]** We believe that this result is in keeping with the intent of the 75th Congress which drafted the Nonprofit Institutions Act. Although the exact intent of Congress is less than crystal clear from a reading of the legislative history, *see* Rosoff & Dunfee, A "Fix" for the Retail Pharmacy: The Supreme Court Redefines Application of the Robinson-Patman Act to Drug Sales by Nonprofit Hospitals, 13 Cal. W. L. Rev. 195, 203 n.35 (1977), at least one Justice has concluded that the Act was passed because " Congress was primarily interested in directly aiding nonprofit institutions by lowering their operating expenses, but not interested in indirectly aiding such institutions by providing them with the means of raising additional money." *Abbott Labs*, 425 U.S. at 23 (Marshall, J., concurring). If that principle is applied to this case, it supports a finding that all drugs purchased by an HMO for resale to its members fall within the Nonprofit Institutions Act. There can be no question that allowing HMO's to purchase drugs that are resold to members at lower prices directly helps the HMO by lowering the operating expense it must incur to provide this aspect **[**17]** of health care to its membership.

We also believe that a finding that drugs purchased by an HMO for resale to its members qualify for protection under the Nonprofit Institutions Act is in keeping with national health care policy. Under *Abbott Labs*, fee-for-service hospitals are exempted from the Robinson-Patman Act when they provide medicine to their patients. If we held that HMO's, such as Kaiser-Permanente, do not qualify for a similar exemption when they provide medicine for their

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price was purchased for the institution's own use depends on whether and how the item was resold. *See generally* 3 E. Kinter & J. Bauer, *Federal* ***Antitrust Law*** § 25.9 (1983).

[7] HMO's, such as the Kaiser-Permanente, can therefore engage in some sales that would not be allowed if we applied the ten categorical rules formulated in *Abbott Labs* to this case.

For instance, in *Abbott Labs*, the Court held that fee-for-service hospitals cannot purchase drugs at discriminatorily low prices if those drugs are sold to refill a prescription, even if the original prescription was filled as part of an exempt sale. *425 U.S. at 15-16*. It appears that the Court declined to exempt prescription refills because the basic institutional function of a fee-for-service hospital is to provide temporary medical care for its patients. Refilling prescriptions goes beyond that basic institutional function because it extends the relationship between the fee-for-service hospital and the patient into the indefinite future. *Id. at 16* (A prescription is not for the hospital's "'own use' forever just because it originated under hospital auspices. We conclude that the statute's limitation has been exceeded when the connection with the hospital has become as attenuated as it is at the refill stage.").

As we explained in text, however, the relationship between an HMO and its members is ongoing, not temporary. The relationship thus does not attenuate simply because the member stepped out the door of an HMO hospital some time ago. The HMO is consequently acting within its basic institutional function when it refills the prescription of a health plan member.

members, fee-for-service hospitals would enjoy a market advantage over HMO's. Congress passed the Health Maintenance Organization Act in 1976, however, to ensure that consumers have a free choice among various methods of obtaining medical care because Congress believed that this was the best way to lower the medical costs that consumers must bear. S. Rep. No. 129, 93rd Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 3033, 3039-40. Accordingly, we decline to interpret the somewhat open-ended language of the Nonprofit Institutions Act in a way which would impinge upon the free choice of consumers of medical goods and services.

Our conclusion that drugs purchased by HMO's for **[**18]** resale to members are purchased for the HMO's "own use" and thus qualify for protection under the Nonprofit Institutions Act does not dispose of appellants' Robinson-Patman Act claim, however. Appellees make some sales to walk-in customers who are not members of a Kaiser-Permanente HP. Under our analysis, those sales are not protected by the Nonprofit Institutions Act. Indeed, appellees concede that these sales are not for the HP's "own use" and thus are not covered by the Nonprofit Institutions Act. Nevertheless, appellees argue that these sales should not be subject to the strictures of the Robinson-Patman Act because the sales are so minor as to be a de minimis violation of the Act. The district court agreed with the appellees, citing to the fact that appellees' sales of drugs to non-members constituted less than one percent of appellees' total sales of drugs.

We do not believe, however, that a court can determine whether or not certain sales are de minimis solely by reference to the percentage of an organization's total sales they constitute. ***HN6***[] The term de minimis generally refers to **[**19]** the effect of a violation, not to the proportion of a party's conduct which violates the law as compared to that which does not. One percent of appellees' total sales might amount to a substantial dollar volume with a dramatic effect on the ability of the relatively small retail drug stores to compete. We therefore remand **[*1395]** this case to the district court for an evaluation of the impact of appellees' non-exempt sales on competition in the retail drug market. [8]

[20]** III. THE ATTEMPTED MONOPOLIZATION CLAIM

HN7[] To establish a claim for attempted monopolization, a plaintiff must show that the defendant had a specific intent to monopolize the market, that there was a dangerous probability that the attempt might succeed, and that the defendant committed acts designed to achieve the illegal objective of creating a monopoly. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1027 (9th Cir. 1981)*, *cert. denied*, *459 U.S. 825, 103 S. Ct. 57, 58, 74 L. Ed. 2d 61 (1982)*.

We find that appellants failed to raise a genuine issue of material fact on the question whether the appellees engaged in acts designed to monopolize the market for retail drugs. The only evidence offered by appellants in opposing appellees' motion for summary judgment shows merely that the appellees drove hard bargains with pharmaceutical companies and obtained the best prices possible. [9] Appellants offered no evidence of predatory intent, such as proof that appellees coerced pharmaceutical companies into selling drugs to them **[**21]** below cost, or that appellees, in turn, sold drugs to their members below the cost of acquiring the drugs. Nor did appellants present any evidence that appellees coerced pharmaceutical companies into harming appellants. Accordingly, summary judgment was properly granted on this claim.

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[8] Appellees contend that they would cease sales to non-members if they were certain that doing so would not subject them to liability for violation of state licensing law, state tax law, or state rules of tort liability. This record, however, is not nearly sufficient to demonstrate that the operation of these state laws immunizes appellees' conduct under the standard for antitrust immunity set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*. Nor have appellees made clear why closing the pharmacies to non-members would violate federal tax law, as they assert in their brief.

[9] To bolster their attempted monopolization claim, appellants filled their opening brief with references to an affidavit by Howard Steinbach. The district court ruled, however, that the information in that affidavit was not admissible because the affidavit contained nothing but conclusory statements and hearsay. We agree with the district court's ruling on this point and consequently do not consider the Steinbach affidavit.

IV. THE TIE-IN CLAIM

HN8[] To establish a tying claim, a plaintiff must first demonstrate that the defendant is selling two distinct products as a package. He must then show that the defendant has sufficient power **[**22]** in the market for one product (the tying product) to encourage consumers to buy the other product (the tied product) when they might not ordinarily do so. *See Portland Retail Druggists Ass'n v. Kaiser Foundation Health Plan, 662 F.2d 641, 648 (9th Cir. 1981)*.

Appellants claim that appellees have made three such tying arrangements. All of these arrangements involve the drug plan that appellees sell to members. The first alleged tying arrangement is between the drug plan (the tied product) and the basic health plan (the tying product). The second is the converse arrangement between the health plan (the tied product) and the drug plan (the tying product). The third is between the drugs sold at appellees' facilities (the tied product) and the drug plan (the tying product).

None of these contentions is meritorious. The first alleged arrangement is not an illegal tie-in because appellees do not require that one purchase the drug plan to obtain the health plan. Appellants have no standing to attack the second alleged arrangement because they are not competitors in the market for the tied product, health plans. *See Aurora Enterprises, Inc. v. National Broadcasting Co., Inc., 688 F.2d 689 (9th Cir. 1982)* **[**23]** (only consumers **[*1396]** and competitors in the market for the tied product have standing to bring suit). Nor can appellants succeed on their third contention because we have already rejected the theory that a drug plan and the drugs provided under that plan are separate commodities for purposes of the Clayton Act. *Klamath Lake Pharmaceutical Assn. v. Klamath Med. Serv. Bureau, 701 F.2d 1276, 1288-90* (9th Cir.), *cert. denied*, *464 U.S. 822, 104 S. Ct. 88, 78 L. Ed. 2d 96 (1983)*.

V. CONCLUSION

In sum, we affirm the district court's grant of summary judgment with respect to the claim of attempted monopolization and the tie-in claim. We also affirm the district court's conclusion that drug purchases made by appellees for resale to their members are exempt from the Robinson-Patman Act under the exception created by the Nonprofit Institutions Act. We reverse, however, the district court's determination that appellees' sales of drugs to non-members constituted a de minimis violation of the Robinson-Patman Act, and we remand to the district court for reconsideration of this question.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. [10]

[24]**

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[10] Appellants also made an emergency motion to strike portions of appellees' Excerpt of Record. We took this motion under submission with the rest of the case.

The portion of the Excerpt of Record which appellants wish to strike served as an important basis for the district court's factual findings in this case. It was thus proper for appellees to include it in their Excerpt of Record. Consequently, appellants' motion is denied.

Glictronix Corp. v. American Tel. & Tel. Co.

United States District Court for the District of New Jersey

October 4, 1984

Civ. A. No. 82-4447

Reporter

603 F. Supp. 552 *; 1984 U.S. Dist. LEXIS 23031 **; 1985-1 Trade Cas. (CCH) P66,340

GLICTRONIX CORPORATION, on behalf of itself and all others similarly situated, Plaintiff, v. AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al., Defendants

Core Terms

certification, tariff, interconnection, class member, network, competitors, customers, terminal, damages, installation, collateral estoppel, contends, telephone, registration, bad faith, litigate, class certification, interface, marketed, Defendants', manufacturers, connected, decisions, argues, cases, sales, antitrust violation, anticompetitive, delayed, telephone company

LexisNexis® Headnotes

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN1[] **Estoppel, Collateral Estoppel**

The doctrine of collateral estoppel provides that once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent cases based on a different cause of action involving a party to the prior litigation.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN2[] **Estoppel, Collateral Estoppel**

Before application of collateral estoppel can be deemed appropriate, the court must find that: (1) the party to be estopped must have been a party or in privity with a party to the prior action; (2) the issues to be estopped must be the same as the issues determined in the prior action; (3) the issues must have been actually litigated and necessary to the prior judgment; and (4) application of collateral estoppel will not be unfair because: (a) the party to be estopped had little incentive to vigorously litigate the first action; (b) the first judgment is inconsistent with other judgments on the issue to be estopped; (c) the second action affords procedural opportunities unavailable in the first action (or, more generally speaking, that the party to be estopped had a full and fair opportunity to litigate its claims in the first action); or (d) application of collateral estopped would not otherwise be unfair to the defendant.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN3[] **Estoppel, Collateral Estoppel**

The party against whom collateral estopped is asserted must have been a party or in privity with a party to the prior action.

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 > US Supreme Court Review > General Overview

Civil Procedure > ... > Jurisdiction on Certiorari > Considerations Governing Review > Federal Court Decisions

HN4[] **Estoppel, Collateral Estoppel**

One prerequisite to the application of collateral estoppel is that there must have been a final judgment on the merits on the issues to be collaterally estopped.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN5[] **Estoppel, Collateral Estoppel**

To support application of collateral estoppel, the issues as to which a party seeks preclusion must be identical or in substance the same as the issues determined in the prior litigation.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN6[] **Estoppel, Collateral Estoppel**

In order to apply collateral estoppel, the issues to be precluded must have been actually litigated and necessary to the outcome of the first action.

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

HN7[] **Estoppel, Collateral Estoppel**

An alternative ground upon which a decision is based should be regarded as necessary for purposes of determining whether a party is precluded by the principles of res judicata or collateral estoppel from relitigating in a subsequent lawsuit any of those alternative grounds.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN8[] **Estoppel, Collateral Estoppel**

A judgment is conclusive as to all issues that support all independent grounds on which the judgment may be based.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN9[] **Estoppel, Collateral Estoppel**

There are three situations in which it may be unfair to the defendant to apply offensive, non-mutual collateral estoppel: (1) if a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable; (2) if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant; and (3) where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.

Administrative Law > Agency Adjudication > Decisions > Collateral Estoppel

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[] **Decisions, Collateral Estoppel**

Collateral estoppel is premised on an underlying confidence in the judgment relied on. However, for the purposes of the "inconsistent judgment" consideration, the form of the prior determination is significant.

Administrative Law > Agency Adjudication > Decisions > Collateral Estoppel

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN11[] **Decisions, Collateral Estoppel**

Administrative proceedings may collaterally estop relitigation in court. However, such proceedings have preclusive effect only when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Exemptions & Immunities, Labor**

The Noerr-Pennington doctrine holds that the Sherman Act, *15 U.S.C.S. § 1 et seq.*, does not apply to activities comprising mere solicitation of governmental action with respect to the passage and enforcement of laws. Noerr shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. The Noerr-Pennington doctrine applies to administrative proceedings.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN13[] **Estoppel, Collateral Estoppel**

As a general matter, collateral estoppel may apply to questions of law. However, this rule is subject to broad qualifications. Offensive use of collateral estoppel is inappropriate where the issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule on which it was based. This consideration is especially pertinent when there is a difference in the forums in which the two actions are to be determined.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN14[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Under the "sham" exception to the Noerr-Pennington doctrine, petitioning activities that would normally be protected can be the basis for liability when the defendant's activity was intended to injure the plaintiff directly rather than through a government decision. When the antitrust defendant had not truly sought to influence the governmental decision, his invocation of governmental machinery is a sham. Where he had no reasonable expectation of obtaining the favorable ruling, his effort to do so was a sham.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN15[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The sham exception to the Noerr-Pennington Doctrine is not satisfied by a mere showing of anticompetitive intent; there must be proof that those being charged subverted the integrity of the governmental process or that the relevant activities were intended not to secure governmental action but to harm others through deliberate abuse of the governmental process.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN16[] **Estoppel, Collateral Estoppel**

Courts give collateral estoppel effect to partial grants of motions to dismiss or for summary judgment.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN17[] **Estoppel, Collateral Estoppel**

Whether a judgment should be considered final for the purposes of collateral estoppel turns upon such factors as the nature of the decision (i.e., that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN18[] **Estoppel, Collateral Estoppel**

Offensive collateral estoppel will not be applied where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result. Stated generally, collateral estoppel cannot apply against a party who in the earlier case did not have a full and fair opportunity to litigate the issue to be precluded.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

HN19[] **Estoppel, Collateral Estoppel**

The question of whether a party, without fault of his own, was deprived of crucial evidence or witnesses in the first litigation is relevant to a determination of whether that party had had a full and fair opportunity to litigate. No one set of facts, no one collection of words or phrases will provide an automatic formula for proper rulings on estoppel pleas. In the end, decision will necessarily rest on the trial courts' sense of justice and equity.

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

HN20[] **Estoppel, Collateral Estoppel**

The doctrine of collateral estoppel is premised on an underlying confidence in the correctness of the judgment relied on.

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

HN21[] **Parties, Joinder of Parties**

In order to maintain a class action, a plaintiff must demonstrate compliance with the mandatory requirements of *Fed. R. Civ. P. 23(a)*. If the initial prerequisites of *Fed. R. Civ. P. 23(a)* are met, plaintiff must additionally meet the requirements of at least one of the three subsections of *Fed. R. Civ. P. 23(b)*.

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

HN22[] 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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN23[] Class Actions, Certification of Classes

Under *Fed. R. Civ. P. 23(b)(3)*, an action may proceed as a class action if 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. To support certification, common issues need only predominate; they need not be dispositive of the entire litigation.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN24[] Class Actions, Certification of Classes

The burden of demonstrating fulfillment of the conditions outlined in *Fed. R. Civ. P. 23* for maintenance of a class action lies with the moving party. The strength of a plaintiff's case on the merits is not to be considered in determining whether a class should be certified. There is no requirement of a prima facie showing of merit in a class action to support certification. However, some analysis of the substantive claims and the essential elements needed to establish those claims is necessary for thorough evaluation of whether the requirements of *Fed. R. Civ. P. 23* have been met. Therefore, a preliminary hearing addressed not to the merits of plaintiff's individual claim but to whether she is asserting a claim which, assuming its merit, will satisfy the requirements of *Fed. R. Civ. P. 23* has never been regarded as violative of *Fed. R. Civ. P. 23*.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Adequacy of Representation

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN25[] Prerequisites for Class Action, Adequacy of Representation

The *Fed. R. Civ. P. 23(a)(4)* requirement that a class representative fairly and adequately protect the interests of the class, encompasses two inquiries: (1) whether plaintiff's counsel is competent and (2) whether the named plaintiff has interests antagonistic to those of the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN26[] Class Actions, Prerequisites for Class Action

Where class members are competitors in a limited market, the named plaintiff's attempts to maximize its damage recovery will conflict with the interests of the other class members, and class certification should be denied.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN27[] Sherman Act, Claims

In order to certify a class under *Fed. R. Civ. P. 23(b)(3)*, the court must find that common issues predominate over individual ones. In an action under Sherman Act *§ 1*, *15 U.S.C.S. § 1*, a plaintiff must establish: (1) an antitrust violation, (2) causation (that plaintiff suffered antitrust "impact" or "injury in fact"), and (3) the amount of damages. In order for a class to be certified in an antitrust action under *Fed. R. Civ. P. 23(b)(3)*, plaintiff must demonstrate that both the violation and fact of injury can be proved for the entire class by common evidence. The amount of damages can be established individually for each class member.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN28[] Sherman Act, Claims

Proof of unreasonableness is not an element of Sherman Act *§ 2*, *15 U.S.C.S. § 2*, monopolization claims.

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

HN29[] Tying Arrangements, Clayton Act

Tying arrangements are normally per se Sherman Act *§ 1*, *15 U.S.C.S. § 1*, violations.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN30[] **Antitrust & Trade Law, Sherman Act**

Proof of impact is an essential element of an antitrust action and must be provable on a common basis in order for a class to be certified. To prove impact, a plaintiff must show that he suffered some loss in his business or property and that there is a causal relationship between the antitrust violation and the loss. Impact is a distinct element of liability, independent of proof of a violation and independent of the matter of individual damages. Fact of damage is susceptible of common proof. There is no reason why proof of the impact cannot be made on a common basis so long as the common proof adequately demonstrates some damage to each individual.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Superiority

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN31[] **Prerequisites for Class Action, Superiority**

Fed. R. Civ. P. 23(b)(3) requires a plaintiff to prove that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The rule also sets out four criteria relevant to the inquiry regarding superiority: (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, and (D) the difficulties likely to be encountered in the management of a class action.

Counsel: [1]** Stern, Steiger, Croland & Borstein by Howard Stern, Paramus, New Jersey, for Plaintiff.

Pitney, Hardin, Kipp & Szuch by Dennis R. LaFiura, Morristown, New Jersey, and Sidley & Austin by George L. Saunders, Jr., Chicago, Illinois, and Sidley & Austin by Stewart A. Block, Ronald S. Flagg, Washington, District of Columbia, and Norman E. Gamble, American Tel. & Tel. Co., New York, New York, for defendants.

Judges: Debevoise, District Judge.

Opinion by: DEBEVOISE

Opinion

[*556] DEBEVOISE, District Judge.

Plaintiff Glictronix Corporation filed this action against the American Telephone and Telegraph Company and its other affiliated defendants alleging violations of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*.

Now pending are plaintiff's motions (1) for class certification and (2) for partial summary judgment to preclude relitigation of issues decided adversely to AT & T in *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 76 Civ. 2512 (S.D.N.Y.1981), aff'd, *700 F.2d 785 (2d Cir.1983)*, *cert. denied*, *464 U.S. 1073, 104 S. Ct. 984, 79 L. Ed. 2d 220 (1984)*.

Facts

Plaintiff, Glictronix Corporation ("Glictronix") a retailer of telephone terminal equipment, alleges that **[**2]** the defendants (hereinafter collectively referred to as "AT & T") engaged in a course of anticompetitive and predatory conduct with respect to the distribution, sale, rental and/or lease of telephone terminal equipment in the geographic markets serviced by the two defendant operating companies, New Jersey Bell Telephone Company and New York Telephone Company. Glictronix alleges that defendants' acts constitute monopolization, attempt to monopolize and conspiracy to monopolize, all in violation of *Section 2* of the Sherman Act and a conspiracy to restrain trade in violation of *Section 1* of the Sherman Act.

The products at issue in this case are two types of telephone terminal equipment: private branch exchange telephone systems ("PBXs") and key telephone systems ("key systems"). A PBX is used for transmitting and receiving telephone calls and switching such calls to a number of connected individual telephones. A key telephone system is used to connect a single telephone station to telephone trunk lines by manipulation of buttons on the face of the telephone.

Reference to the history of AT & T's control over the telephone terminal equipment market is necessary to an understanding of **[**3]** Glictronix's claims. [1] Until 1968, AT & T held an absolute, governmentally recognized monopoly over terminal equipment. It issued tariffs which were filed with the Federal Communications Commission ("FCC"), prohibiting telephone customers from installing any such equipment not obtained from AT & T. [2]

In 1968, the FCC ruled that these tariffs were unlawful. *In the Matter of Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C.2d 420*, *recon. denied*, *14 F.C.C.2d 571 (1968)*. Following this decision, AT & T imposed new tariffs which required that telephone customers **[**4]** who obtained terminal equipment from AT & T's competitors use an "interface device" or "protective connecting arrangement" ("PCA"), to be interposed as a barrier between the AT & T network and the non-AT & T equipment. The PCA had to be leased from and installed by AT & T. The ostensible purpose of the PCA was to protect the network from non-AT & T equipment which might damage it.

The PCA tariff was chosen by AT & T over an alternative method of ensuring protection **[*557]** of the network, namely the development of a system of certification standards. A certification or registration system would regulate the type of equipment which could be connected to the network, and ensure that potentially harmful equipment would not be connected to the network, at least not without protective circuitry.

When AT & T filed the PCA tariff in 1968, the FCC permitted enforcement of the tariff without either approving or disapproving it. *Carterfone, supra*, *14 F.C.C.2d 571 (1968)*.

However, in November, 1975, the FCC generally rejected the PCA tariff in favor of a certification system. *Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Services (MTS) and* ***[**5]*** *Wide Area Telephone Service (WATS), 56 F.C.C.2d 593 (1975)*. Although excluded from this ruling in 1975, the equipment at issue in this case was later included in the certification program. *Interstate and Foreign Toll Telephone Service, 58 F.C.C.2d 736 (1976)*; *Interstate and Foreign MTS and WATS, 67 F.C.C.2d 1255 (1978)*.

The FCC's 1975 ruling stated in unequivocal terms that the PCA tariff provisions "impose[d] an unnecessarily restrictive limitation" and "constitute[d] an unjust and unreasonable discrimination both among users . . . and among suppliers of terminal equipment." After cataloging the extensive reports, recommendations and other material the FCC had considered, the filing also concluded that "there has been no demonstration of network harm resulting from the interconnected operation of some 1600 independent local telephone companies and the Bell System . . . many of whom purchase and connect without benefit of carrier-supplied connecting arrangements the identical independently manufactured terminal equipment for which the individual user must lease carrier-supplied

[1] A detailed discussion of the relevant history may be found in *Litton Systems, Inc. v. American Tel. & Tel. Co., 700 F.2d 785 (2d Cir.1983)*.

[2] AT & T tariffs are imposed by AT & T itself on its customers. Tariffs must be filed with the FCC and can be disapproved by the FCC, but the filing of tariffs constitutes private action by AT & T, not governmental action. See *Litton Systems, supra, 700 F.2d at 807*.

connecting arrangements." *Proposals for New or Revised Classes of Interstate and Foreign* ***[**6]*** *Message Toll Telephone Service (MTS) and Wide Area Telephone Service (WATS), 56 F.C.C.2d 593, 598 (1975)* (first Report & Order). In affirming the FCC's extension of a certification system to PBXs and key systems which had their own protective circuitry, the Fourth Circuit termed the PCA requirement an attempt to preserve "the carriers' private lawmaking authority over independent manufacturers." *North Carolina Utilities Commission v. F.C.C., 552 F.2d 1036, 1051 (4th Cir.)*, *cert. denied*, *434 U.S. 874, 98 S. Ct. 222, 54 L. Ed. 2d 154, 98 S. Ct. 223 (1977)*.

Even after these decisions, PCAs are still required for equipment that does not meet FCC registration standards and for equipment which is not properly installed. *Interstate and Foreign MTS and WATS, supra*, 67 F.C.C.2d at 1256, 1272 n. 21.

Glictronix alleges that AT & T violated *§ 2* of the Sherman Act, by adopting the PCA tariff and opposing the adoption of certification standards. It alleges that AT & T's imposition of the PCA tariff was unlawful in light of the alleged facts that:

1. the PCA was unnecessary to protect the network from harm;

2. the direct cost of the PCA created an artificial economic **[**7]** barrier to competition in the terminal equipment market; and
3. the tariff was adopted and pressed on the FCC as a delaying tactic, designed to suppress competition in the terminal equipment market until AT & T developed products which could compete effectively in that market.

> Glictronix also alleges that AT & T: disparaged the telephone terminal equipment distributed by their competitors (Complaint para. 33(a)); prematurely announced to telephone customers the availability of new terminal equipment in order to persuade such customers not to purchase competitive equipment (*id*. at P 33(b)); delayed installation of and improperly installed and maintained PCAs required to interconnect the equipment distributed by plaintiff and other class members (*id*. at P 33(d)); engaged in the practice of reciprocal trading, whereby defendants would purchase goods and **[*558]** services upon the condition that the supplier of such goods and services would obtain its telephone equipment from defendants (*id*. at P 33(g)); "refuse[d] to sell inside wiring at all, refuse[d] to sell the inside wiring at a reasonable price, refuse[d] to negotiate the sale of inside wiring in good **[**8]** faith, refuse[d] to make timely responses to purchase requests and otherwise sabotage[d] inside wiring obtained by plaintiffs" (Plfs., Brief at 26); and "subjected competitors to unfair and expensive cut-over tactics by failing to acknowledge or claiming non-receipt of customer cut-over instruction letters; by continuously changing cut-over dates; by delivering the wrong Bell trunk line or tie line equipment; by refusing to remove defendants' equipment or lines; by insisting incorrectly that customer difficulties were due to the customer equipment; by installation personnel leaving a job site unfinished; by their destruction of cable on the customer's premises; and by improperly making the cut-over to competitor's equipment" (Plfs. Brief at 27-28).

AT & T contends that the equipment included under the headings of PBXs and key systems is diverse. It claims that the design and functions of PBXs vary greatly, with different variations handling from fewer than 30 to thousands of telephone lines. During the relevant period, PBXs could operate through "radically different technologies." The generic term "key telephone system" also encompasses a wide variety of equipment having varying **[**9]** capacities and using varying technologies. Glictronix marketed only a few of the many PBX and key systems in existence during the relevant period. (Glick Dep. at 91-93). Glictronix concentrated its sales efforts on customers seeking equipment for fewer than 200 lines (*Id*. at 96).

AT & T asserts that these different makes and models of PBXs and key systems possessed different potentials for causing harm to the AT & T network. As noted by AT & T, even when the FCC permitted direct connection of PBXs and key systems to the network in 1978, it ruled that PCAs would continue to be required for equipment that did not conform to registration standards, *67 F.C.C.2d 1255, 1272 n. 21 (1978)*.

One difference among various makes and models of PBXs and key systems found significant by the FCC in its registration orders was the ability of the power supply transformer to prevent power surges from passing through the equipment into the network. According to AT & T, some, but not all manufacturers of terminal equipment, used power supplies listed by Underwriters Laboratories as safe for use with commercial power supplies. AT & T implies that the equipment manufactured by some of the class members **[**10]** would not meet FCC registration requirements, and that, despite the advent of registration standards, these manufacturers would still be required to use a PCA. AT & T asserts that these manufacturers cannot show they were damaged by AT & T's maintenance of the PCA requirement. In addition, the FCC ruled that PBXs and key systems without protective circuitry -- even ones that met registration standards -- could not be considered harmless until the specific installation of the equipment at the customer's premised was inspected and certified, *67 F.C.C.2d 1255*. For example, because telephone lines within a PBX or key system can come into contact with commercial power lines, causing hazardous voltages on the network, the FCC mandated that each non-AT & T installation be certified unless a PCA were used. 67 F.C.C.2d at 1277. AT & T argues that any AT & T competitor whose installation would not pass inspection would require a PCA and cannot maintain that it was injured by AT & T's PCA tariff.

AT & T has offered no evidence that any class member's equipment has actually failed to meet FCC registration standards and has been required to be used with a PCA. Similarly, AT & T has offered no **[**11]** evidence that any class member's installations have failed to pass FCC inspection. Nor has Glictronix offered evidence to the contrary.

[*559] In support of its motion for partial summary judgment, Glictronix relies on the jury findings and the opinion of the Second Circuit in litigation brought by Littons Systems, Inc. against the defendants in this case and other AT & T affiliated companies. *Litton Systems, Inc. v. American Tel. & Tel. Co.*, 76 Civ. 2512 (S.D.N.Y. 1981), *aff'd*, *700 F.2d 785 (2d Cir.1983)*, *cert. denied*, *464 U.S. 1073, 104 S. Ct. 984, 79 L. Ed. 2d 220 (1984)*.

In 1976, Litton, a terminal equipment manufacturer filed suit alleging the same antitrust violations as are alleged here. The litigation dealt with the same product categories as are in issue here. In *Litton*, AT & T stipulated that PBXs and key systems constituted a relevant product market under the antitrust laws. *See* *Litton, supra, 700 F.2d at 791*.

The extensive nature of the *Litton* litigation was aptly summarized in *Jack Faucett Assoc. v. American Tel. & Tel. Co., 566 F. Supp. 296, 298 (D.C.Dist.Col.1983)*, *rev'd*, *240 U.S. App. D.C. 103, 744 F.2d 118 (D.C.Cir.1984)* another **[**12]** case in which a plaintiff interconnect company sought to have the *Litton* findings applied collaterally against AT & T:

> Trial began in 1980, ran for more than five months, generated 18,000 pages of testimony, and 945 exhibits, and concluded with a jury verdict for Litton in January, 1981, for nearly $92 millions as a competitor and $268,000 as a customer of AT & T which the trial count then trebled. . . . On February 3, 1983 the U.S. Court of Appeals for the Second Circuit unanimously affirmed. *700 F.2d 785 (2d Cir.1983)*. Rehearing and rehearing en banc were denied, apparently without a dissenting vote, on March 31, 1983.

After the *Jack Faucett* trial court rendered its decision, the United States Supreme Court denied certiorari in *Litton, 464 U.S. 1073, 104 S. Ct. 984, 79 L. Ed. 2d 220 (1984)*.

Glictronix submits that AT & T should be precluded from relitigating the following issues which were decided in *Litton*:

Relevant Product Market

(1) The relevant product market is the sale and lease of telephone terminal equipment consisting of PBX Telephone Systems and Key Telephone Systems.

(2) Defendants possessed monopoly power in the relevant market.

[13]** (3) Defendants had a specific intent to obtain monopoly power in the relevant market.

(4) There was a dangerous probability that defendants would obtain monopoly power in the relevant market.

Anticompetitive or Predatory Conduct

(5) Defendants attempted to obtain and did wilfully maintain their monopoly power in the relevant market through the following anticompetitive or predatory conduct:

(a) They filed the tariffs requiring a Protective Connecting Arrangement in bad faith;

(b) They opposed certification of telephone terminal equipment in bad faith;

(c) They intentionally delayed the provision and installation of Protective Connecting Arrangements;

(d) They refused, in bad faith, to sell inside wiring at all or on a reasonable basis; and

(e) They delayed, in bad faith, in making cutovers to customer provided telephone terminal equipment.

Standing to Sue

(6) The class plaintiffs in this case have standing to sue for damages as competitors of defendants in the relevant market.

Defenses

(7) The Protective Connecting Arrangement was not necessary to protect the telephone network from harm, and any claim that it was necessary is baseless.

(8) The *Noerr-Pennington* **[**14]** doctrine is inapplicable to the anticompetitive or predatory conduct of defendants at issue in this case.

(9) The "sham" exception to the *Noerr-Pennington* Doctrine is applicable to the **[*560]** anticompetitive or predatory conduct of defendants at issue in this case.

The proposed class of plaintiffs is defined as:

> "all persons who engaged in the business of distributing, selling, renting and/or leasing PBX Systems, both automatic and otherwise, and key telephone systems, of various manufacturers, to subscribers of telephone service in interstate commerce provided by the defendants, New Jersey Bell Telephone Company and New York Bell Telephone Company, and who sustained damages as a result of defendants' violations of the antitrust laws."

(Complaint para. 5). According to Glictronix, there are approximately 600-800 identifiable members of the proposed class. The class members include companies with a wide variety of sizes, structures and marketing philosophies.

Glictronix contends that it can establish many essential elements of its case by evidence common to the class. (See Plaintiff's Class Certification Brief at 3-5). Among the issues Glictronix believes **[**15]** it can establish by common evidence are the relevant product and geographic markets; AT & T's monopoly power in those markets; its claims based on AT & T's promulgation of the PCA requirement and opposition to certification standards; its claims based on alleged anticompetitive practices by AT & T including delay in provision and installation of PCAs, refusal to sell inside wiring at all or on a reasonable basis, delay in interconnection to the AT & T network of competitors' terminal equipment; the fact of injury to each member of the class; and the appropriate measure of damages as to each member of the class.

Glictronix has submitted several reports by experts in support of its motion for class certification. These reports deal exclusively with the effects on the class of the PCA requirement and of the delay in adoption of certification standards.

One of these experts, Thomas R. Pratt, concluded that the imposition of the PCA tariff on all AT & T competitors: (a) resulted in a significant competitive disadvantage and loss of profits to each proposed plaintiff-competitor; (b) impeded development of the terminal equipment market and reduced competitive activity in that market, and; **[**16]** (c) imposed major constraints on the profitability of each competitor.

Mr. Pratt asserts that the members of the plaintiff class incurred damages in two ways. First, the PCA requirement significantly reduced the volume of sales for AT & T's competitors since the device added significant costs to using and installing competitors' equipment. Since the class members could have earned profits on these lost sales, they have all been damaged to the extent of the lost profits. (Pratt Report at 2-3).

Second, Pratt claims the class members lost profits because the added cost of the PCA forced them to lower their prices in order to stay competitive with AT & T. The need to price their equipment lower resulted in lower profits for each unit of equipment they did sell. (*Id*.)

Pratt served as an expert for *Litton* in its case against AT & T and was one of the principal participants in the creation of a damage study presented by *Litton*. That study concluded:

> The plaintiffs were all damaged by the interface device because it stifled the development of the market and thereby reduced the level of sales and profits. The device also damaged the plaintiffs by necessitating an additional **[**17]** reduction in selling prices in order to compete, and by increasing selling, installation, and maintenance costs for each sale. The overall effect of the device was equivalent to the imposition of a discriminatory tariff against each of the plaintiffs which resulted in lost sales and profits for each of the plaintiffs.

(Pratt Report at 4, Appendix to Plaintiff's Brief in Support of Class. Cert.) These findings are generally supported by reports submitted by Dr. Les Seplaki, a professor of economics at Rutgers, and by Samuel M. DeLuca, an independent consultant in the **[*561]** telecommunications industry and a former employee of New Jersey Bell.

According to Glictronix's experts, the PCA requirement gave AT & T an opportunity to affect every sale of terminal equipment attempted by competitors. Since non-AT & T equipment could only be connected through a PCA provided and installed by a defendant operating company (Plaintiff's Ex. 23, A-307), AT & T was involved every time a non-AT & T sale was attempted.

AT & T activities vis-a-vis competitors in the terminal equipment market are recorded in Competitive Activity Reports, which were compiled on an individual basis for each **[**18]** customer when a Bell operating company was faced with competition for a customer's terminal equipment business. The information in the Competitive Activity Reports included the number of the customers' lines, the nature of the terminal equipment, the number of stations, detailed cost comparisons, reasons for the customer's choice between Bell and the competitor, and a general comments section (See para. CC ex. 0, A-1083). In addition, a Computerized Economic Comparison -- comparing the costs of Bell and non-Bell proposals -- was commonly prepared and distributed to customers.

Mr. Pratt's report presents a methodology for calculating damages and allocating damages among the proposed class members. The Competitive Activity Reports provide much of the crucial information on which the method rests. Glictronix contends that calculation of damages is made manageable by the fact that defendants maintained "quite complete records" of every competitive situation. A formal program of competitive activity reporting was commenced on a nationwide basis by AT & T in 1974 (Gear Dep. at 24-16 to 25-5). But monthly competitive analyses for both New York and New Jersey were compiled throughout the **[**19]** entire period of issue here. According to Glictronix, the periodic analyses of the competitive market provide much of the data necessary to determine the size of the market, the extent of competitive efforts and the amount of the market obtained by competitors.

The Pratt damage methodology provides for allocation among the class members on a yearly basis dependent upon their *pro rata* share of the available market. According to the report, the *pro rata* share is readily ascertainable from the monthly reports. AT & T's reports provided information on the most active competitors and a "wins to attempts ratio" allowing comparison of the competitors' relative effectiveness. Although competitive ranking was done only for the top few companies, both the underlying data and software programming is available to rank the competitive effectiveness of every competitor in the market place. (December 12, 1983 2 Weigman Dep. at 129-25 to 131-16).

AT & T officials have admitted that, by and large, "If a vendor made a number of sales, he would appear on the list" (McNamara Dep. at 112-113). The Competitive Activity reports provide the best available source for quantitatively and qualitatively **[**20]** assessing AT & T's competitors in the terminal equipment market.

AT & T also submits expert testimony, in the form of a report by Dr. Almaris Phillips, a professor of public policy and of economics and law at the University of Pennsylvania. Dr. Phillips contends that the conclusion of Mr. Pratt and Dr. Seplaki that each class member lost sales and profits it would have obtained in the absence of the PCA requirement is predicated on two incorrect assumptions. He defines these assumptions:

> "(1) the assumption that, but for the PCA requirement in the Bell System's post-Carterfone tariffs, the particular PBX and key telephone systems marketed by each potential class member would have been directly connected to the network without protective circuit; and
> "(2) the assumption that each potential class member would make more sales and more profit in the increased competitive environment that plaintiff assumes would accompany the earlier advent of registration."

[*562] (Appendix to Defendants' Class Certification Brief, Tab 1, at 3.) Phillips contends that the first assumption is wrong because, even under the present certification standards, some class members' **[**21]** equipment would have to be used with a protective device either because its design did not meet FCC registration standards or its installation did not pass FCC inspection (Phillips Report at 4-7).

Phillips also suggests that for some class members the cost of compliance with FCC design and installation requirements could be more expensive than the use of protective circuitry. He cites an FCC report as evidence of this proposition. *67 F.C.C.2d 1255, 1256, 1275-76 (1978)*.

This suggestion is also made in AT &T's brief, which states that "one interconnect company complained to the FCC that its competitors were choosing to use PCAs rather than comply with the registration requirements. . . . *Customer Provided Equipment and Connecting Arrangement, 85 F.C.C.2d 868, 883 (1981)*." (AT & T's OC brief, p. 45, note.) Glictronix apparently investigated the circumstances of this FCC decision and discovered that the company in question did not deal with PBXs or key systems and therefore was involved in a different product market.

In deposition, Glictronix's expert Pratt did agree that the FCC's 1978 registration program did impose costs on interconnect companies, and admitted that he did not **[**22]** know what all the components of those costs were or whether they were more or less than the PCA requirement for particular types of equipment (Pratt Dep. at 91, 98-99). However, Mr. Pratt points out in his reply affidavit, that even if there were costs associated with the registration program, those costs are imposed on all manufacturers of PBX and key systems equipment. In contrast, the PCA cost was imposed on all manufacturers except the defendants (Pratt Reply Affidavit para. 7, Supplemental Appendix to Brief in Support of Class Certification, Vol. II, Tab 6).

Phillips also takes issue with what he terms Glictronix's second assumption: that each potential class member would have made more sales and/or more profit absent the PCA requirement. Phillips interprets Pratt and Seplaki to have argued that in the absence of the PCA requirement, the AT & T competitors would have been able to raise their prices and thereby obtain higher profits. Phillips attacks this notion under the general economic principle that competition will tend to reduce prices to the marginal cost of the efficient competitor (Phillips Report at 13). He suggests that:

> [some] competitors -- probably those **[**23]** with better financing, better equipment, expandable sources of supply, better management, and adequate service organization -- may have improved their sales, whereas those with higher costs and unattractive products would probably have tendered to suffer reduced sales or complete failure.

(Phillips Report at 17-18). Consistent with Phillips' view was the damage model prepared for the *Litton* case, which Mr. Pratt participated in creating. That model predicted that there would have been a large shake-out of existing interconnect companies that would have been unable to survive if the FCC had adopted registration standards in 1973 (*Id*.)

Pratt and Seplaki respond to Phillips' charge in different ways. Pratt states that he believed that plaintiffs lost profits because of lost sales, not because they could have raised prices in the absence of the PCA requirement. (Pratt Reply Affidavit, para. 11, Appendix to Brief in Support of Class Certification, Supplemental Vol. II, Tab 6). Seplaki states that lost profits were due not to an inability to make more sales, but due to "the necessity of reducing per-unit profit margins as a result of the PCA requirement." (Seplaki Reply **[**24]** Affidavit, *Id*. at Tab 7).

Pratt attacks Phillips' argument for its allegedly erroneous substitution of a "hypothetical world" in which Phillips analyzes what would have happened had registration been adopted in 1973 -- for the "real world" in which according to Pratt, all class members lost at least some sales because **[*563]** of the costs added by the PCA requirement. Dr. Seplaki similarly responds that he, Seplaki, "concentrate[d] on the impact of the PCA as a factual matter in the real world that existed during the relevant period." (Seplaki Reply Affidavit, para. 10). His conclusion is that because of the cost of the PCA, which was imposed on all non-AT & T competitors, all class members were faced with the choice of either lowering their prices to absorb the cost of the PCA for the customer or losing some sales. (Seplaki Reply Affidavit para. 6).

Phillips also assails Pratt's methodology for establishing and allocating damages. He identifies "two serious flaws that render it unworkable and contrary to the interests of many of the potential class members." (Phillips Report at 19). Phillips first criticizes the model because it "allocate[s] damages among class members **[**25]** based on their actual market share for each year from 1970-1978 in the real world." (*Id*.) He contends that strong companies, which might have increased their market share in the absence of the PCA requirement, will be foreclosed from making this showing under Pratt's model. Similarly, AT & T will be foreclosed from arguing that weaker companies' share of the market would have shrunk in a freely competitive environment. Second, Phillips contends that the model fails to account for companies which dropped out of the market. Under Pratt's method these companies would be foreclosed from showing what market share they would have captured if they had not been driven from the market. Similarly, companies which delayed their entry into the market because of AT & T's conduct would not be permitted to show what market share they would have won had they entered sooner. For these reasons, Phillips believes allocating damages in this case will place class members in conflict with one another and would have to be done on an individualized basis.

Nothing in plaintiff's experts' reports addresses how Glictronix's damage claims arising from AT & T's anticompetitive practices (such as delaying **[**26]** the interconnection of competitors' equipment to the network) can be proven by evidence common to the class.

Conclusions of Law

I. Collateral Estoppel

Glictronix seeks to preclude AT & T from relitigating numerous issues determined adversely to AT & T by the *Litton* jury and by the Second Circuit on AT & T's appeal. ***HN1***[🡅] The doctrine of collateral estoppel provides that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent cases based on a different cause of action involving a party to the prior litigation." *Montana v. U.S., 440 U.S. 147, 153, 99 S. Ct. 970, 973, 59 L. Ed. 2d 210 (1979)*.

Although Glictronix was not a party to the *Litton* case, all of the defendants here were. Glictronix moves to preclude relitigation of the *Litton* findings under the non-mutual, offensive application of the collateral estoppel doctrine set forth in *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)*.

HN2[🡅] Before application of collateral estoppel can be deemed appropriate, the court must find that:

1. the party to be estopped must have been a party or in privity with **[**27]** a party to the prior action;

2. the issues to be estopped must be the same as the issues determined in the prior action;

3. the issues must have been actually litigated and necessary to the prior judgment; and

4. application of collateral estoppel will not be unfair because:

(a) the party to be estopped had little incentive to vigorously litigate the first action;

(b) the first judgment is inconsistent with other judgments on the issue to be estopped;

(c) the second action affords procedural opportunities unavailable in the first action **[*564]** (or, more generally speaking, that the party to be estopped had a full and fair opportunity to litigate its claims in the first action); or

(d) application of collateral estopped would not otherwise be unfair to the defendant. *See* *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)*.

AT & T contends that collateral estopped should not be applied because many of these criteria cannot be met.

A. *Conditions Met*.

Defendant do not contest that several of the prerequisites for the application of collateral estopped have been met. ***HN3***[] The party against whom collateral estopped is asserted must have **[**28]** been a party or in privity with a party to the prior action. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328-29, 91 S. Ct. 1434, 1442-43, 28 L. Ed. 2d 788 (1971)*. The defendants here were all parties to the *Litton* litigation.

Second, ***HN4***[] there must have been a final judgment on the merits on the issues to be collaterally estopped. *Montana v. United States, 440 U.S. 147, 153, 99 S. Ct. 970, 973, 59 L. Ed. 2d 210 (1979)*. A final judgment on the merits was rendered by the *Litton* jury. That judgment was affirmed on appeal and defendants exhausted their right of appeal when the United States Supreme Court denied certiorari. *Litton Systems, Inc. v. America Tel. & Tel. Co*., 76 Civ. 2512 (S.D.N.Y.1981), *aff'd*, *700 F.2d 785 (2d Cir.1983)*, *cert. denied*, *464 U.S. 1073, 104 S. Ct. 984, 79 L. Ed. 2d 220 (1984)*.

Third, there is no question that AT & T vigorously litigated the *Litton* case. Beyond these points, each criterion for application of collateral estopped is contested.

B. *Same or Different Issues*

HN5[] To support application of collateral estoppel, the issues as to which a party seeks preclusion must be "identical" or **[**29]** "in substance the same" as the issues determined in the prior litigation. *Montana v. United States, 440 U.S. 147, 155, 99 S. Ct. 970, 974, 59 L. Ed. 2d 210 (1979)*; *Blonder-Tongue, supra, 402 U.S. at 323, 91 S. Ct. at 1439*.

Defendants contend that the issues here are different from those decided in *Litton* because the equipment at issue is not the same. The terms PBX and key system are generic and encompass a wide variety of equipment. Defendants contend that the *Litton* judgment is inapplicable to models of PBXs and key systems not at issue in *Litton*. The different models should be treated differently, the argument goes, because they have widely differing potentials for harming the network. Since the PCA is still required by the FCC for equipment which does not meet registration standards, defendant assert that it is important to distinguish among types of PBXs and key systems. Arguably, some equipment would have been required to use a PCA even if registration standards had been adopted much earlier than they were.

In support of their position, defendants rely on a recent decision in *Am/Comm Systems, Inc. v. American Tel. & Tel. Co., 101 F.R.D. 317 (E.D.Pa.1984)* **[**30]** (Defendants' CE Appendix, Tab 2), in which a motion to certify a nationwide class of distributors of telephone terminal equipment was denied. Regarding the question of whether class representatives' claims satisfied the Fed.R.Civ.P. 23(a)(3) requirement of typicality, the *Am/Comm* Court held that there had to be a "product-by-product" determination of whether the PCA requirement violated the antitrust laws. Id. at 321. Defendants interpret this holding to mean that a model by model analysis of the PBXs and key systems is required in this case and that application of collateral estoppel is inappropriate regarding any model which was not in issue in *Litton*.

Defendants' use of *Am/Comm* in this context is inappropriate. The *Am/Comm* plaintiffs defined the relevant product market to include many products in addition to PBXs and key systems, such as burglar alarms and automatic answering devices. (See Suppl. Appendix, Tab 8, para. 4(b)). In fact, in its brief opposing class certification **[*565]** in *Am/Comm*, AT & T emphasized this difference between that case and Litton:

> The Litton case was limited to PBXs and Key Telephone Systems (700 F.2d at 801). Thus, **[**31]** *Litton* did not involve any of the types of equipment that are specifically identified in the Complaint in this case.

(See Plaintiff's Supplemental appendix regarding Class Cert., Vol II Tab 9 at 21).

Given these facts, it is evident why the *Am/Comm* court held that product-by-product analysis was required; the products at issue were wholely different from the PBXs and key systems at issue in *Litton*. Here AT & T can only contend that different models of PBXs and key systems are involved.

In *Litton*, PBXs and key systems were treated generically. There was no attempt to limit the case to particular models or manufacturers. The relevant product market was "the sale and lease of PBX's and key systems". *See Phonetele, Inc. v. American Telephone & Telegraph Co*., No. CV-74-3566-MML (C.D.Cal., January 19, 1984).

In this case, unlike in *Am/Comm*, the relevant market is limited to PBXs and key systems. Since the relevant product market in *Litton* covered all such equipment, the PBXs and key systems at issue here must necessarily have been the subject of the findings in *Litton*.

As AT & T points out, the FCC's registration orders recognized that different **[**32]** equipment may have different potential for harm to the system. Despite this theoretical possibility, the Second circuit in *Litton* found as a general matter that "the jury could have reasonably concluded . . . that AT & T's ongoing claim of harm to the system was baseless." Litton, supra, 700 F.2d at 811. Since this determination appears clearly to address the entire product market, there is no basis to require that a new determination be made regarding the specific equipment in this case.

C. *Actually Litigated and Necessary*

HN6[] In order to apply collateral estoppel, the issues to be precluded must have been "actually litigated and necessary to the outcome of the first action." Parklane, supra, 439 U.S. at 326, 99 S. Ct. at 649, n. 5. AT & T contends that the *Litton* jury's "belated" finding that the filing of the interface device tariff was in bad faith was not necessary to outcome of *Litton* and should therefore not be given preclusive effect here.

As was discussed by the Second Circuit in *Litton*, when the *Litton* jury returned its verdict finding AT & T guilty of monopolization, it had failed to reach unanimity on three matters, including special interrogatory **[**33]** 16(a), which asked whether the filing of the interface tariff was in bad faith. Special interrogatory 16 listed nine alleged practices of the defendants and asked the jury on which of the practices it had based its finding of predatory conduct. The jury answered in the affirmative with respect to three of the listed practices: 16-b, "intentional delay in providing and installing interface devices"; 16-c, "opposing certification in bad faith"; and 16-h, "bad faith refusal to sell inside wiring at all or on a reasonable basis." The jury reported it was divided regarding 16-a, "filing of the interface device tariff in bad faith" and 16-i, "bad faith delay in making customers." [3]

After this initial verdict, counsel and the court discussed whether the jury should be asked to deliberate further on the undecided questions. AT & T's counsel argued **[**34]** against further deliberations saying that the absence of unanimity on 16-a and 16-i "doesn't interfere in of itself with the damage award . . . ." (Plaintiff's Appendix to CE

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[3] The third issue on which the jury failed to reach unanimity was the question of whether AT & T's attempted monopolization was the proximate cause of plaintiffs' injury.

Brief, A6390). The court expressed the opinion that the damage award could be supported by the answer to 16-c. (*Id*. at A6394).

Over defendant's objections, the judge instructed the jury to try to answer the **[*566]** questions "if you can possibly agree after discussing the matter again . . . to see whether or not you can't in good conscience adopt [the views of other jurors] as your own". *Litton, supra, 700 F.2d at 804, n. 24*. (brackets in original). The jury returned after approximately a half hour's deliberation, having found against AT & T on all three issues. The jury did not change the amount of damages it had already assessed. *Id*. at n. 25.

AT & T argues that because the answer to Special Interrogatory 16(a) came after the determination of damages, the jury did not reach its verdict in reliance on its finding that the tariffs were filed in bad faith and therefore that finding was not essential to the judgment. AT & T also notes that the Second Circuit has stated that the verdict on the **[**35]** monopoly charge and the damage award could be sustained without the three belated findings. *Litton, supra, 700 F.2d at 803*.

In *Phonetele, Inc. v. American Tel. & Tel. Co., supra*, the court considered and rejected plaintiffs' motion for application of collateral estoppel based on the *Litton* findings. As Glictronix contends, the holding of the *Phonetele* opinion appears to be that collateral estoppel could not be applied because the product and market at issue were entirely different from the products and market in *Litton*. The product at issue in *Phonetele* was the "Phonemaster", a product against which AT & T did not compete since it had no comparable product. (Slip op. at 7, 8).

However, after pointing out this difference in product markets, the *Phonetele* court considered the significance for collateral estoppel purposes of the belated findings. It stated that:

> Inasmuch as the Court of Appeals then determined that the initial three findings were adequately supported, *700 F.2d at 814-15*, it is clearly arguable that the answer to question 16(a) was not necessary. In view of the potentially broad impact of the issue in this case, the Court concludes **[**36]** that its preclusion here on dubious grounds would not be appropriate. (Slip op. at 9).

In *Selectron, Inc. v. American Tel. & Tel. Co., 587 F. Supp. 856 (D.Ore.1984)*, the court concluded that "it is a well recognized rule that ***HN7***[] an alternative ground upon which a decision is based should be regarded as necessary for purposes of determining whether [a party] is precluded by the principles of *res judicata* or collateral estoppel from relitigating in a subsequent lawsuit any of those alternative grounds. *Winters v. Lavine, 574 F.2d 46, 67 (2d Cir.1978)*." *Id., at 862-863*.

The clear majority view is that ***HN8***[] a judgment is conclusive as to all issues that support all independent grounds on which the judgment may be based. 1B J Moore para. 0.443[5.-2]; *Restatement (Second of Judgments, § 27 comment 0* (1982); *Winters v. Lavine, 574 F.2d 46, 66-69 (2d Cir.1978)*; *Williams v. Ward, 556 F.2d 1143, 154 (2d Cir.1977)*; *but see* *Halpern v. Schwartz, 426 F.2d 102, 105-08 (2d Cir.1970)*; *District of Columbus v. C.F. & B., Inc., 442 F. Supp. 251 (D.D.C.1977)*.

In *Halpern*, a case subsequently limited to its facts by *Winters* and *Williams*, the court identified two **[**37]** considerations against giving collateral estoppel effect to all alternative grounds of a judgment. First, the court was concerned that if the jury or court in the prior case were sure of one ground, it might not give rigorous consideration to the other. Second, it suggested that a losing litigant might not vigorously appeal an erroneous ruling on one alternative ground if it believed the judgment would be affirmed on another ground. *Halpern v. Schwartz, supra, 426 F.2d at 105*.

AT & T implies that because the jury had already found liability, it may not have given rigorous consideration to interrogatory 16-a. The speed with which the jury decided the question and the fact that the damage award remained unchanged allegedly support this conclusion.

In appealing the jury verdict, AT & T argued that the 16-a finding should have **[*567]** been set aside because it had been coerced or was otherwise tainted. The Second Circuit rejected this contention, pointing to evidence that the jury had deliberated conscientiously and had been impartial. *Litton, supra, 700 F.2d at 803*. Specifically, the court believed the jury was not unfairly disposed to make findings favorable to one side **[**38]** or the other since it had found liability on one count, no liability on two others, and reached no agreement on another. The court ruled that "Litton was entitled to a jury determination on all its claims." *Id. at 804*. Apparently the Second Circuit, which had the opportunity to review the entire record, found that there was no reason to believe that the jury had not given fair consideration to interrogatory 16-a. There is no reason to think that the jury's belated findings were coerced or tainted. The fact that the jury added no damages after answering 16-a does not undermine the necessity of the finding or suggest that the jury did not consider it rigorously. The jury had already found AT & T had opposed certification in bad faith. It is entirely plausible that the jury believed that the finding of bad faith in filing the tariff did not cause damages additional to those caused by the bad faith opposition to certification.

Finally, it is mere speculation to conclude that the speed of the jury's decision indicated that it did not give due consideration to the interrogatory. Having observed the lengthy trial and having previously deliberated their verdict, the jury may well have **[**39]** been able take the needed steps to reach its decision in half an hour with due consideration of the issue.

The second *Halpern* consideration is inapplicable to this case. Not only did AT & T have sufficient motive to appeal the jury's belated findings, but it did appeal them. It is obvious from the Second Circuit's opinion that AT & T vigorously challenged the findings and that the court thoroughly considered its arguments. *Litton, supra, 700 F.2d at 802-04, 810-12*.

It is unquestionably true that the jury verdict could have stood absent the interrogatory 16-a findings. But under the prevailing view, the existence of multiple independent grounds for a judgment does not justify the conclusion that any of those grounds are unnecessary for collateral estoppel purposes. This case does not fit into the *Halpern* exception, even if the Third Circuit recognizes that exception. For these reasons, I conclude that the belated jury findings are to be deemed "necessary" for collateral estoppel purposes. *But see Wrede v. AT & T*, Civ. No. 83-283-1, slip op. at 9-10 (M.D.Ga. May 28, 1984); *Phonetele v. AT & T., 1984-1 Trade Cas.(CCH) P65,921*, Civ. No. 74-3566, slip op. at 8-9 (C.D.Cal. **[**40]** January 19, 1984).

D. *Unfairness to AT & T*

In *Parklane Hosiery Co. v. Shore, supra, 439 U.S. at 330-31, 99 S. Ct. at 651-52*, the Supreme Court listed ***HN9***[] three situations in which it may be unfair to the defendant to apply offensive, non-mutual collateral estoppel:

> If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable. The *Evergreens v. Nunan, 141 F.2d 927, 929 (CA2)*; *cf.* *Berner v. British Commonwealth Pac. Airlines, 346 F.2d 532* (CA2 [d Cir.1965]) (application of offensive collateral estoppel denied where defendant did not appeal an adverse judgment awarding damages of $35,000 and defendant was later sued for over $7 million). Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant. Still another situation where it might be unfair to apply offensive estoppel is where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause **[**41]** a different result.

AT & T contends that it should not be estopped from relitigating the *Litton* judgment for the latter two reasons.

[*568] 1. Inconsistent Judgments.

AT & T contends that various portions of the *Litton* judgment are inconsistent with an opinion in *United States v. American Tel & Tel. Co., 524 F. Supp. 1336 (D.D.C.1981)*, rulings of the FCC and state regulatory agencies, and a National Academy of Sciences report. *Parklane Hosiery, supra*, explicitly states that previous, inconsistent judgments may bar application of collateral estoppel; nowhere does the opinion suggest that inconsistent determinations other than final judgments may act as a bar. *See also* *Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 346 (3d Cir.1982)*; but see a contrary analysis by the Court of Appeals in *Faucett, supra*, at 129-130.

a. Administrative and Other Determinations

However, AT & T contends that the preclusive effect of a final judgment may be blocked by the existence of administrative agency determinations which are inconsistent with that judgment. In support of this contention, AT & T offers two arguments. First, it argues that the fact that these rulings **[**42]** were not final judgments is not controlling because the doctrine of collateral estoppel is premised on an "underlying confidence" in the correctness of the judgment relied on, and therefore the fact that inconsistent determinations exist is more important than their form.

Second, AT & T suggests that since administrative agency findings may themselves have collateral estoppel effect in some circumstances, they must also carry enough weight to bar the preclusive effect of a judgment with which they are inconsistent.

Regarding AT & T's first point, it is true that ***HN10***[] collateral estoppel is premised on an underlying confidence in the judgment relied on. *Standefer v. U.S., 447 U.S. 10, 23 n. 18, 100 S. Ct. 1999, 2007 n. 18, 64 L. Ed. 2d 689 (1980)*. As will be discussed later, the administrative rulings which AT & T cites are not inconsistent with *Litton*. However, for the purposes of the "inconsistent judgment" consideration, the form of the prior determination is significant.

To illustrate the potential unfairness to defendants which the "inconsistent judgment" criterion is designed to prevent, the Supreme Court in *Parklane* cited a hypothetical case presented by *Professor Currie. **[**43]** Parklane, supra, 439 U.S. at 330 n. 14, 99 S. Ct. at 651 n. 14*. In his hypothetical, Currie posited a railroad collision which injures 50 passengers, each of whom brings individual suit against the railroad. Currie argues, and the Court implicitly agreed, that if the railroad won the first 25 suits and lost the 26th, plaintiffs in cases 27 through 50 should not be able to apply case 26 offensively against the railroad.

This example aptly illustrates the purpose of the "inconsistent judgment" consideration, and suggests that the form of the prior determination is important. When courts in earlier cases have fully litigated an issue and reached inconsistent final judgments, there is good reason not to give preclusive effect to either judgment. The mere fact of the inconsistent judgments suggests that even after full consideration of the issue between adversary parties there remains ground on which a reasonable jury or court may differ.

But where a determination is reached by an administrative agency, without the benefit of a full adversary process, there is no reason to bar the preclusive effect of a later final judgment reached in a fully litigated adjudication simply because **[**44]** it is inconsistent with the agency determination.

The cases cited by AT & T in support of its argument that the administrative agency determinations are "inconsistent judgments" are unpersuasive. In *Nasem v. Brown, 193 U.S. App. D.C. 416, 595 F.2d 801, 806 (D.C.Cir.1979)*, the court treated as "well established" the "proposition that ***HN11***[] administrative proceedings may collaterally estop relitigation in the court." However, it went on to say that such proceedings have preclusive effect when "an administrative agency is acting in a judicial capacity and resolves **[*569]** disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *Id*. quoting *U.S. v. Utah Construction & Mining Co. 384 U.S. 394, 422, 86 S. Ct. 1545, 1560, 16 L. Ed. 2d 642 (1966)*. [4] In this case, the administrative determinations are not adjudications between parties which can be relied on for collateral estoppel. [5] They are not the product of proceedings in which adverse parties presented conflicting evidence on the issues presented in this case. These administrative determinations did not afford the parties here an adequate opportunity to litigate the questions **[**45]** at issue in this case, and therefore should not be used to block the preclusive effect of *Litton*, in which these issues were fully litigated.

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[4] *Utah Construction* is the only other case cited by AT & T to support its argument that administrative determinations are inconsistent judgments.

[5] The FCC rulings, for example, were not the result of litigation between adversarial parties after full discovery. The purpose and methods of the proceedings are wholely dissimilar to those of the *Litton* litigation.

For similar reasons, it is obvious that the report of the NAS is not a judgment inconsistent with *Litton*.

b. *United States v. AT & T and the Noerr-Pennington* Doctrine.

AT & T contends that the *Litton* court's determinations (1) that the *Noerr-Pennington* Doctrine does not apply to AT & T's opposition to certification before the FCC, and (2) that the opposition to certification constituted a sham under the "sham exception" to the *Noerr-Pennington* Doctrine both conflict with determinations **[**46]** of Judge Greene in *United States v. American Tel. & Tel. Co., 524 F. Supp. 1336 (D.D.C.1981)*.

One part of the government's case against AT & T involved the claim that AT & T's post-Carterfone policies on interconnection of customer-provided terminal equipment violated the antitrust laws. The government's proof in this area consisted of a series of "episodes", each describing the experience with the PCA requirements of individual companies which marketed terminal equipment. One of these episodes involved Litton's experience marketing PBXs. *United States v. AT & T., supra, 524 F. Supp. at 1349* & n. 40. In an earlier opinion, Judge Greene ordered that the government have access to the document discovery which had been undertaken in *Litton* because he considered the claims and issues in *Litton* to "represent a separate and identifiable segment of the government's case here." *United States v. AT & T, 461 F. Supp. 1314, 1340-41 (D.D.C.1978)*.

Following the presentation of the government's case, AT & T moved to dismiss. Under the heading "Interconnection of Customer-Provided Terminal Equipment," Judge Greene reviewed the government's evidence regarding the PCA requirement: **[**47]**

> The testimony and exhibits presented in support of the government's contentions in these episodes tended to show that the PCA requirement was unnecessary; that the PCAs imposed by Bell were overly engineered and that their cost, when added to that of the terminal equipment itself, either foreclosed non-Bell manufacturers from the particular equipment market or made it difficult for them to compete with Western Electric; that PCAs were often unavailable, that their delivery was sometimes substantially delayed, or that they were incompatible with non-Bell equipment; and that the stated need for the PCA and the defects of some PCAs caused customers to fear that, unlike Western Electric products, non-Bell equipment was unsafe and unreliable.
> The eleventh episode is the "umbrella" package, concerning more generally Bell practices and policies with regard to the interconnection of customer-provided terminal equipment. The evidence presented in conjunction with this episode tended to show the following.
>
> As of 1968, the time of the Carterfone decision, defendants had considered at least two options to protect the network **[*570]** from harm by customer-provided equipment: **[**48]** the PCA requirement and a certification program. A certification program -- that is, a means by which non-Bell equipment would be permitted to be connected to the network after it had been certified to meet certain technical standards -- would have obviated the need for the PCAs, with their costs, problems, and drawbacks, and it would thus have been consistent with the FCC's Carterfone mandate to liberalize interconnection policy. Nevertheless, defendants decided to implement a PCA tariff rather than the certification option.
>
> The government's evidence further tended to show that, during the five-year period after 1968, defendants concluded that the implementation of some kind of certification program was feasible, but they nevertheless decided to oppose any liberalization of their interconnection policy (whether by certification or otherwise) out of concern over the effect on their revenues and market position. Defendants were at that time all aware of (and they encouraged) the barrier to competition created by the unavailability and inadequate maintenance of the PCAs as well as of the additional economic barrier these devices created because of their added cost. The government's **[**49]** proof further indicated that defendants were unable ever to find empirical support for the proposition that the PCA policy was necessary to prevent actual harm to the telecommunications network.
> Finally, the evidence showed that, at approximately the same time that the FCC initiated its own certification docket on June 14, 1972, Bell decided to continue to withhold support from any effort to establish a certification program in order to "buy time" for internal restructuring so as to enable it to prosper in a competitive market.

United States v. AT & T, supra, 524 F. Supp. at 1349-50. The court concluded that "by and large, the evidence addressed sustained the government's charges." *Id. at 1350-51*.

Thus, the factual findings of Judge Greene are not inconsistent with *Litton* on the claims of "anticompetitive or predatory conduct" and many other of the *Litton* findings for which Glictronix seeks collateral estoppel here.

However, Judge Greene went on to consider the legal question of whether AT & T's opposition to certification fell within the protection of ***HN12***[] the *Noerr-Pennington* doctrine. The doctrine holds that "the Sherman Act . . . does not apply to **[**50]** . . . activities comprising mere solicitation of governmental action with respect to the passage and enforcement of laws . . . ." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138, 81 S. Ct. 523, 530, 5 L. Ed. 2d 464 (1961)*. "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition". *United Mine Workers v. Pennington, 381 U.S. 657, 670, 85 S. Ct. 1585, 1593, 14 L. Ed. 2d 626 (1965)*. The *Noerr-Pennington* doctrine applies to administrative proceedings. *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510-11, 92 S. Ct. 609, 611-12, 30 L. Ed. 2d 642 (1972)*.

Although his factual findings were consistent with the conclusion that AT & T opposed certification in bad faith, Judge Greene held that AT & T's opposition to certification in proceedings before the FCC constituted "petitioning" activities which were entitled to *Noerr-Pennington* protection. *United States v. AT & T, supra, 524 F. Supp. at 1350 n. 54* ("since this proof **[**51]** [of AT & T's opposition to certification] directly concerns the positions taken by defendants before the FCC, the court may not rely on it as a basis for antitrust liability.") and at 1363 and n. 110.

This legal conclusion conflicts with the holding of the *Litton* court that the opposition to certification was not petitioning activity and did not fall within the *Noerr-Pennington* doctrine. *Litton, supra, 700 F.2d at 809*. Both Judge Greene **[*571]** and the *Litton* court agreed that AT & T's filing of the PCA tariff constituted a private commercial action, and not advocacy before the FCC which would warrant *Noerr-Pennington* protection. *Litton, supra, 700 F.2d at 807* and n. 32; *United States v. AT & T, supra, 524 F. Supp. at 1350* & n. 47. [6] However, unlike Judge Greene, the *Litton* court held that opposition to certification, like the filing of the tariff, was not entitled to *Noerr-Pennington* protection. The court rejected AT & T's argument that its opposition "amounted to no more than espousing a position before an administrative body." *Litton, supra, 700 F.2d at 809*. Its reasoning appears to have been that the opposition was merely a bad faith **[**52]** effort to maintain the tariff and was therefore not entitled to any more protection than was the act of filing the tariff. The court stated:

> Much of our analysis relating to the filing of the interface tariff applies to AT & T's opposition to certification. Opposition to certification is simply the other side of the interface tariff coin; AT & T's filing and maintenance of the PCA requirement was the very embodiment of opposition to the only feasible alternative -- certification standards.

Litton, supra, 700 F.2d at 809.

Glictronix seeks a ruling, based on *Litton*, that the defense of the *Noerr-Pennington* doctrine is inapplicable to the anticompetitive or predatory conduct alleged in this case. Regarding the applicability of *Noerr-Pennington* to the opposition **[**53]** to certification, Judge Greene's opinion constitutes a judgment inconsistent with the *Litton* judgment. Collateral estoppel cannot be applied to foreclose the question of whether the opposition to certification may be entitled to *Noerr-Pennington* protection.

A second reason exists for this conclusion. ***HN13***[] As a general matter, collateral estoppel may apply to questions of law. 1B J. Moore para. 0.448 at 840. However, this rule is subject to broad qualifications. *Restatement (second) of Judgments § 29(7)* states that the offensive use of collateral estoppel is inappropriate where "the issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule on which it was based." Elaborating on this provision, *Comment i to § 29*(7) states, "this consideration is especially pertinent when there is a difference in the forums in which the two actions are to be determined. . . ."

[6] It is therefore clear that nothing in Judge Greene's opinion is inconsistent with *Litton's* findings that AT & T filed the PCA tariff in bad faith and that the *Noerr-Pennington* doctrine does not protect this conduct.

There is considerable question whether the *Litton* court's ruling that the opposition to certification is not entitled to *Noerr-Pennington* protection is correct. Judge Greene's opinion conflicts directly with the *Litton* **[**54]** court on this point. Numerous other cases also suggest that many courts would consider opposition to certification to be a protected effort to influence government action. *See e.g., Mid-Texas Communications Systems, Inc., v. American Tel & Tel. Co., 615 F.2d 1372, 1384 and n. 10 (5th Cir.), cert. denied, 449 U.S. 912, 101 S. Ct. 286, 66 L. Ed. 2d 140 (1980)*. In *Phonetele, Inc. v. AT & T, supra*, slip op. at 10, on precisely the question at issue here, the court stated:

> Because this Court entertains doubt about the correctness of the *Litton Systems* decision on the applicability of the [*Noerr-Pennington*] doctrine to the opposition to certification, *see, Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, 674 F.2d 1252, 1262-63 (9th Cir.1982)*, the Court declines to apply issue preclusion with respect to that point.

The effect of applying the Second Circuit's ruling in *Litton* that the opposition to certification is not entitled to *Noerr-Pennington* protection would be to foreclose the Third Circuit from independently considering this legal question. In view of the fact that the *Litton* court's holding appears to be at odds with the positions **[**55]** of other circuits, it would be inappropriate to **[*572]** bind this court to the *Litton* court's holding. Restatement (second) judgments *§ 29(7)* and comments: *Phonetele, Inc. v. AT & T, supra*.

After determining that AT & T's opposition to certification fell within the *Noerr-Pennington* doctrine, Judge Greene addressed the question of whether that conduct might still be a basis of for antitrust liability under the "sham" exception to the *Noerr-Pennington* doctrine. ***HN14***[] Under the "sham" exception, petitioning activities which would normally be protected can be the basis for liability when:

> The defendant's activity was intended to injure the plaintiff directly rather than through a government decision. When the antitrust defendant had not truly sought to influence the governmental decision, his invocation of governmental machinery is a sham . . . . Where he had no reasonable expectation of obtaining the favorable ruling, his effort to do so was a sham.

Litton, supra, 700 F.2d at 810, quoting P. Areeda, ***Antitrust Law*** para. 203.1a (Supp.1982).

As argued by Litton in its opposition to AT & T's petition for certiorari in the Supreme Court, Judge Greene's **[**56]** formulation of the standards for the sham exception are consistent with those of the *Litton* court. As part of his discussion, Judge Greene noted that ***HN15***[] "the sham exception is not satisfied by a mere showing of anticompetitive intent . . .; there must be proof that those being charged subverted the integrity of the governmental process . . ." or that "the relevant activities were intended not to secure governmental action but to harm others through deliberate abuse of the governmental process." *United States v. AT & T, supra, 524 F. Supp. at 1362*.

Having agreed on the standards, Judge Greene and the *Litton* court reached conflicting conclusions as to whether AT & T's opposition to certification fit the sham exception. Viewing the evidence in the light most favorable to Litton, as it was obliged to do in reviewing the jury's verdict, the *Litton* court determined that the sham exception applied to AT & T's conduct, which it said "was not undertaken in the hope of influencing governmental action, but in the hope of delaying it." *Litton, supra, 700 F.2d at 812*. The court based its decision or its belief that:

> AT & T had no realistic hope that the FCC would approve **[**57]** the interface device; its own people thought that the device was a redundant "artificial barrier" to competition. It nevertheless consciously pursued a policy of delaying the time when the FCC would strike down the PCA requirement. It implemented this policy by making baseless claims relative to potential harms to the network while opposing certification standards in every way possible.

Id. at 811.

Judge Greene did not specifically address the application of the sham exception to AT & T's opposition to certification before the FCC. But with only a single exception, irrelevant to this case, he generally determined that "the evidence shows little more than that Bell opposed new cutouts, that it made contentions which were not wholly correct, and that the FCC ultimately ruled against Bell." United States v. AT & T, supra, 524 F. Supp. at 1361-64. He held that such conduct did not fit the sham exception and ordered the government's contentions regarding AT & T's representations to the FCC be stricken. Id. at 1363-64, 1381.

The two opinions appear to be in direct conflict. While both seem to agree that AT & T acted with at least some degree of bad faith, Judge Greene **[**58]** concluded that AT & T's conduct did not amount to a subversion of the administrative process, while the *Litton* court concluded that it did.

Glictronix argues that the two decisions are not inconsistent, but merely reflect rulings based on differing factual records. It is true that the two courts agreed on the applicable legal standard and on many of **[*573]** their factual findings. Glictronix suggests that if Judge Greene had had before him the full body of evidence on which the *Litton* jury relied, he too would have found AT & T's petitioning activities a sham. To this effect, Glictronix cites Litton's opposition to AT & T's petition for certiorari to the Supreme Court, which lists the *Litton* witnesses who did not testify in the government's case. (Plaintiffs' Reply Brief on Partial Summary Judgment, Ex. B p. 27 n. 18)

However, Glictronix offers no explanation of what facts emerged in the *Litton* litigation that were unavailable to Judge Greene. As noted earlier, Judge Greene ordered the discovery in *Litton* be made available to the government. His discussion of the evidence demonstrates that he had much of the same evidence before him as did the *Litton* court. **[**59]** United States v. AT & T, supra, 524 F. Supp. at 1348-50. Glictronix has not shown that Judge Greene had an incomplete record before him. *Compare* Carr v. District of Columbia, 207 U.S. App. D.C. 264, 646 F.2d 599, 606 (D.C.Cir.1980).

In considering the same issue, the *Selectron* court held that Judge Greene's ruling was based on an incomplete record. Selectron v. AT & T, 587 F. Supp. 856, 866 (D.Ore.1984). The sole example of evidence missing from the record before Judge Greene cited by the *Selectron* court was "testimony of the Chairman of the PBX Advisory Committee indicating intentional delay in the development of a certification program." *Id*. at n. 21. The opinion contains no elaboration of what this testimony was. I do not find the absence of this evidence alone to be significant enough to permit a conclusion that the judgments in the government's case and in *Litton* are not inconsistent.

Glictronix has not submitted any concrete explanation for the differing outcomes which would justify the conclusion that the two opinions are not inconsistent. In the absence of an adequate explanation, I cannot apply the *Litton* court's ruling that AT & T's opposition **[**60]** to certification before the FCC is not entitled to *Noerr-Pennington* protection under the sham exception.

Judge Greene and the Litton court agreed on many more questions of fact than they disagreed on. But on the crucial question of whether AT & T's representations to the FCC amounted to a subversion of the administrative process, they differed.

Similarly, I must reject the *Selectron* court's conclusion, urged by Glictronix here, that Judge Greene's opinion does not constitute a "final judgment" for collateral estoppel purposes. In ordering the government's contentions regarding AT & T's petitioning activities be stricken, Judge Greene granted a part of AT & T's motion to dismiss. Numerous ***HN16***[] courts give collateral estoppel effect to such partial grants of motions to dismiss or for summary judgment. See 1B of Moore para. 0.441[4] at 744-47; Restatement (second) of Judgments § 13.

In concluding that Judge Greene's ruling was not a final judgment, the *Selectron* court notes that the filing was made on a mid-trial motion to dismiss under Fed.R.Civ.P. 41(b). Judge Greene stated in his opinion that:

> The decision on the motion to dismiss is a "tentative and inconclusive **[**61]** ruling on the quontium of plaintiff's proof," which does not preclude a court from making finding and conclusions at the close of the case that are inconsistent with its prior tentative ruling.

United States v. AT & T, 524 F. Supp. at 1343. Since Judge Greene himself characterized his decision as tentative, the *Selectron* court reasons, it cannot be considered a final judgment.

HN17[] Whether a judgment should be considered final for the purposes of collateral estoppel "turns upon such factors as the nature of the decision (i.e., that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review." *Lummus Co. v. Commonwealth Refining Co., 297 F.2d 80, 89 (2d Cir.1961)*, *cert. denied*, *368 U.S. 986, 82 S. Ct. 601, 7 L. Ed. 2d 524 (1962)*; *Aiello v. City of Wilmington, 470 F. Supp. 414, 419 (D.Del.1979)* (*quoting Lummus*).

[*574] Notwithstanding his prefatory comments, Judge Greene's decision clearly appears to dispose of the government's contentions regarding AT & T petitioning activities. There is no doubt that the hearing was adequate, and the judge rendered a lengthy opinion which addressed the issue. More importantly, the judge **[**62]** in fact reached definite rather than tentative conclusions. He did not merely suggest tentatively that the government's contentions regarding AT & T's representations before the FCC would not prevail; he struck those contentions. *United States v. AT & T, supra, 524 F. Supp. at 1381*.

If Judge Greene's opinion was in any sense tentative, it was regarding rulings adverse to AT & T. The government had already put on its case, and Judge Greene was in a position to make a final ruling that the government had failed to make its case on the issue of AT & T's opposition to certification. The *Noerr-Pennington* rulings in *United States v. AT & T* are final judgments for the purpose of collateral estoppel. They therefore constitute cognizable inconsistent judgments preventing the application of collateral estoppel to the *Litton* holdings regarding the *Noerr-Pennington* protection owed to AT & T's petitioning activities.

2. Full and Fair Opportunity to Litigate.

HN18[] Offensive collateral estoppel will not be applied "where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result." *Parklane Hosiery* ***[**63]*** *Co. v. Shore, 439 U.S. 322, 330-31, 99 S. Ct. 645, 651-52, 58 L. Ed. 2d 552 (1979)*, stated generally, collateral estoppel cannot apply against a party who in the earlier case did not have a full and fair opportunity to litigate the issue to be precluded. *Id. at 332-33, 99 S. Ct. at 652-53*; *Allen v. McCurry, 449 U.S. 90, 95, 101 S. Ct. 411, 415, 66 L. Ed. 2d 308 (1980)*.

AT & T offers several reasons for its contention that it did not have a fair opportunity to litigate the PCA/certification issues in Litton.

First, AT & T contends the trial court in *Litton* excluded critical evidence offered by AT & T concerning the reasonableness of its conduct. Specifically, AT & T alleges that the trial court wrongly excluded a 1969 New York Public Service Commission decision holding that "retention of control by the telephone company of network control signaling . . . is absolutely necessary to insure reliable service to the public." *Re New York Telephone Co*., 79 P.U.R.3d 410, 417 (1969). Although AT & T implies that evidence of a number of state regulatory agencies' policies was excluded, AT & T only attempted to introduce evidence of this one decision. (Plaintiffs' response **[**64]** to and analysis of Defendants' Documentary Submission, p. 15).

The trial judge excluded this decision on the ground that its likelihood of misleading the jury outweighed its probative value (Plaintiff's Response to and Analysis of Defendant's Documentary Submission, Ex. C, Tr. 11397). At issue before the New York Commission was a tariff requiring a $20 installation of a "voice coupler" carrying a 50 cents monthly fee. The judge determined that the tariff was too dissimilar to the PCA tariff, which carried a monthly charge of at least $6.50, to be probative of the issues in the case. In reviewing this evidentiary ruling, the Second Circuit concluded that the New York Commission's decision was "arguably probative of AT & T's position" and found it "difficult to justify the exclusion of this decision in the light of the admission" of the various FCC rulings. *Litton, supra, 700 F.2d at 819*. The court stated that the difference in costs between the two tariffs went more to the question of the weight to be given the evidence, rather than to its admissibility. However, recognizing the complicated and extensive nature of the trial and the trial court's need to limit the evidence at some **[**65]** point, the Court found that the exclusion of the decision did not amount to prejudicial error. *Id*.

[*575] AT & T argues that because this allegedly "crucial" evidence was excluded, the *Litton* judgment should not be given preclusive effect. AT & T implicitly argues that the excluded evidence should be treated as would newly discovered evidence. At least according to one view, "newly discovered evidence, even if insufficient to justify setting aside a judgment, may warrant refusal to give the [prior] judgment preclusive effect in other actions." See *Carr v. District of Columbia, 207 U.S. App. D.C. 264, 646 F.2d 599, 606 n. 35*; *Restatement (second) Judgments § 29 Comment j* (1980). Assuming that this view is correct and that it applies to wrongly excluded evidence, AT & T argues that the Second Circuit's refusal to set aside the judgment despite the trial court's incorrect evidentiary ruling should not prevent this court from refusing to give the *Litton* judgment preclusive effect.

In *Blonder-Tongue Labs. v. University Foundation, 402 U.S. 313, 333, 91 S. Ct. 1434, 1445, 28 L. Ed. 2d 788 (1971)*, the Supreme Court stated that ***HN19***[] the question of whether a party, **[**66]** without fault of his own, "was deprived of crucial evidence or witnesses in the first litigation" was relevant to a determination of whether that party had had a full and fair opportunity to litigate. The Court went on to say that:

> No one set of facts, no one collection of words or phrases will provide an automatic formula for proper rulings on estoppel pleas. In the end, decision will necessarily rest on the trial courts' sense of justice and equity.

Id. at 333-34, 91 S. Ct. at 1445.

Assuming *arguendo* that the showing a party must make to avoid collateral estoppel is less than that required to obtain a new trial because of newly discovered evidence, the district court in *Faucett* held that the party "must nevertheless proffer evidence which is not only relevant to the issues as to which they seek to avoid preclusion, but is also more than conjecturally likely to make a difference in the outcome." *Faucett, supra, 566 F. Supp. at 300*. The Court of Appeals disagreed, holding that:

> We are persuaded by AT & T's argument that the existence of this acknowledged error in the presentation of the case to the *Litton* jury is a serious obstacle to the **[**67]** plaintiff's use of offensive estoppel on the issue of AT & T's liability. While, standing by itself, such error might not tip the scale against such estoppel, when added to the other factors discussed below, the application of offensive estoppel in this case would be unfair.

At 128. The reasoning of the Court of Appeals in *Faucett* is persuasive and I will adopt it on this aspect of the collateral estoppel question.

AT & T's second argument concerning a full and fair opportunity, is that it has newly discovered evidence which will demonstrate that its conduct was reasonable. In support of this proposition, AT & T submitted 11 volumes of documents which it claims establish:

(1) that the post-Carterfone tariffs were filed in 1968 in good faith pursuant to a decision made by H. I. Romnes, then Chairman of the Board of AT & T;

(2) that John deButts' decision in 1973 to oppose certification was not made for the purpose of delay but, instead, was based upon Mr. deButts' good faith belief that certification would result in technical harm to the public switched network, and, even more importantly, would have adverse economic consequences upon ordinary users of the telephone in **[**68]** the form of higher telephone rates, thus threatening the principle of universal service;

(3) that AT & T's opposition to certification did not in fact delay the Commission's proceedings in the Registration docket;

(4) that any delay in that docket resulted from the strong political opposition to certification generated by state regulatory commissioners who took the same position as Mr. deButts with respect to the adverse economic consequences of certification;

(5) that the Commission ultimately adopted a certification program for PBXs and key telephone systems only because it believed, first, that there would be no substantial **[*576]** adverse economic impact from certification, and second, that if some such impact did occur, the feared effect upon the ordinary telephone user could be avoided through changes in the separations formula;

(6) that the decisions of the Commission, which reflected Commission adoption -- virtually without change -- of the recommendations made by its staff under the supervision of the newly-appointed Chief of the Common Carrier Bureau, distorted many of these facts and contained language deliberately inserted to create a basis for antitrust litigation **[**69]** against AT & T; and

(7) that events subsequent to the completion of the *Litton* trial demonstrate that the FCC was wrong and, hence, that the state regulatory commissioners and Mr. deButts were right on the critical economic issues surrounding certification.

Glictronix convincingly argues that most of the documents AT & T has submitted are either not newly discovered, would be inadmissible, refer only to collateral issues or are cumulative of evidence which was admitted. (See Plaintiff's Response to Defendants' Documentary Submission).

In its document-by-document response, Glictronix establishes that most of this "newly discovered evidence" was available to AT & T at the *Litton* trial, but that AT & T simply decided as a matter of trial strategy not to use it. Since the absence of this evidence in *Litton* was AT & T's own fault, it cannot claim unfairness here. *Blonder-Tongue, supra, 402 U.S. at 333, 91 S. Ct. at 1445*.

AT & T has submitted here the testimony of various individual FCC officials. AT & T could have offered their testimony in *Litton* and did not. Moreover, testimony giving a personal interpretation of the meaning of FCC decisions probably would be **[**70]** inadmissible. *United States v. AT & T, 524 F. Supp. 1381, 1387 (D.D.C.1981)*.

Several documents were apparently newly discovered by AT & T. One was a "Report to the Chairman of Critical Projects," which AT & T claims establishes that AT & T caused no delay in the adoption of a registration program. (defendants' Vol. Xc. Tab 9 and Summary of Documentary Submission, p. 68.) Suffice it to say, the documents do not in any way establish that AT & T was not responsible for at least some delay in the changeover from the blanket PCA requirement to certification standards. (See *Id*. at pp 7 and 9 and Plaintiffs' Response to and Analysis of Defendants' Documentary Submission, p. 36-37).

Much of the allegedly new evidence involves Walter Hinchman, who became chief of the FCC's Common Carrier Bureau in 1974. Hinchman testified in *Southern Pacific Comm. Co. v. American Tel. & Tel. Co*., ("SPCC"), *556 F. Supp. 825 (D.D.C.1983)*, on issues other than those involved in this case. In that case, Judge Richey stated:

> The inference is justified that under the direction of Mr. Hinchman, whom the Court found to be lacking in candor and trustworthiness, the staff launched into a program **[**71]** to protect the specialized carriers from competition from AT & T and to create FCC findings that could be utilized as predicates in antitrust actions against the Bell System.

SPCC, supra, 556 F. Supp. at 1056-57.

The FCC rulings that the interface tariff was "unnecessarily restrictive" and an "unjust and unreasonable discrimination" were written by Mr. Hinchman or his staff. (Defendants' Documentary Submission, p. 59-60). The *Litton* court stated unequivocally that these FCC "decisions were central both to Litton's claim that the PCA device was unnecessary and Litton's rebuttal of AT & T's defense that the interface tariff was an attempt to comply with previous FCC rulings." *Litton, supra, 700 F.2d at 818*. AT & T argues that *Litton* should not be collaterally applied because of this newly found evidence that the FCC decisions on which the jury relied may be untrustworthy.

Glictronix responds that Hinchman himself did not testify on the reasonableness of the PCA tariff in *Litton*, and that Hinchman's **[*577]** trustworthiness is irrelevant to whether *Litton* should be collaterally applied. These arguments miss the point. The issue is the trustworthiness **[**72]** of the FCC decisions he and his staff authored. More relevant is Glictronix's argument that Judge Richey's assessment of the trustworthiness of FCC findings in the context of the *SPCC* suit has little bearing on the trustworthiness of the FCC decisions regarding the PCA tariff. Moreover, Glictronix argues that the substantive conclusions of *SPCC* are cast in doubt by the contrary holding in *MCI v. American Tel. & Tel. Co., 708 F.2d 1081 (7th Cir.1983)*.

SPCC involved different but related issues dealing with AT & T's interconnection policies. Although *SPCC* dealt with AT & T's so-called "telpole" tariff, Judge Richey noted that Hinchman testified that his staff wrote all of the FCC decisions relating to telecommunications from 1974 to 1978. Hinchman recalled no changes being made by the Commissioners to staff recommendations, and was himself "totally unfamiliar with the basis for any of the decisions for which he was responsible and did not even understand the concepts involved." *SPCC, supra, 556 F. Supp. at 1055*. It is clear that Judge Richey doubted the trustworthiness of all the decisions rendered under Hinchman, not just those specifically at issue in *SPCC* **[**73]** .

Taking into account the concrete basis for Judge Richey's skepticism -- Hinchman's own testimony -- and the acknowledged importance of the FCC decisions to the *Litton* verdict, I think this new evidence should preclude collateral estoppel effect to the *Litton* findings on the reasonableness of AT & T's PCA/certification policies.

3. Unfairness to AT & T: The Question of Underlying Confidence in the *Litton* Judgment.

AT & T's final argument is that it would be unfair to preclude AT & T from relitigating the *Litton* findings because "underlying confidence" in the *Litton* judgment is lacking. Central to AT & T's opposition to the partial summary judgment motion is its position that the *Litton* judgment was based on a demonstrably false premise. That premise was that after *Carterfone* AT & T knew that the FCC's basic position was that AT & T could not exclude customer-provided terminal equipment absent a showing of actual harm and that "neither filing of the interface tariff nor opposition to certification squared with the FCC's mandate in *Carterfone." Litton, supra, 700 F.2d at 810*. According to AT & T, the *Litton* court's affirmance of the jury finding **[**74]** that AT & T acted in bad faith to monopolize the PBX and key system market by filing the PCA tariff and by opposing certification was based on this allegedly false premise.

The *Litton* court relied on a number of AT & T internal documents to support this premise that AT & T adopted the PCA tariff and opposed certification in bad faith. *Litton, supra, 700 F.2d at 791 n. 2, 798-801, 810-11*. Among these internal documents were statements of AT & T officials to the effect that AT & T had been unable to produce any evidence that interconnection of non-AT & T equipment harmed the network. An in-house report prepared in 1971 by David Beyers, one of AT & T's two representatives to the FCC's PBX Advisory Committee, wrote:

> A Credibility Gap Exists -- Limited interconnection on the message network and greater interconnection on private line facilities has been in existence for a long period of time and the carriers still find it virtually impossible to cite cases of harm . . . result[ing] from . . . interconnect[ion] . . . . This inability to demonstrate cases of harm . . . is causing the manufacturers . . . users and regulatory bodies to . . . challenge the expansive efforts **[**75]** which [AT & T] insists must be taken to avoid the network pollution.

(*quoted in Litton, supra, 700 F.2d at 799*.)

In August, 1972, H. H. Boettinger, director of AT & T's Management Sciences Division reported:

> Here is our weakest position now, because even though everyone concedes **[*578]** that serious breaches of our tariffs by illegal or unauthorized equipment has grown over the years, we have not been able to produce evidence of harm to anyone. (I understand that our people on the PBX Certification Committee have been unable to respond with any forceful data when asked for proof of our allegations of potential harm.)

Plaintiff's Ex. 58, A-455 at 460 to 461. The report recommended that the PCA requirement be rescinded. *See Litton, supra, 700 F.2d at 799*. AT & T's only evidence of potential harm was derived from studies, referred to as the "Hunt Studies", which various AT & T officials conceded did not prove anything. *See Litton, supra, 700 F.2d at 799*.

According to evidence submitted in *Litton*, AT & T knew that the PCA device was unnecessary and duplicative of components in the competitors' equipment, but it enforced the PCA requirement **[**76]** so as to hamper competition and delay the inevitable advent of a certification system until AT & T had developed products which could compete effectively in the terminal equipment market.

In 1967, AT & T organized a group of senior executives of AT & T and Bell subsidiaries and affiliates, called the Tariff Review Group, which was charged with the responsibility of formulating a policy in response to the expected ruling in *Carterfone*. In February, 1968, a Special Task Force to the Review Group issued one of its reports. (Appendix to Plaintiff's Class Certification Brief, Exhibit 55.) The Task Force first summarized its conclusion that:

> Any attempt to propose the use of an interface requirement . . . can be interpreted merely as a shifting of our present-day restrictions on customer-owned devices to similar restrictions through the provision of an arbitrary and redundant Telephone Company device that duplicates the customer's equipment.

Id. at 423. Expanding on this conclusion, the report states:

> An attempt to design an interface, or a family of interfaces, sufficient to minimize all adverse effects of customer-provided equipment poses an economic **[**77]** and administrative problem . . . . Such an interface device would be priced at a level of at least what our existing equipment offering is now. This would, of course, result in what effectively might be considered to be an unjustified economic restriction in allowing customer to provide his own device. And the provision of an interface does not, in itself, necessarily provide the full protection we desire . . . .

Id. at 423-24. The report explicitly rejected the PCA requirement and endorsed technical certification standards, stating that the PCA requirement "would erect a redundant, artificial and economic barrier to those wishing to purchase their own equipment." *Id*. at 425.

According to the Litton plaintiffs and Glictronix, AT & T persisted in advocating the PCA requirement and opposing certification because it was aware it could not compete effectively in the terminal equipment market and needed to buy time to develop competitive equipment. The First Task Force Report concluded that AT & T would lose a considerable share of the terminal equipment market if the PCA tariff was struck down, and stated, "if we cannot compete with outside manufacturers of terminal equipment, **[**78]** we may be forced to drop out of the market." (Appendix to Plaintiff's Class Certification Brief, Ex. 11, 54-A-388 to A-397).

Despite AT & T's persistence in claiming that the PCA was necessary to protect the telephone network from harm, it has never offered any proof that competitors' equipment was inferior to AT & T provided equipment. *Id*. at Ex. 59, A-464. Indeed, its own records reveal a knowledge and fear that its product offerings lagged significantly behind in terms of quality and features. *Id*. at Ex. 67, A-505.

At the trial of *Litton, supra*, a former AT & T executive testified that the PCA requirement was "predicated upon the assumed **[*579]** inferiority of the competitors' equipment," an assumption "we knew to be false." *Id*. at Ex. 60, A-469. In 1972, an AT & T executive stated that he had recently seen many competitive PBX and key systems "clearly in the same league -- in terms of features, price and quality -- with the best BTL ([Bell Labs] designs." *Id*. at Ex. 61, A-471. In February 1972, Bell Labs Quality Assurance Division found that competitive PBX systems had lower trouble rates than Bell PBX systems. Id. at Ex. 61, A-474 at 480.

It has been **[**79]** admitted by AT & T's own high level executives that in the early 1970's, with the advent of competition, customers began asking AT & T for newer and better equipment with more features and flexibility, equipment that AT & T knew it did not offer. *Id*. at Ex. 63, A-489; Ex. 64, A-492; Ex. 65, A-493; Ex. 66, A-504. AT & T's marketing studies recognized that its weaknesses in furnishing competitive features handicapped its sales efforts. *Id*. at Ex. 67, A-505; Ex. 68, A-511 at 518 and 539. In a 1971 status report to Bell Labs management on product development, J. W. Schaefer, the Bell Labs Executive Director in charge of PBX Development, admitted that Bell had "neglected PBX development" and that its PBX systems were antiquated. Id. at Ex. 69, A-599 at A-600.

The *Litton* plaintiffs contended that this need to delay the allegedly inevitable abolition of the PCA tariff in favor of certification standards was AT & T's motive for its conduct. There was evidence at the *Litton* trial that AT & T

> "did not complete some of its 'homework assignments' on time" in connection with the PBX Advisory Committee's efforts to develop certification standards. AT & T Brief at 20. And, **[**80]** although AT & T had decided in March 1 of 1973 that it would oppose certification standards, it continued to work with the Advisory

> Committee in accordance with an internal "Tactics Memorandum" which concluded that withdrawing from the committee would accelerate "decisions in favor of certification." This evidence is sufficient to support an inference that AT & T did what it could to delay and obfuscate the efforts undertaken by the FCC and other interested parties to develop certification standards.

Litton, supra, 700 F.2d at 811.

AT & T's argument that the premise of the *Litton* judgment was false is based on a number of documents. First, AT & T relies on the opinions of several state regulatory agencies, which, until 1974, shared jurisdiction with the FCC over interconnection matters. *See* *Telerent Leasing Corp., 45 F.C.C.2d 204 (1974)*. According to AT & T, the first such state agency to review the PCA requirement in a formal opinion was the New York Public Service Commission, which found in July, 1969, that a PCA for customer-provided equipment was necessary to protect the network. *New York Tel. Co.*, 79 P.U.R.3d 410, 417 (N.Y.Pub.Serv.Comm'n, 1969) (Defendants' **[**81]** Documentary Submission, Vol. VI, Tab. 1). As is discussed elsewhere, this decision, the only such decision AT & T even offered into evidence in *Litton*, dealt with a PCA for a different type of device at very different costs. While the *Litton* court found that the excluded evidence of this ruling should have been admitted, it found that the exclusion was not prejudicial error.

Second, AT & T argues that the FCC itself considered the PCA requirement and found it reasonable. According to AT & T, the FCC explicitly stated on at least five occasions that the PCA requirement in the post-Carterfone tariffs did not violate the FCC's policy enunciated in *Carterfone*. (See Defendants' Collateral Estoppel Brief, at 57.)

The first of these cited rulings dealt with the contention that the *Carterfone* ruling not only invalidated the complete ban on the use of customer-provided terminal equipment, but also invalidated the barring of "any customer-provided network control signaling units irrespective of whether they were harmful or harmless" to the network. *AT & T "Foreign Attachment"* *Tariff Revisions, 15 F.C.C.2d 605, 609 (1968)*. The **[*580]** F.C.C. stated that this contention **[**82]** was based on a "misconstruction of *Carterfone*, and clarified that *Carterfone* had not addressed equipment providing network control signaling functions. (*Id*. at 609-10). [7] The Commission refused to strike down AT & T tariffs banning such customer-supplied equipment.

However, the ruling also made clear that while *Carterfone* did not invalidate a blanket ban on such equipment, it did not approve such a ban. The FCC stated:

> Although the tariff bar against any customer providing his own network control signaling unit is not in conflict with our Carterfone ruling, the question remains as to whether the telephone companies should make provision in their tariffs by which subscribers may have access to the so-called switched telephone network through the **[**83]** use of their own provided network control signaling equipment. On the basis of the pleadings and comments before us, we are in no position to determine the extent to which any such provision may be consistent with efficient and economic telephone service and otherwise in the public interest. In our opinion, these and other matters warrant further consideration by the Commission before it determines whether and what further action, if any, may be required.

AT & T "Foreign Attachment" *Tariff Provisions, supra, 15 F.C.C.2d at 610*. Consistent with this wholly noncommittal approach, the FCC concluded its ruling by warning, "our action is not to be construed as approval [of the PCA tariff] and these tariffs are subject to such further actions as the Commission may wish to take with respect thereto." (*Id*. at 611).

In *AT & T "Foreign Attachment"* *Tariff Revision, 18 F.C.C.2d 871 (1969)*, the FCC reiterated its conclusion that *Carterfone* had neither disapproved nor approved AT & T's ban on signaling equipment irrespective of the question of harm. The Commission stated that there was nothing in the memorandum opinion of December 29, 1968 (*15*

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[7] This distinction is apparently the distinction drawn elsewhere between equipment which is connected to the network and equipment which is substituted for part of the network. See *Mebane Home Telephone Co., 53 F.C.C.2d 473, 477 (1975)*.

F.C.C.2d 605) "from which **[**84]** it can reasonably be inferred that a final conclusion has been reached with respect to what portions of an interconnected communication system may be provided by customers". 189 F.C.C.2d at 874.

In *Interstate and Foreign MTS and WATS, 35 F.C.C.2d 539 (1972)*, the FCC gave notice of an inquiry to determine whether and under what conditions the telephone companies should provide new classes of interstate and foreign service "whereby customers would have the option of furnishing 'Network Control Signalling Units' (NCSU) and any needed 'Connecting Arrangements' (CA) (or the functional equivalent thereof) that are presently furnished only by the telephone company." *Id*. at 539. Specifically the FCC stated:

> Our proceeding herein is concerned with the pending and unresolved basic issues now before us as to whether and to what extent, there is public need for us to go beyond what we ordered in *Carterfone* and permit customers to provide in whole or in part the aforementioned NCSUs and CA's in interstate MTS and WATS and, if so, what terms and conditions should apply to protect the telephone system and services of others.

Id. at 542.

The FCC opinions in *Telerent **[**85]** Leasing Corp., 45 F.C.C.2d 204, 206 (1974)* and *Mebane Home Telephone Co., 53 F.C.C.2d 473, 476 (1975)* similarly indicated that the *Carterfone* ruling had not decided the question of whether and under what conditions customers could provide their own NCSUs.

However, in *Mebane*, the FCC took a position on whether AT & T would be permitted to absolutely ban customer-provided equipment, such as the PBX or key systems, which substituted for part of the network. After reviewing previous decisions, the FCC stated:

> **[*581]** The foregoing adequately demonstrates the broad principle underlying *Hush-A-Phone* and *Carterfone*, namely the subscriber's right to make beneficial use of an interconnected device without causing harm to the telephone company's operations. We see no reason why this broad principle should not extend to interconnected devices such as PBX's and key systems which may replace telephone system equipment. Clearly, the customer would obtain the requisite benefit from such interconnection. Thus, the only question remaining regarding the applicability of the broad principle underlying *Hush-A-Phone* and *Carterfone* to interconnected devices such **[**86]** as PBX's and key systems is whether such interconnection would be harmful to the telephone company's operations. Significantly, we have had substantial experience under the AT & T customer interconnection tariffs which do permit interconnection of customer devices such as PBX's and key systems. Indeed, PBX's and key systems constitute the heart of interconnection that now exists. Our experience indicates that not only have customers obtained substantial private benefit from such interconnection, but there has been no technical harm to telephone company operations. Nor has *Mebane* alleged any facts showing that interconnection of PBX's or key systems would be technically harmful. Moreover, as shown below, *Mebane* has made no prima facie showing warranting summary relief or hearing on economic injury grounds, although we have decided to afford it an opportunity to make such a showing in an evidentiary hearing on our own motion. Under the foregoing circumstances, we believe that here as in *Carterfone* it would be unjust, unreasonable to restrict the customer's right to use beneficial, interconnection devices that are not publicly detrimental, through a blanket prohibition against **[**87]** interconnection of devices that may involve some substitution of telephone company equipment. The determining factor should be whether there is harm to the telephone network, irrespective of whether the particular interconnection device is one of the nature involved in *Carterfone* or a PBX or key system. To make a distinction based solely on whether there is a substitution of telephone company equipment, would be an arbitrary and unreasonable infringement of the subscriber's right in the absence of technical harm or other public detriment. A subscriber has a statutory right under Section 201(b) not to be subjected to tariff restrictions which indiscriminately bar interconnection of customer-provided equipment without regard to harm. Moreover, as noted above, the option of the customer to interconnect his PBX or key system is a service that has been generally available to the public under the AT & T tariffs for several years.

AT & T also relies on the statements of various individual FCC officials, who believe that the *Litton* court mischaracterized the *Carterfone* ruling. (See memorandum of former FCC Commissioner Benjamin L. Hooks as Amicus Curiae in Litton, March **[**88]** 1, 1983, Defendants' Collateral Estoppel Brief, Appendix, Tab 4; Deposition of Bernard Strassburg, Chief of the FCC's Common Carrier Bureau from 1963 to 1973, pp. 74, 123, Defendants' Documentary Submission, Volume XA, Tab 1.) The FCC itself has filed an amicus brief in the *Faucett* case contending that the *Litton* conclusions were "demonstrably incorrect."

Glictronix correctly points out that the statements of individual FCC officials merely reflect personal views. Similarly, the FCC amicus brief is not a formal opinion of the FCC, but only an interpretation by current FCC counsel of post FCC rulings. Also the amicus brief contains no analysis supporting its conclusion.

It is clear from review of these rulings that the FCC did not believe that *Carterfone* specifically invalidated the PCA tariff. Nor do these rulings evince FCC approval or support for the tariff.

As in this case, AT & T attempted in *Litton* to counter the evidence of its bad faith by arguing that the FCC supported **[*582]** the imposition of the tariff. AT & T's implicit argument was -- and is -- that if a presumably impartial governmental body believed the requirement necessary, then AT & T could **[**89]** not have been acting in bad faith when it argued that the tariff was necessary. The *Litton* court specifically addressed this contention:

> AT & T claims that certain FCC proceedings occurring prior to the adoption of certification standard regulations had the effect of placing the FCC's imprimatur upon the PCA requirement. See *Telerent Leasing Corp., 4 F.C.C.2d 204 (1974)*, aff'd sub nom. *North Carolina Utilities Comm'n v. FCC, 537 F.2d 787 (4th Cir.)* *cert. denied*, *429 U.S. 1027, 97 S. Ct. 651, 50 L. Ed. 2d 631, 97 S. Ct. 652 (1976)*; *AT & T-Mebane Home Telephone Co., 53 F.C.C.2d 473 (1975)*. It is difficult to see how either of these decisions can be read to qualify the FCC's earlier, explicit statement that it was not approving the proposed tariffs, however. *Telerent* was a declaratory judgment order expressing the Commission's disapproval of a state utility commission's proposed rule that would absolutely prohibit the interconnection of customer-provided equipment on any intrastate portion of the telephone network. The Commission held that the proposed rule was contrary to the thrust of *Carterfone* and recently instituted proceedings considering the **[**90]** possibility of liberalizing the post-Carterfone tariffs. In *Mebane* a local telephone company sought exemption from so much of the post-Carterfone tariffs as allowed interconnection of customer-provided equipment. Although the Commission upon its own motion granted the local carrier an opportunity to demonstrate the need for a waiver from the tariffs on the basis of economic injury, it specifically ruled that, under *Carterfone*, customers must generally be allowed to provide their own equipment.

Litton, supra, 700 F.2d at 792 n. 12.

AT & T correctly argues that ***HN20***[] the doctrine of collateral estoppel is premised on an "underlying confidence in the correctness of the judgment relied on." *Standefer v. United States, 447 U.S. 10, 23 n. 18, 100 S. Ct. 1999, 2007 n. 18, 64 L. Ed. 2d 689 (1980)*; *Restatement (Second) of Judgments § 29, Comment f*. It contends that FCC rulings after *Carterfone* as well as various other evidence undercuts the *Litton* finding that after *Carterfone* AT & T knew that the PCA tariffs were inconsistent with the mandate of *Carterfone*.

In assessing this contention it is important to specify just what *Litton* held. The crucial passage **[**91]** states:

> The clarity of the Commission's language was such that from AT & T's perspective it had to be clear as a bell, so to speak, that at least as of the 1968 *Carterfone* decision, if not before, it was unreasonable, unjust, and discriminatory to prohibit interconnection of terminal equipment without respect to any harm such devices might cause.

Litton, supra, 700 F.2d at 794. The salient point of this passage is its focus on AT & T's state of mind as opposed to what position the FCC had taken. Through most of the relevant period after *Carterfone* and before the adoption of certification standards, the FCC took a hands-off position regarding the PCA tariff. It explicitly stated that it neither approved nor disapproved this tariff, which AT & T was imposing on its customers.

On several occasions, the FCC arguably went further, and suggested that the PCA tariff was consistent with *Carterfone*. But the importance of such statements must be entirely dependent on what information the FCC had at its disposal when making them. If it assumed, as AT & T continually claimed at the time, that uncontrolled interconnection posed grave dangers to the network, then **[**92]** it could have reasonably believed that the PCA requirement was consistent with *Carterfone*.

However, the *Litton* court found -- and no persuasive evidence has been submitted to controvert this finding -- that the jury could reasonably have concluded that the claim of potential harm to the system was baseless. Certainly, there could be no better **[*583]** evidence of the lack of actual harm than AT & T's own admission that despite thousands of unauthorized interconnections AT & T could document no harm to the network.

Had the FCC known what the *Litton* jury apparently believed -- that there was in fact no actual harm to the network from interconnection -- it might have concluded that the PCA tariffs violated *Carterfone*.

The post-Carterfone rulings only attacked the assertion that *Carterfone* prevented all prohibitions against customer-supplied terminal equipment regardless of whether they were harmful or harmless. They did not suggest that interconnection could be absolutely banned where there was no evidence of harm.

In *AT & T "Foreign Attachment"* *Tariff Revisions, 15 F.C.C.2d 605, 609 (1968)*, *recon. denied*, *18 F.C.C.2d 871 (1969)*, the FCC stated "we **[**93]** were concerned in [*Carterfone*] with the lawfulness of tariff provisions that prohibit a customer from making harmless interconnection of his terminals" with the network. Judging from this formulation of the meaning of *Carterfone*, it seems reasonable to assume that if the FCC had known at the time that the allegation of harm from interconnection was baseless, it would have held that the PCA tariff conflicted with *Carterfone*. Meanwhile, AT & T, which knew of the nonexistence of evidence of harm, did know that the PCA tariff was inconsistent with *Carterfone*. It was on AT & T's knowledge that its liability in *Litton* could reasonably have been based.

I would conclude that the *Litton* decision merits confidence for collateral estoppel purposes, but for the possible unreliability of the later FCC rulings promulgated under Walter Hinchman. I do not believe AT & T has shown that the *Litton* decision was based on a "false premise." But the possibility that Hinchman's rulings were written to set a predicate for antitrust liability and the fact that these rulings were relied on by the jury in reaching its verdict strongly suggests that *Litton* should not be given **[**94]** preclusive effect in this case.

E. *Miscellaneous Issues*

It is clear that application of collateral estoppel is inappropriate regarding some of the issues for which Glictronix requests it. These issues include the definition of the relevant product market and the findings that AT & T delayed the provision and installation of PCAs, refused to sell inside wiring at all or on a reasonable basis, and delayed making cutovers.

Litigation of the relevant market cannot be precluded because the parties in *Litton* stipulated to this issue rather than litigated it. See *Restatement (Second) of Judgments § 27 comment e*. In *Litton*, there were no findings as to whether AT & T delayed or refused services to Glictronix. Therefore, the litigation of AT & T's conduct toward Glictronix cannot be precluded.

Conclusion

For the foregoing reasons, Glictronix's motion for partial summary judgment is denied in full.

Class Action Certification

HN21[] In order to maintain a class action, a plaintiff must demonstrate compliance with the mandatory requirements of *rule 23(a)*, which provides that:

> *HN22*[] One or more members of a class may sue or be sued as representative parties on behalf of all **[**95]** 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 defense of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

If the initial prerequisites of *Rule 23(a)* are met, plaintiff must additionally meet the requirements of at least one of the three subsections of Rule (b). Glictronix here seeks certification of the proposed class *HN23*[] under *Rule 23(b)(3)*, which provides that an action may proceed as a class action if:

> **[*584]** 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. . . .

Katz v. Carte Blanche Corp., 496 F.2d 747 (3d Cir.), *cert. denied*, *419 U.S. 885, 95 S. Ct. 152, 42 L. Ed. 2d 125 (1974)*; *Young v. Jo-Ann's Nut House, Inc., 1980-81 Trade Cas. (CCH) P 63,746 at 77,790 (D.N.J.1980)*. To support certification, **[**96]** common issues need only predominate; they need not be dispositive of the entire litigation. *State of Illinois v. Harper & Row, 301 F. Supp. 484, 489 (N.D.Ill.1969)*.

HN24[] The burden of demonstrating fulfillment of the conditions outlined in *Rule 23* for maintenance of a class action lies with the moving party. *Katz v. Carte Blanche Corp., supra.* The strength of a plaintiff's case on the merits is not to be considered in determining whether a class should be certified. *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176, 94 S. Ct. 2140, 2151, 40 L. Ed. 2d 732 (1974)*. There is no requirement of a prima facie showing of merit in a class action to support certification. *City of Philadelphia v. American Oil Co., 53 F.R.D. 45, 61 (D.N.J.1971)*; *accord* *Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir.1970)*. However, some analysis of the substantive claims and the essential elements needed to establish those claims is necessary for thorough evaluation of whether the requirements of *Rule 23* have been met. *Chmieleski v. City Products Corp., 71 F.R.D 118, 127 (W.D.Mo.1976)*. Therefore, "a preliminary hearing addressed not to the merits of plaintiff's individual claim but to whether **[**97]** she is asserting a claim which, assuming its merit, will satisfy the requirements of *Rule 23* has never been regarded as violative of the Rule stated in *Eisen. . . ."* *Cobb v. Avon Products, Inc., 71 F.R.D. 652, 654 (W.D.Pa.1976)*.

Having chosen to seek certification under *Rule 23(b)(3)*, Glictronix must satisfy the requirements of that rule and the requirements of *Rule 23(a)(1)-(4)*. AT & T contends that class certification should be denied for four reasons. First, it claims that Glictronix cannot satisfy the *Rule 23(a)(3)* and *(4)* requirements that it can adequately represent a class of competitors and that its claims are typical of the claims of the members of the proposed class. AT & T also asserts that Glictronix has not met the *Rule 23(b)(3)* requirements that common questions predominate over individual question or that a class action is the superior method of adjudicating this controversy. AT & T concedes that Glictronix has met the *Rule 23(a)(1)* numerosity requirement. It addresses the issue of whether there are common questions only in the context of *Rule 23(b)(3)* analysis, and not under *Rule 23(a)(2)*.

A. *Typicality*

AT & T contends that Glictronix claims cannot be typical **[**98]** of those of the proposed class members because Glictronix markets only a few of the numerous varieties of PBXs and key systems marketed by the class members. AT & T states that under current FCC rulings whether or not a PCA will be required turns on the quality and technical characteristics of the equipment and on the quality of each individual installation. Therefore, AT & T contends, the assessment of whether the PCA requirement was reasonable must be individually made for each different type of equipment and each installation. According to this theory, Glictronix's claims, based on its own equipment, cannot be typical of the claims based on other equipment. Whether the existence of an antitrust violation and proof of antitrust injury can be shown by common evidence for the different equipment marketed by the various class members will be addressed later. The question here is merely whether the named plaintiffs claims are typical.

Despite the diversity of types of PBXs and key systems, this equipment has consistently been viewed as a unit. In the *Litton* litigation the relevant market was defined as all PBXs and key systems. No differentiation was made among the various **[*585]** **[**99]** types of PBXs and key systems. Furthermore, AT & T was unable to produce any concrete evidence of harm to the network from any type or brand of terminal equipment. The contention that Glictronix's claims are atypical because of differences in harm to the system is belied by the general lack of evidence of harm, which is documented in AT & T's own internal papers.

In support of its argument, AT & T relies heavily on *Am/Comm Systems, Inc. v. American Tel. & Tel. Co., 101 F.R.D. 317 (E.D.Pa.1984)*, discussed earlier in connection with Glictronix's motion for partial summary judgment. As Glictronix makes clear, the proposed product market in *Am/Comm* included a wide variety of products besides PBXs and key systems including burglar alarms, automatic dialers, and many others. Not surprisingly, the court found the claims of the class representative, which marketed only some of this diverse array of equipment not typical for *Rule 23* analysis. The *Am/Comm* ruling therefore has little bearing on the question of typicality in this case.

Glictronix's claims are typical of those of the class.

B. *Adequacy of Representation*

HN25[] The *Rule 23(a)(4)* requirement that a class representative **[**100]** "fairly and adequately protect the interests of the class," encompasses two inquiries: (1) whether plaintiff's counsel is competent and (2) whether the named plaintiff has "interests antagonistic to those of the class." *Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239, 247 (3d Cir.)*, *cert. denied*, *421 U.S. 1011, 95 S. Ct. 2415, 44 L. Ed. 2d 679 (1975)*. Conceding the competence of plaintiff's counsel, AT & T contends that Glictronix has interests antagonistic to those of other class members.

The basis of Glictronix's claim in this case is that it was foreclosed from a share of the terminal equipment market by AT & T's allegedly illegal anticompetitive conduct. Proof of damages for such loss of a share of the market is measured by lost profits or sales. AT & T contends that where the proposed class members are competitors in the relevant market, the need to assess damages by lost sales or profits places class members in conflict with one another and makes it impossible for the representative plaintiff to adequately represent the other class members.

This was the holding in *Am/Comm*, where Judge Bechtle denied plaintiff's motion for class certification against *AT & T.* ***[**101]*** *Am/Comm, supra, 101 F.R.D., at 321-322*. Other cases in the Third Circuit consistently support the view that ***HN26***[] where the class members are competitors in a limited market, the named plaintiff's attempts to maximize its damage recovery will conflict with the interests of the other class members and class certification should be denied. *Franklin Container Corp. v. International Paper Co*., 1983-2 Trade Cas. P 65,727 at 69,722 (E.D.Pa.1982); *Chestnut Fleet Rentals, Inc. v. Hertz Corp., 72 F.R.D. 541, 544-45 (E.D.Pa.1976)*.

Glictronix tries to distinguish *Chestnut* and *Franklin Container* on the ground that these cases involved "fixed" or "limited" markets which created conflicts among the class members which do not exist here. It implies that the market in this case is practically unlimited and that all the class members can show profits and sales lost to AT & T without anyone of the members ever claiming it would have made particular sales which another member also claims for itself.

There is no basis for Glictronix's attempted distinction between a limited and unlimited market here. The market for terminal equipment is limited just as were the markets in *Franklin Container* **[**102]** and *Chestnut Fleet*. See *Am/Comm, supra, at 321-322*.

Glictronix cites a number of cases in which it claims classes composed of competitors were certified. These cases do not support Glictronix contentions. In some, the fact that the class members were competitors was unrelated to the claims raised. *Philadelphia Electric v. Anaconda American* ***[*586]*** *Brass, 43 F.R.D. 452, 463 (E.D.Pa.1968)*; *Sunrise Toyota, Ltd. v. Toyota Motor Co., 55 F.R.D. 519 (S.D.N.Y.1972)*; *Gold Strike Stamp Co. v. Christensen, 436 F.2d 791 (10th Cir.1970)*. In another, the plaintiff requested class certification only as to the allegations regarding which there was no conflict among the class members. *Hawkins v. Holiday Inns Inc*., 1975-1 Trade Cas. P 60,153 at 65,464 (W.D.Tenn.1975).

Finally, Glictronix invokes *Siegel v. Chicken Delight, Inc., 271 F. Supp. 722 (N.D.Cal.1967)*, where the court stated that class members "whose interests are antagonistic to those of their brethren . . . may by order be excluded from the suit." *Id. at 728*. *Siegel* did not involve claims of lost profits from a lost share of the market. It is unclear from the opinion what type of antagonisms the **[**103]** court contemplated, but certainly they were not the pervasive conflicts which arise in the lost share of the market context. The fact that the court suggested that the antagonisms could be dealt with by excluding some class members indicates that relatively few conflicts were contemplated. This is very different from the lost profit context where one may anticipate that there may be conflicts among or between all of the class members.

At least one case in the Third Circuit suggests that a class representative may be adequate under *rule 23(a)(4)* in a case where class members' claims are based on business not done where there are "objective guidelines for apportioning individual damages among the class members." *Al Barnett & Son v. Outboard Marine Corp., 64 F.R.D. 43, 50-51 (D.Del.1974)*, *aff'd*, *611 F.2d 32 (3d Cir.1979)*.

Glictronix claims its expert's methodology, based on the Competitive Activity Reports compiled by AT & T constitutes just such objective guidelines. While Glictronix's methodology may provide a relatively accurate formula for allocating damages, it certainly will not prevent all conflict among the class members.

The methodology only permits recovery based **[**104]** on applications by class member interconnect companies to AT & T for a PCA. Glictronix's theory is that the interconnect company which got far enough with a customer to request a PCA is the company which would have made the sale in the absence of AT & T's anticompetitive practices. But under this approach, as Glictronix admits, class members which dropped out of the market or delayed entering it because of AT & T's practices would be foreclosed from recovery. Certainly, they would dispute the allocation of damages which would result from Glictronix's methodology.

In addition, while it may be true in most cases that the company which requested a PCA would have made the sale, the theory ignores possible competition among rival interconnect companies which may have gone on prior to the request and which may have been affected by AT & T's anticompetitive practices.

Despite the existence of the Competitive Activity Reports, this remains a "lost profits" case in which class members' interests are adverse to one another. Glictronix cannot adequately represent its rivals in the interconnect business.

C. *Predominance of Common Questions*

HN27[] In order to certify a class under *Rule 23(b)(3)*, **[**105]** the court must find that common issues predominate over individual ones. In an action under *Section 1* of the Sherman Act, a plaintiff must establish (1) an antitrust violation; (2) causation (that plaintiff suffered antitrust "impact" or "injury in fact"), and; (3) the amount of damages. *American Bearing Co., Inc. v. Litton Industries, Inc., 729 F.2d 943, 948 (3d Cir.1984)*. In order for a class to be certified in an antitrust action under *Rule 23(b)(3)*, plaintiff must demonstrate that both the violation and fact of injury can be proved for the entire class by common evidence. The amount of damages can be established individually for each class member. *Bogosian v. Gulf Oil Co., 561 F.2d 434, 454-55 **[*587]** (3d Cir.1977)*, *cert. denied*, *434 U.S. 1086, 98 S. Ct. 1280, 55 L. Ed. 2d 791 (1978)*. AT & T contends that Glictronix cannot establish an antitrust violation or fact of injury by common evidence.

1. *Antitrust Violation*

Glictronix's complaint alleges antitrust violations under both *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*. Under *Section 2*, Glictronix alleges monopolization, attempted monopolization and conspiracy to monopolize. Under both *Sections **[**106]** 1* and *2*, it alleges a combination in restraint of trade among the defendants to institute an illegal tying arrangement. According to Glictronix:

> By enforcing a "tie-in" between the use of telephone terminal equipment provided by Bell and the lack of a need to lease unnecessary and useless PCAs from Bell, defendants violated *15 U.S.C. Sec. 1*.

Plaintiffs Brief in Support of Motion for Class Certification, p. 68.

Defendants allegedly carried out these antitrust violations by requiring the use of PCAs and opposing certification and by undertaking various activities to discourage customers from switching from AT & T to competitors' equipment. These activities allegedly included delaying installation of and improperly installing PCAs, refusing to sell inside wiring or refusing to do so on a reasonable basis, sabotaging inside wiring obtained by plaintiff, subjecting competitors to unfair and expensive cut-over tactics, and disparaging competitors' equipment.

AT & T claims that whether or not its requirement of a PCA constitutes an antitrust violation can only be determined on an individual basis. Under present FCC rulings, a PCA is required for all terminal equipment which **[**107]** either does not meet FCC standards or which was not installed in conformity with FCC standards. Therefore, AT & T reasons, Glictronix would have to establish an antitrust violation as to each class member by individual showing that each member's equipment would not be required under present FCC standards to use a PCA. In effect, AT & T argues that an antitrust violation cannot be established without an assessment of the reasonableness of the PCA requirement as to each class member's equipment.

AT & T's position mischaracterizes Glictronix's claims. To establish an antitrust violation, Glictronix does not need to show that the imposition of a PCA requirement was unreasonable in every case. Rather, Glictronix alleges that by imposing a blanket requirement of a PCA and opposing establishment of a systems of registration standards (under which it would be possible to determine whether or not particular equipment needed a PCA), AT & T sought to monopolize the relevant market and establish an illegal tie-in. ***HN28***[] Proof of unreasonableness is not an element of *Section 2* monopolization claims. *See e.g.* *U.S. v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1703-04, 16 L. Ed. 2d 778* ***[**108]*** *(1966)*. ***HN29***[] Tying arrangements are normally per se *Section 1* violations. *Northern Pacific Ry. Co. v. United States, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. There is no reason to believe this case does not fall within the general rule governing tie-ins. [8] Therefore, contrary to AT & T's suggestion, proof of the unreasonableness of the restraint is not necessary to establish the antitrust violations alleged. Whether AT & T's PCA requirement constituted an antitrust violation is susceptible of common proof. The violation would be established, if at all, by evidence of AT & T's conduct, and not by individualized analysis of the various class members' equipment and installations.

[109]** AT & T contends that Glictronix's claims of anticompetitive activities, such as refusal to sell inside wiring and the like, must **[*588]** necessarily be considered individually and are inherently episodic. However, to establish a violation, Glictronix need not individually establish AT & T's conduct vis-a-vis each class member. It can show a violation by establishing that AT & T engaged in an orchestrated attempt to damage and harass competitors in the interconnect business. It can do so by introducing proof of a pattern of conduct.

2. *Fact of Damage*.

HN30[] Proof of impact is an essential element of an antitrust action and must be provable on a common basis in order for a class to be certified. *See* *Bogosian, supra, 561 F.2d at 454-55*.

To prove impact, a plaintiff must show that he suffered some loss in his business or property and that there is a causal relationship between the antitrust violation and the loss. *Bogosian, supra, 561 F.2d at 454*. Impact is a distinct element of liability, independent of proof of a violation and independent of the matter of individual damages.

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[8] In *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*, the Supreme Court reaffirmed the general per se rule in tie-in cases, but found that it did not apply in the particular circumstances of that case, where the tying arrangements did not restrain trade on the merits by forcing purchases that would not otherwise be made. This case bears little resemblance to *Jefferson Parish*, and the per se rule should apply.

Fact of damage is susceptible of common proof. "There is no reason why proof of the impact cannot **[**110]** be made on a common basis so long as the common proof adequately demonstrates some damage to each individual." *Bogosian, supra, 561 F.2d at 454*.

The *Bogosian* court strongly implies that where damages must be shown on the basis of lost profits, the plaintiff will not be able to show fact of damage through common evidence. *Id. at 455*. But at least concerning the PCA requirement, Glictronix makes a plausible argument that fact of damage can be proved on a common basis.

Based on its experts' affidavits, Glictronix contends that each of the members of the class suffered at least some damages from the PCA requirement in two ways. First, the PCA added significantly to the cost of their equipment and thereby reduced the volume of sales. Second, the class members all lost profits because the added cost of the PCA forced them to lower the prices of their equipment in order to stay competitive with AT & T. While the actual extent of damages may require individualized proof, Glictronix contends that the fact of damage in the form of lower profits on sales made and lost sales can be commonly established for all class members from the existence and effects of the PCA tariff.

AT & **[**111]** T's expert finds two flawed assumptions behind Glictronix's fact of damage analysis. The first is the assumption that but for the PCA tariff, all the class members would have been able to market their equipment without PCAs. According to AT & T, this assumption is proved wrong by the fact that even under present FCC rulings, equipment and installations which do not meet FCC certification standards are obligated to use a PCA. The manufacturers or sellers of equipment still needing a PCA cannot show fact of damage, according to AT & T. I find this argument persuasive. [9]

[112]** Glictronix's second false assumption, according to AT & T, is that each class member would have made more sales and more profits had certification standards replaced the PCA tariff sooner. AT & T's expert Phillips contends that had registration occurred sooner some interconnect companies would have improved their market position and some would have suffered diminution or complete loss of their market shares. Glictronix's expert Pratt agreed in the study he helped create in *Litton* with Phillips' conclusion. Phillips argues from the fact that some companies would have suffered from earlier registration that fact of injury cannot be established on a common basis.

[*589] It appears inevitable that an individualized assessment of the market position of each class member would be necessary to determine whether the member would or would not have increased its actual sales and profits absent the PCA tariff. Similarly, individualized analysis would be necessary to determine whether companies which left the marketed or delayed entering it suffered any damage.

The allegation that the plaintiff class was damaged by the delay in adoption of registration standards is only one of Glictronix's **[**113]** claims. With regard to many of the other claims, fact of damage also cannot be commonly proved. These claims include (1) delay in providing and installing PCAs; (2) refusal to sell inside wiring at all or on a reasonable basis, and; (3) delay in interconnecting competitors' terminal equipment. Proof of fact of damage on each of these claims will require individual investigation as to each class member.

For all the reasons given above, fact of damage cannot be established on a common basis.

D. *Superiority of Class Action*

Rule 23(b)(3) ***HN31***[] requires a plaintiff to prove that a "class action is superior to other available methods for the fair and efficient adjudication of the controversy." The rule also sets out four criteria relevant to the inquiry regarding superiority:

[9] It is conceivable that none of the class members' equipment would need a PCA under the present FCC standards. However, as pointed out by AT & T at oral argument, it would be Glictronix's burden to establish this fact. It has made no effort to do so. In addition, AT & T has specifically alleged that certain of the class members' equipment, such as equipment which cannot prevent power surges, would be required to use a PCA under present FCC standards.

> (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 **[**114]** of a class action.

In applying these criteria in *Am/Comm*, the court determined that a class action was not the superior method for adjudication. It stated:

> (1) The members of the proposed class would presumably want to litigate on their own due to the conflicting interests among the members regarding damages. (2) There is a need for a determination of the reasonableness of the PCA requirement on a product-by-product basis. (3) it is alleged that a number of individual related cases have already been filed against defendants, a factor which weighs against class certification. *Bogus v. American Speech & Hearing Asso., 582 F.2d 277, 278*, [Sic; see p. 290] n. 17 (3d Cir.1978) (citing *Comments of Advisory Committee on Civil Rules, 39 F.R.D. 69, 104)*. And finally, (4) this case could become entirely unmanageable due to individualized proofs of violation and impact. Accordingly, a class action in this case would not be a superior method of adjudication.

Am/Comm Systems, supra, 101 F.R.D., at 323.

The determination concerning superiority is more difficult in this case. As discussed earlier, there was an extremely wide range of products at issue in *Am/Comm* **[**115]** . It was because products other than PBX's and key systems were involved that the court determined that the reasonableness of the PCA had to be assessed on a product-by-product basis. Here there is no such individualized need. Secondly, I am not convinced that members of the proposed class would prefer to litigate on their own. Although there may be conflicts among the members regarding damages, the costs of individually litigating a major antitrust case would lead many members to prefer class treatment. This is particularly true because the denial of Glictronix's motion for partial summary judgment would put Glictronix or any other similarly situated plaintiff to great expense in trying to establish its claims.

On the other hand, other parties have instituted cases similar to this one against AT & T, a factor weighing against class certification because it suggests an interest in individual litigation. *Bogus v. American Speech & Hearing Ass'n., 582 F.2d 277, 290 n. 17 (3d Cir.1978)*. While it is unclear how many cases deal precisely with **[*590]** the issues raised here (see Plaintiff's Reply Brief in Support of Class Certification at 43-44 n. 13), it seems clear that there is **[**116]** litigation in New York and New Jersey on these issues.

Finally, the individual proofs needed to establish fact of injury on all the plaintiff's claims would render this case unmanageable. On balance, I conclude that class treatment is not the superior method of adjudication of this case.

Conclusion

Because of the need for individual proof of fact of injury and the inherent conflicts among class members, the motion for class certification must be denied.

Defendants' attorneys are requested to present a form of order consistent with this opinion.

Monmouth Real Estate Inv. Trust v. Manville Foodland, Inc.

Superior Court of New Jersey, Appellate Division

September 12, 1984, Argued ; October 4, 1984, Decided

A-6187-82T3

Reporter

196 N.J. Super. 262 *; 482 A.2d 186 **; 1984 N.J. Super. LEXIS 1167 ***

MONMOUTH REAL ESTATE INVESTMENT TRUST, D & E REALTY COMPANY AND EDWARD M. NELSON, JR., PLAINTIFFS-APPELLANTS, v. MANVILLE FOODLAND, INC., FOODARAMA SUPERMARKETS, INC., EASTON & HOUSTON CORP., MAYFAIR SUPERMARKETS, INC., NEW LINDEN PRICE RITE, INC., AND STANLEY KAUFELT, DEFENDANTS-RESPONDENTS

Prior History: [*1]** On appeal from the Superior Court, Law Division, Monmouth County.

Core Terms

lease, supermarket, antitrust, premises, tortious interference, proofs, Unclaimed, retail, costs, unreasonable restraint, economic advantage, shopping center

LexisNexis® Headnotes

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN1[] **Standards of Review, Substantial Evidence**

The standard for appellate review of the dismissal of causes of action is whether the evidence, together with the legitimate and favorable inferences therefrom, could sustain a judgment in plaintiffs' favor.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Covenants

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Contracts Law > Contract Interpretation > General Overview

Real Property Law > Fixtures & Improvements > Fixture Characteristics

Real Property Law > Landlord & Tenant > Lease Agreements > Assignments

HN2[] **Types of Contracts, Covenants**

No covenant can be implied in a lease contrary to its express provisions.

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Contracts Law > Contract Interpretation > General Overview

HN3[] Types of Contracts, Lease Agreements

The court construes "unoccupied" in accordance with the accepted meaning in the law of its antonym "occupied," that is, in actual possession and use.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

HN4[] Contract Interpretation, Ambiguities & Contra Proferentem

Where a landlord claims that a limitation on the use of demised premises is imposed by a lease, all doubts with respect thereto arising from the language employed ordinarily are resolved in favor of that construction which least restricts the use.

Torts > ... > Business Relationships > Intentional Interference > Defenses

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Business Relationships > General Overview

Torts > ... > Business Relationships > Intentional Interference > Elements

Torts > ... > Commercial Interference > Contracts > General Overview

Torts > ... > Contracts > Intentional Interference > Elements

HN5[] Intentional Interference, Defenses

An element of a tortious interference with a contractual or business relationship is malice, that is, the intentional doing of a wrongful act without justification or excuse. Malice may be inferred from the absence of just cause or excuse, that competition may be justification and that business loss as a "mere incident" of competition is damnum absque injuria. A tortious interference must be unreasonable.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Torts > ... > Prospective Advantage > Intentional Interference > Elements

Torts > Business Torts > General Overview

Torts > ... > Commercial Interference > Prospective Advantage > General Overview

HN6[] Regulated Practices, Price Fixing & Restraints of Trade

The purchase of a competitor's business premises in order to shut down its business and thereby to reduce competition is not actionable either as a tortious interference with prospective business advantage or as an ***antitrust law*** violation, unless amounting to an unreasonable restraint of trade with a significant tendency to reduce competition.

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**

Only unreasonable restraints of trade and monopolies within relevant geographic and product markets are ***antitrust law*** violations. The "rule of reason" requires the court to weigh all the circumstances of a given case to determine whether the disputed practice constitutes an unreasonable restraint on competition. The court must subject the challenged restraint's impact on competitive conditions to probing examination.

Antitrust & Trade Law > Regulated Practices > Private Actions > State Regulation

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

HN8[] **Private Actions, State Regulation**

The New Jersey Antitrust Act, *N.J. Stat. Ann. § 56:9-1 et seq.*, specifically *N.J. Stat. Ann. § 56:9-10(b)*, establishes an injunctive remedy to any person threatened with loss or damage to "property or business."

Counsel: *Eugene W. Landy* argued the cause for appellants (*Landy & Spector*, attorneys).

Irwin P. Burzynski argued the cause for respondents Manville Foodland, Inc., Foodarama Supermarkets, Inc., and New Linden Price Rite, Inc. (*Hellring, Lindeman, Goldstein & Siegal*, attorneys; *Robert S. Raymar*, on the brief; *Bernard Hellring, Robert S. Raymar* and *Irwin P. Burzynski*, of counsel).

Paul F. Clausen argued the cause for respondents Mayfair Supermarkets, Inc., Easton & Houston Corp., and Stanley Kaufelt (*Greenbaum, Rowe, Smith, Ravin, Davis & Bergstein*, attorneys; *Victor A. Deutch*, of counsel).

Judges: Matthews, Furman and Cohen. The opinion of the court was delivered by Furman, J.A.D.

Opinion by: FURMAN

Opinion

[*265] **[**187]** Plaintiffs appeal from judgment of dismissal on motion, *R. 4:37-2(b)*, at the close of their proofs in a jury trial on the issue of liability only. Defendants cross-appeal from the denial of costs other than taxed costs.

This litigation arises out of a lease assignment followed by a sublease of a 33,000 square foot building in a shopping center on Route **[***2]** 527 in Franklin Township outside the City of New Brunswick. The building was occupied by a supermarket between **[*266]** 1967 and 1981 and is flanked by a **[**188]** separate 10,000 square foot building, which is partitioned for eight satellite stores.

Plaintiffs are Monmouth Real Estate Investment and D & E Realty Company (Monmouth), owners of the shopping center, and Edward M. Nelson, Jr., a customer of the former supermarket. Defendants are Foodarama Supermarkets, Inc. and its wholly owned subsidiaries Manville Foodland, Inc. and New Linden Price Rite, Inc. (Foodarama), who leased the building from Monmouth and operated the supermarket; and Mayfair Supermarkets, Inc., its subsidiary Easton & Houston Corp. (Mayfair), and its chief executive officer Stanley Kaufelt. Foodarama assigned the lease to Mayfair for $ 140,000 in March 1981. Mayfair in turn subleased the building at the same rent to Unclaimed Salvage & Freight, a corporation, in July 1981. Unclaimed Salvage & Freight, which is not a party to this litigation, has maintained a store for the sale of unclaimed goods.

Foodarama's supermarket business declined by 20 percent or more upon the construction by the State **[***3]** of a concrete median divider on Route 527 in the fall of 1979. Pursuant to the lease Foodarama had paid Monmouth overage rentals totaling slightly over $ 40,000 based upon a percentage of gross receipts in excess of eight million dollars per year during the six preceding years. Gross receipts fell below eight million dollars annually thereafter. Meanwhile approvals were granted by the State and the municipality in January and February 1981 for design and construction of a jughandle to provide access to and from the shopping center across Route 527. The jughandle was completed and open for traffic in the late fall of that year.

Mayfair owns a supermarket about half a mile from the former Foodarama supermarket, on the opposite side of Route 527, and in competition with it for several years preceding 1981. Aware of the precipitous fall-off in Foodarama's business and of Foodarama's interest in assigning its lease, Mayfair negotiated with Foodarama for a sublease to it and with a firm referred **[*267]** to in the record as Drug Fair for a sublease, in turn, from it of half the building. Foodarama ceased retail supermarket operation on March 7, 1981 and assigned its lease to Mayfair **[***4]** on March 17, 1981. Mayfair's negotiations with Drug Fair broke off unsuccessfully. The former supermarket premises were closed for retail business from March 7 until about July 15, 1981, when Unclaimed Salvage & Freight opened its store. Foodarama employees were present in the building on a regular basis detaching and removing fixtures and equipment from March until late June 1981.

Monmouth's complaint sought a declaration of rights and obligations under the lease; compensatory damages for breach of the lease against both Foodarama as lessee and Mayfair as assignee of the lease; and compensatory and punitive damages for the intentional tort of tortious interference with prospective economic advantage, primarily against Mayfair. Nelson as co-plaintiff sought an injunction, *N.J.S.A. 56:9-10(b)*, and treble damages, *N.J.S.A. 56:9-12*, against both Foodarama and Mayfair for violation of the New Jersey Antitrust Act, *N.J.S.A. 56:9-1 et seq.*, specifically *N.J.S.A. 56:9-3* and *56:9-4(a)*. A prior antitrust action brought by Monmouth against Foodarama and Mayfair was dismissed in the United States District Court for lack of standing in October 1981. In the litigation **[***5]** before us, a trial judge dismissed the State antitrust claim brought by Monmouth, also for lack of standing. That pretrial ruling is not challenged.

HN1[] The standard for appellate review of the dismissal of the various causes of action is whether the evidence, together with the legitimate and favorable inferences therefrom, could sustain a judgment in any of the plaintiffs' favor, *Dolson v. Anastasia, 55 N.J. 2, 5 (1969)*. By applying that standard we affirm.

Monmouth claims three breaches of its lease to Foodarama: non-occupancy of the building for over 90 days during Foodarama's detachment and removal of fixtures and equipment; **[*268]** use of the building **[**189]** by Unclaimed Salvage & Freight other than for a supermarket; and bad faith and unfair dealing contrary to what it asserts to be an implied covenant. By a plain reading of the lease all three claims are untenable. ***HN2***[] No covenant can be implied in the lease contrary to its express provisions. Nor does Monmouth argue on appeal that a fact issue as to the intent and understanding of the parties remains unresolved. The lease permits assignment "freely" and without the landlord's approval.

Default is provided **[***6]** for under the lease "if the Tenant leaves the leased premises unoccupied for a continuous period of ninety days or more during the term of the lease." Monmouth would construe "unoccupied" as "closed for business" and impose a default based upon the approximately 90-day period of Foodarama's clean-up and removal of fixtures and equipment after its supermarket shutdown. But that provision of the lease must be construed, contrary to Monmouth's construction, in *pari materia* with Paragraph 15, which authorizes the tenant "at any time during the term of this lease" to remove its property, including fixtures and equipment installed by it on the leased premises. *HN3*[] We construe "unoccupied" as Judge Selikoff did below, in accordance with the accepted meaning in the law of its antonym "occupied," that is, in actual possession and use, irrespective whether in retail business use or not.

Under the lease permissible use of the leased premises is restricted to "the operation of a supermarket and drug store and any and all other lawful purposes." Another provision authorizes the landlord to construct satellite stores in the same shopping center but not to permit use of any of them as a supermarket **[***7]** "or any other establishment selling food for off-premises consumption." In the light of the lease restriction against competition with a supermarket and in the light of the lease provision for overage rentals based upon gross receipts from sales exceeding eight million dollars, Monmouth would **[*269]** construe permissible use of the premises as limited to supermarket use. It argues that "any and all other lawful purposes" in the permissible use provision of the lease means "any and all other lawful purpose," incidental to and combined with supermarket use or supermarket and drug store use and that uses not incidental to and combined with supermarket use are barred.

Like Judge Selikoff below, we read no such limitation into the lease provision governing permissible uses. Rather, we construe it as permitting any other lawful use separate from and in lieu of supermarket use, specifically use as a retail store by Unclaimed Salvage & Freight.

In rejecting Monmouth's construction of "any and all other lawful purposes," we apply the rule of construction of leases set forth in *Carteret Properties v. Variety Donuts, Inc., 49 N.J. 116, 127 (1967)*:

> . . . *HN4*[] [W]here a landlord **[***8]** claims that a limitation on the use of demised premises is imposed by a lease, all doubts with respect thereto arising from the language employed ordinarily are resolved in favor of that construction which least restricts the use.

Ingannamorte v. Kings Super Markets, Inc., 55 N.J. 223 (1970) is clearly distinguishable and does not compel a contrary result because of the restriction in the lease involved there that the leased store was "to be used and occupied only for a supermarket."

Monmouth's remaining cause of action sounds in tort for willful, unjustified and unreasonable interference with its lease and with its prospective economic advantage. In view of our affirmance of the holding below that the proofs failed to establish a *prima facie* breach of the lease by any defendant, we need deal only with Monmouth's claim of tortious interference with prospective economic advantage. The jury trial was limited to the issue of liability. Nevertheless, there was sufficient evidence in the record, in our view, to support **[**190]** an inference that Mayfair intended to terminate retail supermarket operation at the leased premises and that such termination, even if **[***9]** another retail store use ensued, would deprive Monmouth of **[*270]** overage rentals under the lease and of enhanced rental value of the satellite stores, economic advantages to be anticipated from a continuing supermarket operation, upon construction of a jughandle on Route 527 to facilitate access to the shopping center.

Our further determination, accordingly, must be whether on Monmouth's proofs, in the light most favorable to them, a jury could have found liability for a tortious interference against Mayfair, as tortious interference with prospective economic advantage is defined in the case law.

According to *Louis Schlesinger Co. v. Rice, 4 N.J. 169, 179-181 (1950)*, *HN5*[] an element of a tortious interference with a contractual or business relationship is malice, that is, the "intentional doing of a wrongful act without justification or excuse." The opinion of Justice Heher recognizes that malice may be inferred from the absence of just cause or excuse, that competition may be justification and that business loss as a "mere incident" of competition is *damnum absque injuria*. In *Glasofer Motors v. Osterlund, Inc., 180 N.J. Super. 6, 26 (App.Div.1981)*, we held **[***10]** that a tortious interference must be "unreasonable." *See also* *Harris v. Perl, 41 N.J. 455, 461 (1964)*; *Louis Kamm, Inc. v. Flink, 113 N.J.L. 582, 588-590* (E. & A. 1934); *O'Connor v. Harms, 111 N.J. Super. 22, 26 (App.Div.1970)*, certif. den. *57 N.J. 137 (1970)*.

Judge Selikoff concluded below that Monmouth's proofs would not support a finding of malice by Mayfair. We agree that no evidence of a deliberate spiteful intent directed towards Monmouth was before the jury. Nor does Monmouth contend to the contrary on appeal. Rather, Monmouth contends that Mayfair's purchase of the assignment of the Foodarama lease was unreasonable and unjustifiable and, thus, through an inference of malice actionable as a tortious interference.

Under the evidence in the light most favorable to Monmouth, the jury as fact finder, by rejecting Mayfair's claim of a real estate investment, might have inferred that Mayfair acquired the Foodarama leasehold for the sole, or at least predominant, **[*271]** purpose of reducing competition with its own supermarket by eliminating a competitor half a mile away. Judge Selikoff categorized the acquisition as a "legitimate business practice." **[***11]** Monmouth cites no authority, and our research reveals none, that ***HN6***[] the purchase of a competitor's business premises in order to shut down its business and thereby to reduce competition is actionable either as a tortious interference with prospective business advantage or as an ***antitrust law*** violation, unless amounting to an unreasonable restraint of trade with a significant tendency to reduce competition. No market data were introduced at trial; no *prima facie* showing of an unreasonable restraint of trade was before the jury.

HN7[] Only unreasonable restraints of trade and monopolies within relevant geographic and product markets are ***antitrust law*** violations. *See* *Pomanowski v. Monmouth Cty. Bd., 89 N.J. 306, 315 (1982)*; *State v. Lawn King, Inc., 84 N.J. 179, 194 (1980)*; *Glasofer Motors v. Osterlund Inc., supra 180 N.J. Super. at 26*; *Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1050* (9 Cir.1983), *cert.* den. *U.S. , 104 S.Ct. 156, 78 L.Ed.2d 144 (1983)*; *N.J.S.A. 56:9-3* and *56:9-4(a)*. As the Supreme Court stated in *Pomanowski:*

> As first framed in *Standard Oil Co. v. United States, 221 U.S. 1, 31* ***[***12]*** *S.Ct. 502, 55 L.Ed. 619 (1911)*, the "rule of reason" requires the court to weigh all the circumstances of a given case to determine whether the disputed practice constitutes an "unreasonable restraint on competition." *State v. Lawn King, Inc., supra, 84 N.J. at 194*. *See also Continental T.V., Inc. v. G.T.E. Sylvania,* **[**191]** *Inc., supra*, 433 *U.S.* [36] at 49, 97 *S.Ct.* [2549] at 2557, 53 *L.Ed.*2d [568] at 580 [(1977)]. The court must subject the challenged restraint's impact on competitive conditions to probing examination. *United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362 (5th Cir.1980)*. *See also* *National Society of Professional Engineers v. United States, 435 U.S. 679, 688, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637, 648 (1978)*. [*89 N.J. at 315*]

We hold that Mayfair's purchase of an assignment of the Foodarama lease, even assuming a predominant purpose to reduce competition by eliminating a competitor, was not *per se* actionable and that Monmouth's proofs fell short of a *prima facie* cause of action for malicious, unreasonable or unjustifiable interference with the prospective benefits of **[***13]** its leasehold interest.

[*272] The surviving count for ***antitrust law*** violations after dismissal of Monmouth's is plaintiff Nelson's as a customer of the former Foodarama supermarket. His sole allegation was inconvenience to him. At the time of trial he shopped at a supermarket two and a half miles away approximately twice a month (without explanation why he did not shop at the Mayfair Supermarket only half a mile from the former Foodarama supermarket).

Judge Selikoff questioned Nelson's standing but went on to rule that his proofs on his antitrust claim for injunctive relief and treble damages were insufficient to withstand defendants' motions for dismissal. We agree with that substantive holding; we would also dismiss Nelson's antitrust cause of action for lack of standing. ***HN8***[] The New Jersey Antitrust Act in *N.J.S.A. 56:9-10(b)* establishes an injunctive remedy to any person threatened with loss or damage to "property or business." Palpably, Nelson suffered or was threatened with no loss or damage to his property or business. He alleged no out-of-pocket loss other than *de minimis* additional travel expenses by automobile.

Nelson's evidential showing of an ***antitrust*** **[***14]** ***law*** violation, without relevant market data, would not have sustained a determination in his favor of an unreasonable restraint of trade with a significant tendency to reduce competition. The proofs failed to meet the rule of reason test recognized and applied in *Northrop, Pomanowski* and other authorities cited *supra*. Further, Nelson failed to specify what injunctive relief he sought and failed to join as a party Unclaimed Salvage & Freight, the sublessee in possession of the premises.

Other issues raised by plaintiffs may be dealt with briefly. Because of our affirmance on other grounds, we need not and do not pass upon the issue of waiver against plaintiff Monmouth, which was decided in favor of defendants below, specifically whether the clause in the lease providing that acceptance of rent would not effect or constitute a waiver should be denied **[*273]** enforcement under *Carteret Properties v. Variety Donuts, Inc., supra 49 N.J. at 129*.

Plaintiffs urge that evaluations of the issues by another trial judge in denying defendants' pretrial motion for summary judgment should be "the law of the case." In our view pronouncements prior to the introduction of **[***15]** any evidence were not binding on the trial judge in the differing procedural context of the motion for dismissal at the close of plaintiffs' proofs.

One other issue raised by plaintiffs, although not as a separate point, is clearly without merit: that reversible error was committed in the exclusion of various documents from evidence, including long outdated and irrelevant market surveys. We sustain Judge Selikoff's exercise of discretion under *Evid.R.* 4.

We reject also defendants' cross-appeals from the discretionary denial of costs other than taxed costs. In our view Judge Selikoff did not abuse his discretion in failing to award costs other than taxed costs to defendants. *See* *Fortugno Realty Co. **[**192]** v. Schiavone-Bonomo Corp., 39 N.J. 382, 396 (1963)*; *Willis v. Dyer, 163 N.J. Super. 152, 165 (App.Div.1978)*.

We affirm on the appeal and cross-appeals.

Haff v. Jewelmont Corp.

United States District Court for the Northern District of California

October 5, 1984

No. C-83-3104-MHP

Reporter

594 F. Supp. 1468 *; 1984 U.S. Dist. LEXIS 22950 **; 1984-2 Trade Cas. (CCH) P66,222

CHARLES E. HAFF, Plaintiff, v. JEWELMONT CORPORATION and MERVYNS, INC., Defendants

Core Terms

antitrust, anti trust law, anticompetitive, buyers, antitrust violation, brokerage, alleged injury, Clayton Act, commissions, defendants', discount, damages, cases, standing to sue, Robinson-Patman Act, manufacturer's, competitors, seller, alleged violation, centers, lower court, target area, duplicative, eliminated, broker, treble damages, lower price, reimbursement, acquisitions, conversion

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Discrimination > Types of Price Discrimination > Brokerage, Commissions & Compensation

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN1[] **Types of Price Discrimination, Brokerage, Commissions & Compensation**

See § 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.S. § 13(c).

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

HN2[] **Robinson-Patman Act, Claims**

The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Commercial Law (UCC) > Sales (Article 2) > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN3[] Clayton Act, Remedies

The procedural or remedial requirements of § 4 of the Clayton Act, *15 U.S.C.S. § 15* gives the right to sue to a person injured by reason of an antitrust violation.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN4[] Private Actions, Standing

Whether one has standing to sue under the antitrust laws is determined by reference to § 4 of the Clayton Act, *15 U.S.C.S. § 15* . This inquiry is not conducted solely in the vacuum of § 4. The question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

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 > General Overview

HN5[] Standing, Clayton Act

See § 4 of the Clayton Act, *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Clayton Act > Scope

Civil Procedure > ... > Justiciability > Standing > General Overview

Torts > ... > Causation > Proximate Cause > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Costs & Attorney Fees > Clayton Act

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Torts > ... > Elements > Causation > General Overview

HN6[] **Antitrust & Trade Law, Clayton Act**

For a variety of reasons not the least of which is the fear that the lure of treble damages and attorney's fees would inundate the courts with spurious antitrust claims, the judiciary has consistently limited the scope of recovery under § 4 of the Clayton Act, *15 U.S.C.S. § 15*. It is well-established that the "by reason of" language of § 4 imposes a standing requirement on private antitrust plaintiffs which requires proof of legal causation, similar to the concept of proximate cause in the law of torts, as a predicate to recovery.

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

HN7[] **Clayton Act, Claims**

An antitrust violation may be expected to cause ripples of harm to flow through the nation's economy; but despite the broad wording of § 4 of the Clayton Act, *15 U.S.C.S. § 15*, there is a point beyond which the wrongdoer should not be held liable. It is reasonable to assume that Congress does not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.

Antitrust & Trade Law > Clayton Act > Claims

Mergers & Acquisitions Law > Antitrust > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN8[] Clayton Act, Claims

For plaintiffs to recover treble damages under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN9[] Private Actions, Remedies

Where an alleged injury is not of the type that the statute is intended to forestall, recovery under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, is unauthorized.

Antitrust & Trade Law > Clayton Act > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Governments > Legislation > Interpretation

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Governments > Federal Government > US Congress

HN10[] Antitrust & Trade Law, Clayton Act

In evaluating whether an alleged injury is "too remote" to confer standing, the court is to look at two factors: (1) the physical and economic nexus between the alleged violation and the harm to the plaintiff; and (2), the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendants' conduct unlawful.

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

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN11[] **Remedies, Damages**

The issue of whether a private antitrust plaintiff may recover treble damages under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, requires the court to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN12[] **Private Actions, Remedies**

There are three factors to be used in exploring the relationship between the plaintiff's harm and the defendants' alleged wrongdoing. First, it must be determined whether the alleged injury is of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN13[] **Private Actions, Remedies**

A second factor to be examined in each case is the directness or indirectness of the asserted injury.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN14[] **Private Actions, Remedies**

A final, somewhat related factor is whether the damages sought would create the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN15[] **Private Actions, Remedies**

Duplicative recovery is contrary to public policy.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN16[] **Private Actions, Standing**

Where a plaintiff is neither a consumer nor a competitor in the market in which trade is restrained, and does not allege whether he or she is a participant in either the seller's or the buyer's market, and the plaintiff fails to allege any marketwide restraint of trade, the plaintiff must be denied standing to sue for the alleged antitrust violation. Though he is injured by reason of defendants' actions, he is not injured by reason of that which makes defendants' actions unlawful.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN17[] **Private Actions, Remedies**

A second reason why a plaintiff can be denied standing is because an award of damages to a plaintiff would implicate the important public policy concern of avoiding the risk of duplicative recoveries.

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > 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 > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > ... > Private Actions > Standing > Robinson-Patman Act

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Robinson-Patman Act > Remedies > General Overview

HN18[] **Remedies, Damages**

An eliminated middleman does not suffer the requisite competitive injury to maintain a private action for treble damages under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, for an alleged violation of § 2(c) of the Robinson-Patman Act, *15 U.S.C.S. § 13*(c)(1970).

Antitrust & Trade Law > ... > Price Discrimination > Types of Price Discrimination > Brokerage, Commissions & Compensation

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN19[] **Types of Price Discrimination, Brokerage, Commissions & Compensation**

The reduction or elimination of a commission or brokerage fee payable by the seller to its own agent to enable the seller to sell at a lower price is not forbidden by § 2(c) of the Robinson-Patman Act, *15 U.S.C.S. § 13(c)*.

Antitrust & Trade Law > Robinson-Patman 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

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

HN20[] **Robinson-Patman Act, Claims**

Even if a defendant's conduct does constitute a violation of § 2(c) of the Robinson-Patman Act, *15 U.S.C.S. § 13*(c), a plaintiff nonetheless cannot recover under § 4 of the Clayton Act, *15 U.S.C.S. § 15*. Where the only specific injury plaintiff sets forth is that he has not been paid commissions due to him, failure to pay these commissions has no conceivable connection with any subsequent violation of the antitrust laws. Only one who is directly injured by a violation of the antitrust laws is entitled to recover damages under *15 U.S.C.S. § 15*. Persons whose only loss is from the interruption or diminution of a profitable relationship with a party directly affected by the violation are held to have been injured only remotely and indirectly.

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN21[] **Private Actions, Purchasers**

The granting of a price reduction following a seller's conversion to a direct selling arrangement does not, without more, constitute a violation of § 2(c) of the Robinson-Patman Act, *15 U.S.C.S. § 13*(c).

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN22[] **Private Actions, Remedies**

Congress does not intend the antitrust laws to provide a remedy in damages for all injuries which might be conceivably traced to an antitrust violation.

Antitrust & Trade Law > Robinson-Patman Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Robinson-Patman Act

HN23[] **Antitrust & Trade Law, Robinson-Patman Act**

Some anti-competitive effect is necessary to maintain an action under *15 U.S.C.S. § 13(c)*. While a plaintiff may suffer an economic loss as a result of a defendant's actions, the non-competitive nature of that loss, however, is fatal to a plaintiff's attempt to maintain an action under *15 U.S.C.S. § 13(c)*.

Counsel: [1]** Christopher R. Lucas, Walnut Creek, California, for Plaintiff.

Stephen C. Tausz and Keith R. Weed, Bronson, Bronson & McKinnon, San Francisco, California, (Mervyns's Inc.).

Ralph C. Alldredge, San Francisco, California, Thomas Darling and Dylan J. McFarland, Gray, Plant, Mooty, Mooty & Bennett, Minneapolis, Minnesota, (Jewelmont Corp.), for Defendant.

Judges: Patel, District Judge.

Opinion by: PATEL

Opinion

[*1469] Patel, District Judge.

This matter is before the court on a motion to dismiss. The issue addressed by the motion is whether plaintiff has standing to sue for alleged violations of § 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, *15 U.S.C. § 13(c) (1970)*, the so-called "brokerage" provision of the Robinson-Patman Act.

I. FACTS

Plaintiff, Charles E. Haff ("Haff"), is engaged in the business of selling jewelry from wholesale manufacturers to retailers on a commission basis. Prior to August 1, 1981 Haff was employed by defendant Jewelmont Corporation ("Jewelmont") as a manufacturer's representative, at a 12% commission rate, to sell Jewelmont's Golden Mist line of jewelry. Haff was given an exclusive territory to sell the Golden Mist line to department **[**2]** stores and retail chain jewelry stores in the western United States. As Jewelmont's manufacturer's representative, Haff developed an account with defendant Mervyn's, Inc. ("Mervyn's"), a large California-based chain department store. Haff earns substantial commissions from Jewelmont's sales to Mervyn's prior to August 1, 1981.

On August 1, 1981, Jewelmont converted the Mervyn's account into a "house account." Under this arrangement, Jewelmont sold directly to Mervyn's, with no commissions payable to Haff. This action breached an alleged oral agreement between Haff and Jewelmont that Jewelmont would not convert any accounts developed by Haff into house accounts. Mervyn's was granted an 18% discount on these direct sales, or 6% more than Haff had been receiving in commissions prior to August 1, 1981. This 18% discount was not made available to other Jewelmont buyers.

Count I of the complaint alleges violations of § 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, *15 **[*1470]** U.S.C. § 13(c) (1970)*, in that the discount to Mervyn's was "in lieu of" brokerage previously paid to Haff. Counts II through V are pendent state claims for conspiracy, intentional interference **[**3]** with business advantage, fraudulent misrepresentation, and negligent misrepresentation.

Jewelmont and Mervyn's have both moved to dismiss the antitrust claim on the ground that Haff does not allege the requisite competitive injury to confer standing under the antitrust laws. [1] In addition, Jewelmont argues that even if Haff does have standing, a manufacturer's conversion from the use of a broker to a direct selling arrangement, at a discount reflecting the elimination of commissions, does not without more constitute a violation of § 2(c).

[4]** Because the court concludes plaintiff lacks antitrust standing, the merits of this § 2(c) argument are not reached except to the extent necessary to resolve the standing issue.

II. DISCUSSION

A. *The Legislative Intent Behind § 2(c)*

Haff claims that the defendants' actions violated the "brokerage" provision of the Robinson-Patman Act, § 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, *15 U.S.C. § 13(c) (1970)*. ***HN1***[] Section 2(c) provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

The legislative history of § 2(c) establishes that **[**5]** the section was primarily designed to prohibit "dummy brokerage" arrangements by which large, institutional buyers would exercise their leverage to demand discounts under the guise of "brokerage." *See* H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15 (1936). As the Supreme Court noted in its most comprehensive analysis of § 2(c):

> ***HN2***[] The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. A lengthy investigation revealed that large chain buyers were obtaining competitive advantages in several ways other than direct price concessions and were thus avoiding the impact of the Clayton Act. One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who are employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act.
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> . . . .
>
> Congress enacted the Robinson-Patman Act to prevent sellers and sellers' brokers **[**6]** from yielding to the economic pressures of a large buying organization by granting unfair preferences in connection with the sale of goods.

FTC v. Henry Broch & Co., 363 U.S. 166, 168-69, 174, 4 L. Ed. 2d 1124, 80 S. Ct. 1158 (1960). By outlawing such indirect price concessions, Congress hoped "to force price discriminations [achieved by manipulation of brokerage fees and discounts] out into the open where they would be subject **[*1471]** to the scrutiny of those interested, particularly competing buyers." *Biddle Purchasing Co. v. FTC, 96 F.2d 687, 692 (2d Cir. 1938)*; *see also* *Allen Pen Co. v. Springfield Photo Mount Co., 653 F.2d 17, 25 (1st Cir. 1981)*.

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[1] Both Jewelmont and Mervyn's also urge dismissal of the pendent state claims, since dismissal of the antitrust claim would leave this court without federal question jurisdiction. Because this court's jurisdiction obviously depends upon resolution of the antitrust standing issue, today's holding, that Haff lacks standing to sue under the antitrust laws, mandates dismissal of the entire complaint. The court does not thereby express any opinion as to the state causes of action.

B. *Antitrust Standing, Antitrust Injury, and § 4 of the Clayton Act*

Sec. 2(c) of the Clayton Act is the *substantive* provision which plaintiff claims establishes his entitlement to relief for an abuse of the brokerage function. Plaintiff confuses this section, which defines the anticompetitive conduct, with ***HN3***[] the procedural or remedial requirements of § 4 of the Clayton Act, *15 U.S.C. § 15* which gives the right to sue to a person injured "by reason of" an antitrust violation. *Cf. Brunswick Corp.* ***[**7]*** *v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)* ("Intermeshing a statutory prohibition against acts that have a potential to cause certain harms with a damage action intended to remedy those harms is not without difficulty.") Whether a party's interests are protected by the antitrust laws is analytically distinct from whether that party has standing to sue under the antitrust laws. As one antitrust scholar has remarked, "Even where there is a violation and an injury to competition, the plaintiff may still not be the 'right' person to complain of these acts." E. Kintner & J. Bauer, *Federal* ***Antitrust Law***, § 30.11, at 663 (1983).

HN4[] Whether one has standing to sue under the antitrust laws is determined by reference to § 4. This inquiry is not conducted solely in the vacuum of § 4. As the Supreme Court has pointed out in its recent efforts to lay down some specific guidelines for determining antitrust standing, "the question requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants and the relationship between them." *Associated General Contractors of California, Inc. v. California State Council of Carpenters* ***[**8]*** *, 459 U.S. 519, 103 S. Ct. 897, 907, 74 L. Ed. 2d 723 (1983)*. *See also Blue Shield of Virginia v. McCready, 457 U.S. 465, 482, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)* ("the injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation") (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 489*). Nevertheless, the inquiry begins with § 4, a provision wholly overlooked by plaintiffs.

The class of persons who may maintain a private action for treble damages under the antitrust laws is broadly defined in ***HN5***[] § 4 of the Clayton Act, *15 U.S.C. § 15*:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

On its face, § 4 seems broad enough "to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust **[**9]** violation." *Associated General, 459 U.S. at 529, 103 S. Ct. at 904*. However, ***HN6***[] for a variety of reasons not the least of which is the fear that the lure of treble damages and attorney's fees would inundate the courts with spurious antitrust claims, the judiciary has consistently limited the scope of recovery under § 4. *Id. at 912* (citing *Illinois Brick Co. v. Illinois, 431 U.S. 720, 745, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977))*. *See also Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292, 1295 (2d Cir. 1971)*. It is by now well-established that the "by reason of" language of § 4 imposes a standing requirement on private antitrust plaintiffs which requires proof of legal causation, similar to the concept of proximate cause in the law of torts, as a predicate to recovery. [2] Berger & **[*1472]** Bernstein, *An Analytical Framework for Antitrust Standing*, 86

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[2] There has been a tremendous amount of confusion among courts and commentators as to the difference, if any, between the terms "antitrust standing" and "antitrust injury." *See, e.g., Ostrofe v. H.S. Crocker Co., Inc*., ("*Ostrofe I*"), *670 F.2d 1378, 1386 & n.23 (9th Cir. 1982)* (noting that the distinction between antitrust standing and antitrust injury is "unclear"), *vacated and remanded*, *460 U.S. 1007, 103 S. Ct. 1244, 75 L. Ed. 2d 475 (1983)* (remanding for reconsideration in light of *Associated General), 740 F.2d 739 (9th Cir. 1984)* ("*Ostrofe II*") (on remand). Many courts, including the Ninth Circuit, have regarded the two as opposite sides of the same coin, and have merged standing analysis with antitrust injury analysis. *See, e.g., Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F.2d 1163, 1167-69* (7th Cir.), *cert. denied*, *440 U.S. 982, 60 L. Ed. 2d 242, 99 S. Ct. 1791 (1979)*; *John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 499-500 (9th Cir. 1977)*; *GAF Corp. v. Circle Floor Co., 463 F.2d 752 (2d Cir. 1972)*, *cert. denied*, *413 U.S. 901, 37 L. Ed. 2d 1045, 93 S. Ct. 3058 (1973)*; *but see* Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term* -- 1977, 77 Colum. L. Rev. 979, 996-97 (1977) (arguing that antitrust injury and antitrust standing are "related, but, nonetheless, disparate doctrines"). The Supreme Court, in *Associated General*, has recently noted that "the focus of the doctrine of 'antitrust standing ' is somewhat different from that of standing as a constitutional doctrine," since "harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury

Yale L.J. 809, 810-11 (1977); *see also* Associated General, 103 S. Ct. at 906-08. As the Supreme Court recently noted:

> ***HN7***[] An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but "despite the broad wording of § 4 there is **[**10]** a point beyond which the wrongdoer should not be held liable." [Citation omitted]. It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property.

McCready, 457 U.S. at 476-77.

[11]** C. *The Evolution of Antitrust Standing*

Although there has been substantial agreement that § 4 imposes a standing requirement on private antitrust plaintiffs, the lower courts have not agreed as to the precise contours of antitrust standing analysis. Absent guidance from the Supreme Court, which has been provided only very recently, the lower courts have developed several different tests for determining antitrust standing. The Ninth Circuit, for example, has for many years applied the so-called "target area" test, under which the plaintiff "must show that he is within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1951)*, *cert. denied*, *342 U.S. 919, 96 L. Ed. 687, 72 S. Ct. 367 (1952)*; *accord, Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 546-47 (5th Cir. 1980)*; *Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 17-18 (1st Cir. 1979)*; *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d at 1295*. This approach focuses on both the directness of the plaintiff's injury and the intention **[**12]** of the antitrust violator to injure the plaintiff: "The rule is that one who is **[*1473]** only *incidentally* injured by a violation of the antitrust laws -- the bystander who was hit but not aimed at -- cannot recover against the violator." *Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 363 (9th Cir. 1955)*.

Both parties to the instant case implicitly assumed in their briefs that the "target area" approach to standing is still the test to be applied by courts in the Ninth Circuit. As discussed *infra*, however, the Supreme Court's recent decisions in *Associated General, 103 S. Ct. at 907-08 n.31* and *McCready, 457 U.S. at 476-79 n.12, 13, 14* and 15, demonstrate that there is little vitality left to the "target area" approach to antitrust standing. The lesson of these most recent cases is that formalistic tests are disfavored and the totality of the circumstances must be considered in light of the principles in these cases. Even this Circuit now disagrees as to its commitment to the "target area" test.

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in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action." *103 S. Ct. at 907 n.31*.

The indiscriminate merging of the two doctrines may sometimes generate analytical confusion; however, the distinction seldom, if ever, makes a practical difference. The primary difference between "antitrust standing" and "antitrust injury" is the point in the proceedings where the plaintiff's right to recover under the antitrust laws is challenged. To say that a plaintiff lacks "standing" is to say that there is no set of facts which could be adduced at trial to show the requisite competitive injury; this decision can be made on a motion to dismiss. To say that a plaintiff has not proved "antitrust injury," on the other hand, is to say that plaintiff has not satisfied the burden of showing that he or she has been injured "by reason of" the antitrust laws. In most cases, this decision cannot be made until after trial. Hence one may have "standing" sufficient to survive a motion to dismiss, yet be unable to prove "antitrust injury" at trial. This may be why the Supreme Court spoke of "antitrust injury" in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*, a case which went to trial, while it spoke of "antitrust standing" in *Blue Shield of Virginia v. McCready, 457 U.S. 465, 477, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*, a case decided on the basis of a motion to dismiss. There is no indication in *Associated General*, that the Court regards the difference between the two concepts as having any practical significance, and therefore this court refers to "antitrust standing" in this case in its present posture. As discussed above, *McCready* and *Associated General* make it clear that antitrust injury must be looked at in order to evaluate antitrust standing.

Compare Parks v. Watson, 716 F.2d 646, 658 (9th Cir. 1983) ("We have used the 'target area ' approach . . . .") with *Ostrofe v. H.S. Crocker Co., Inc*., **[**13]** ("*Ostrofe I*"), 670 F.2d 1378, 1382-83, n.7 (9th Cir. 1982), vacated and remanded, *460 U.S. 1007, 103 S. Ct. 1244, 75 L. Ed. 2d 475 (1983)* (remanding for reconsideration in light of *Associated General*), *Ostrofe v. H.S. Crocker Co., Inc*., ("*Ostrofe II*"), 740 F.2d 739 (9th Cir. 1984) (on remand). [3]

[14]** Other circuits have focused exclusively on the directness of the injury, *see, e.g.,* Reibert v. Atlantic Richfield Co., 471 F.2d 727, 731 (10th Cir. 1973), while still others have looked to see whether the injury is "arguably within the zone of interests protected by the antitrust laws." Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1151-52 (6th Cir. 1975). More recently, the Third Circuit adopted a "balance of factors" test which combines the direct injury test with a policy analysis. Bravman v. Bassett Furniture Industries, Inc., 552 F.2d 90, 99-100 (3d Cir. 1977).

Only recently has the Supreme Court attempted to provide some guidance to the lower courts as to the factors to be examined in determining whether a given plaintiff's injury is sufficiently related to an antitrust violation to confer a private cause of action under the antitrust laws. Beginning with Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977), which clearly imposed a competitive injury requirement on all private antitrust suits, and continuing with McCready, 457 U.S. at 465 (1982) and Associated General, 459 U.S. 519, 103 S. Ct. at 897 (1983), **[**15]** the Supreme Court has refined the various tests employed by the lower courts and adopted a unitary, more flexible approach to antitrust standing.

Brunswick involved a claim by certain operators of bowling alleys that Brunswick **[*1474]** Corp.'s acquisition of competing bowling centers violated § 7 of the Clayton Act, since "because of its size, [Brunswick] had the capacity to lessen competition in the markets it had entered by driving smaller competitors out of business." 429 U.S. at 481. Plaintiffs alleged lost profits on the theory that if Brunswick had not merged with the local bowling centers, these centers would have gone out of business and plaintiffs' profits would therefore have been greater. *Id*.

In holding that § 4 did not allow private damage suits for such injury, the Court clearly related recovery under § 4 to proof of competitive injury:

> While respondents' loss occurred "by reason of" the unlawful acquisitions, it did not occur "by reason of" that which made the acquisitions unlawful. . . . ***HN8***[] For plaintiffs to recover treble damages [under § 4] on account of § 7 violations, they must prove more than injury causally linked to an illegal presence **[**16]** in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended

[3] Despite the clear disfavor shown by the Supreme Court for these formalistic tests and the adoption of a multifactor test, despite the application of such a test just eight days earlier in Chelson v. Oregonian Publishing Co., 715 F.2d 1368 (9th Cir. 1983) and despite its acceptance by the Circuit once again in Solinger v. A. & M. Records, Inc., 718 F.2d 298 (9th Cir. 1983), another panel of this Circuit proceeded to use the "target area" test saying that:

> If no clear answer emerges [from this analysis] we must determine standing by balancing competing policy interests, principally those of effective enforcement of the antitrust laws on the one hand and avoiding vexatious litigation and excessive liability on the other. Parks v. Watson, 716 F.2d 646, 659 (9th Cir. 1983) citing *Ostrofe I* and *Associated General*.

Now apparently in *Ostrofe II* some form of the *Associated General* analysis has been adopted. *Ostrofe II* placed particular emphasis on McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540. Curiously, under the "target area" approach it is difficult to see how plaintiff McCready could have survived a standing challenge. She was not a direct target; the targets were the psychologists. Unless the "target area" was defined without perimeters, *McCready* would find herself out of court in "target area" jurisdictions.

In any event, it makes no difference to the outcome of this case whether we employ the "target area" approach or the multifactor approach of *Associated General*, since even under the "target area" test it is clear that Haff, being a competitor of neither Jewelmont nor Mervyn's, is not within "that area of the economy which is endangered by a breakdown of competitive conditions." Conference of Studio Unions v. Loew's, Inc., 193 F.2d at 54-55. Moreover, though Haff has certainly been "hit," there is no allegation that he has been "aimed at." *See* Karseal Corp. v. Richfield Oil Corp., 221 F.2d at 363-64.

> 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*.

429 U.S. at 488-89 (emphasis added). The Court pointed out that plaintiffs' injury -- the loss of income which would have accrued had the acquired centers gone bankrupt -- was completely unrelated to the potential anti-competitive effects which made the merger unlawful under § 7:

> Respondents would have suffered the identical "loss" -- but no compensable injury -- had the acquired centers instead obtained refinancing or been purchased by "shallow pocket" parents . . . Conversely, had petitioner acquired thriving centers -- acquisitions at least as violative of § 7 as the instant acquisitions -- respondents would not have lost any income that they otherwise would have received.

429 U.S. at 487 & n.12. ***HN9***[] Since the alleged injury was not of "the type that the statute was intended to forestall," 429 U.S. at 487-88 (quoting **[**17]** *Wyandotte Co. v. United States, 389 U.S. 191, 202, 19 L. Ed. 2d 407, 88 S. Ct. 379 (1967))*, recovery under § 4 was unauthorized.

The Court expanded on this theme in *McCready, 457 U.S. 465, 73 L. Ed. 2d 149, 102 S. Ct. 2540*, and in so doing took an important step in clarifying antitrust standing analysis. *McCready* involved a claim by a group health plan subscriber that she had been injured by a conspiracy between Blue Shield and an organization of Virginia psychiatrists to restrain competition in the psychotherapy market. The health plan allowed reimbursement for services performed by psychiatrists, but denied reimbursement for comparable work performed by psychologists unless such claims were billed to a physician. Plaintiff was thus faced with a "Hobson's choice" in that she was compelled to choose between visiting a psychologist and forfeiting reimbursement under the plan, or receiving reimbursement by foregoing treatment by the practitioner of her choice. 457 U.S. at 483.

The Court, examining the record on a motion to dismiss, held that the plaintiff had standing to sue under § 4 for the alleged violation. ***HN10***[] In evaluating whether the alleged injury was "too remote" **[**18]** to confer standing, quoting *Illinois Brick Co. v. Illinois, 431 U.S. 720, 728 n.7, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, the Court looked at two factors: "(1) the physical and economic nexus between the alleged violation and the harm to the plaintiff; and (2), the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendants' conduct unlawful. . . ." *McCready, 457 U.S. at 477-78*. [4]

[*1475] With regard to the first factor, the Court **[**19]** found that plaintiff's alleged injury was an integral aspect of the conspiracy, since the denial of reimbursement to consumers was the "very means by which it is alleged that Blue Shield sought to achieve its illegal ends." 457 U.S. at 479. The Court rejected defendants' argument that only participants in the group health care market -- in other words, competitors of the defendants -- had standing to sue.

With regard to the second factor, the Court concluded that McCready's alleged injury was "inextricably intertwined" with the injury the alleged conspirators sought to inflict on psychologists and the psychotherapy market. Quoting from *Brunswick*, the Court found that McCready's alleged injury fell squarely within the area of congressional concern in passing § 1 of the Sherman Act, and therefore "flowed from that which [made] defendants' acts unlawful." 457 U.S. at 484, quoting *Brunswick, 429 U.S. at 489*.

The Court's most recent explication of antitrust standing principles is found in *Associated General. Associated General* does not represent a departure from *McCready*. It merely amplifies upon the considerations spelled out in *McCready* and gives further direction **[**20]** to the lower courts. Once again the Supreme Court discouraged the use of a formalistic test and emphasized the need for a case-by-case analysis. The court denied standing to plaintiff unions (the "Union") which alleged that an employer's association had coerced certain third parties to enter into

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[4] The Court specifically refused to consider the propriety of any of the various tests employed by the lower courts to determine antitrust standing: "We have no occasion here to evaluate the relative utility of any of these possibly conflicting approaches toward the problem of remote antitrust injury." 457 U.S. at 476 n.12. As discussed infra, however, the Court in *Associated General* resolved the "conflicting approaches" of the circuits by adopting its own unitary, multifactor analysis.

business relations with nonunion firms, in violation of § 1 of the Sherman Act. The Union alleged that this coercion adversely affected the trade of certain unionized firms, and thus restrained the Union's business activities.

In discussing § 4 of the Clayton Act, the Court stated that ***HN11***[] the issue of whether a private antitrust plaintiff may recover treble damages under § 4 "requires us to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *103 S. Ct. at 907*. Observing that the various tests employed by the lower courts for determining standing "may lead to contradictory and inconsistent results," *id. at 907-08 n.33*, the Court substituted a flexible, multifactor analysis in an attempt to bring some coherence to the complicated area of antitrust standing.

HN12[] The Court discussed three factors to be used in exploring the relationship **[**21]** between the plaintiff's harm and the defendants' alleged wrongdoing. First, it must be determined whether the alleged injury "was of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws." *Id. at 909*, *citing McCready, 102 S. Ct. at 2550*, and *Brunswick, 429 U.S. at 488-89*. In applying this factor to the case at hand, the Court noted that the antitrust laws were enacted for the protection of competition, and, in contrast to the health plan subscriber in *McCready*, "the Union was neither a consumer nor a competitor in the market in which trade was restrained . . . Moreover, it has not even alleged any marketwide restraint of trade." *103 S. Ct. at 909* & n.40. The Court further distinguished *McCready* on the ground that the Union's alleged injury was not "inextricably intertwined" with the competitive restraint giving rise to the antitrust violation, since "it [was] not clear whether the Union's interests would be served or disserved by enhanced competition in the market." *Id*. [5]

[22]** ***HN13***[]

[*1476] A second factor to be examined in each case is the "directness or indirectness of the asserted injury." *Id. at 910*. In contrast to the consumer's injury in *McCready*, which was a direct result of the alleged conspiracy between Blue Shield and the psychiatric organization, the Union's alleged injuries "were only an indirect result of whatever harm may have been suffered by 'certain' contractors and subcontractors." *Id*. Moreover, because of the absence of specific allegations in the complaint demonstrating the causal connection between the Union's injuries and the alleged group boycott, the Court found that the Union's damages claim was "highly speculative." *Id. at 911*.

HN14[] A final, somewhat related factor is whether the damages sought would create "the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Id. at 912*, citing *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)* and *Illinois Brick Co. v. Illinois, 431 U.S. 720, 737-38, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*. The Court found that the

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[5] The Ninth Circuit, in the recent case of *Chelson v. Oregonian Publishing Co., 715 F.2d at 1371*, suggested in dicta that whether an antitrust plaintiff's interests "would be served or disserved by enhanced competition in the market" is a factor to be examined in each case under the analysis set forth in *Associated General. Chelson* involved an antitrust action brought by certain news dealers who alleged that defendant newspaper publisher had violated the Sherman Act by selling newspapers to dealers on the condition that they refuse to deal with the publisher's competitor. Although the Ninth Circuit remanded for determination of further facts, and hence did not directly decide the issue, some of the court's language could be construed to mean that a private antitrust plaintiff who is neither a consumer nor a competitor in the relevant market would have standing under *Associated General* provided his or her interests "would be served by enhanced competition in that market." *Id*.

This court does not attach much significance to this language. Many individuals benefit from increased competition in a given market, but this has never been enough to confer standing. Neither *Associated General* nor *Chelson* stands for a rule that any person, no matter how tangentially he or she might benefit from increased competition in a given market, has standing to complain of an antitrust violation. Rather, if any rule emerges from *Associated General*, it is that only consumers or competitors in a relevant market who are injured "by reason of" an antitrust violation have standing to sue under § 4.

Actually this language appears to come from *Associated General's* analysis of the plaintiff union which, it noted, was neither a competitor nor a consumer. The Court noted in passing that it was not clear how the interest of the union would be served by increased competition. This made it all the more clear that the union's injury, if any, was not the result of any anti-competitive conduct contemplated by the antitrust laws, but rather was the result of its labor interest protected by the labor laws.

Union's complaint, if allowed to stand, **[**23]** would burden the district court with the task "of identifying damages and apportioning them among directly victimized contractors and subcontractors and indirectly affected employees and union entities." *103 S. Ct. at 912*. The difficulty of such apportionment created a risk of ***HN15***[] duplicative recovery, which is contrary to public policy. *Id. at 911-12*.

D. *The Application of Current Antitrust Standing Analysis to the Facts of the Present Case*

When the facts of the present case are examined in light of the principles developed in *Brunswick, McCready* and *Associated General*, there can be no doubt that the complaint must be dismissed for failure to state a claim upon which relief may be granted. Although Haff's injury is certainly a direct consequence of defendants' alleged anti-competitive conduct, thus satisfying one of the criteria set forth in *Associated General* and earlier antitrust standing cases, [6] the nature of Haff's injury is completely independent of any antitrust violation. Hence his injury is not of the type Congress sought to prevent in allowing private actions under the antitrust laws. Moreover, because Haff's alleged damages overlap whatever damages **[**24]** might be claimed by injured competitors of Mervyn's, there is a risk of duplicative recovery which counsels against allowing this action to proceed.

[*1477] 1. *The Nature of Haff's Alleged Injury*

Haff claims that he has lost substantial commissions as a result of Jewelmont's conversion of the Mervyn's account into a "house account." The complaint alleges that not only did this action breach an oral agreement **[**25]** between Haff and Jewelmont, but the subsequent 18% discount to Mervyn's is said to violate § 2(c) since it constitutes a discount "in lieu of" brokerage previously paid to Haff.

The fact of the matter, however, is that Haff's injury -- lost commissions -- has nothing whatsoever to do with the alleged antitrust violation, and hence is not "of a type that Congress sought to redress in providing a private remedy for violations of the antitrust laws." *Associated General, 103 S. Ct. at 909*, citing *McCready, 457 U.S. at 483*, and *Brunswick, 429 U.S. at 488-89*. To illustrate this point, the injury to Haff would have been precisely the same if Jewelmont had converted *all* of its accounts to "in-house" accounts and had not granted preferential treatment to Mervyn's. Haff would still have lost his commissions, but there would have been no violation of § 2(c). *See FTC v. Henry Broch & Co., 363 U.S. 166, 176, 4 L. Ed. 2d 1124, 80 S. Ct. 1158 (1960)* (stating in dicta that a price reduction based upon savings in brokerage expenses does not violate § 2(c) if given to all customers). To further illustrate the independence of Haff's injury and the injury to competition which is **[**26]** the gravamen of § 2(c) violation (or of *any* antitrust violation, for that matter), if Jewelmont had *not* converted the Mervyn's account but had instead paid Mervyn's a disguised rebate, Haff would not have been injured at all, yet there would still be a violation of § 2(c). This analysis is precisely the same as in *Brunswick*, where the Court noted that plaintiffs' alleged injury -- the loss of profits which would have been earned had the acquired bowling centers gone bankrupt -- was completely unrelated to the potential anticompetitive effects which made the "deep-pocket" merger unlawful under § 7 of the Clayton Act. This is reinforced by the reasoning in *Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F.2d 1163, 1169* (7th Cir.), *cert. denied*, *440 U.S. 982, 60 L. Ed. 2d 242, 99 S. Ct. 1791 (1979)*, where the Seventh Circuit held that an exclusive distributor did not have standing to sue regarding a 5% discount paid directly to favored buyers and charged back to the distributor, since "the defendant's anticompetitive action, the 5 percent rebate to chain stores, would have been equally anticompetitive if plaintiff had not been required to absorb it."

HN16[] Haff, like the **[**27]** Union in *Associated General* "was neither a consumer nor a competitor in the market in which trade was restrained." *Associated General, 103 S. Ct. at 909*. Haff has not alleged, nor could he allege, that he is a participant in either the seller's (Jewelmont) or the buyer's (Mervyn's) market. Moreover, Haff "has not even alleged any marketwide restraint of trade." *Id. at 909 n.40*. [7] For this reason alone, Haff must be denied

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[6] In discussing the factors to be examined in determining whether a given plaintiff has standing to sue under § 4, the Court in *Associated General* did not attempt to rank these factors in terms of their relative importance. However, this court is of the opinion that the directness of a plaintiff's injury is a far less salient variable than the relationship between the injury and the antitrust violation. Not only is this suggested by the manner in which these factors were discussed in *Associated General*, but it is also suggested by the Court's reasoning in *Brunswick* and *McCready*.

standing to sue for the alleged antitrust violation. Though he may have been injured "by reason of" defendants' actions, he was not injured "by reason of" that which made defendants' actions unlawful. **[*1478]** *See Brunswick, 429 U.S. at 489*.

[28]** 2. *Risk of Duplicative Recovery*

HN17[] A second reason why Haff must be denied standing in this case is because an award of damages to Haff would implicate the important public policy concern of avoiding the risk of duplicative recoveries. *Associated General, 103 S. Ct. at 912*; *see also Illinois Brick Co. v. Illinois, 431 U.S. 720, 737, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*; *Hawaii v. Standard Oil Co., 405 U.S. 251, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972)*. This is due to the fact that any recovery by Haff would significantly, if not completely, duplicate actual damages claimed in future actions by direct competitors of Mervyn's under § 2(a) of the Robinson-Patman Act, [8] since Haff's lost commissions (12%) constitute a substantial portion of the price determination (18%) allegedly allowed to Mervyn's. Were we to allow Haff to maintain this action, Jewelmont would be exposed to the "risk of multiple liability" from future § 2(a) lawsuits. *Illinois Brick, 431 U.S. at 737 n.18*.

[29]** E. *Prior § 2(c) Standing Cases*

Today's holding, that Haff lacks standing to sue under the antitrust laws for the alleged violation of § 2(c), is consistent with every single case which has previously addressed this issue. *See, Larry R. George Sales Co. v. Cool Attic Corp., 587 F.2d 266, 270-72 (5th Cir. 1979)*; *J.F. Reed Co., Inc., et al. v. K-Mart Corp.*, 1982-1 Trade Cases PP 64,499-500 (E.D. Mich. 1981); *Green Bay Packaging, Inc. v. Hoganson & Associates, Inc., 362 F. Supp. 78, 82 (N.D. Ill. 1973)*; *Robinson v. Stanley Home Products, Inc., 178 F. Supp. 230 (D. Mass. 1959)*, *aff'd*, *272 F.2d 601, 603-04 (1st Cir. 1959)*. These cases all stand for the proposition that ***HN18***[] an eliminated middleman has not suffered the requisite competitive injury to maintain a private action for treble damages under § 4 for an alleged violation of § 2(c) of the Robinson-Patman Act.

Robinson v. Stanley Home Products, Inc., is squarely on point. Plaintiff was a manufacturer's representative with an exclusive territory in the New England area to sell defendant's products. After the representative had secured two orders from a large buyer, the seller terminated him and dealt **[**30]** directly with the buyer. As in the present case, the plaintiff alleged that the price paid by the buyer for the direct sales was discriminatory. The district court held that plaintiff had failed to state a claim under § 2(c): ***HN19***[] "The reduction or elimination of a commission or brokerage fee payable by the seller to its own agent to enable the seller to sell at a lower price is not forbidden by [§

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[7] Like the Union's in *Associated General*, it is also unclear whether Haff's interests would be served or disserved by increased competition in either the seller's (Jewelmont) or the buyer's (Mervyn's) market. If, for example, Jewelmont were the sole seller of jewelry, it could presumably charge a higher price for its products reflecting its monopoly power. Whether this would benefit Haff, as manufacturer's representative earning a 12% commission on all sales, would clearly depend upon the elasticity of demand for jewelry in the applicable price range. If a 10% price increase generated a decrease in jewelry sales of more than 10%, Jewelmont's total revenues, and hence Haff's commissions, would decline. Conversely, if the same 10% price increase caused *less* than a 10% decline in volume, Haff's commissions would increase. A similar result would obtain were Mervyn's the sole buyer of jewelry, and it attempted to exercise its monopsony power to lower the market price of jewelry. Unlike the health plan subscriber in *McCready, 457 U.S. at 484*, Haff's alleged injury is not "inextricably intertwined" with the competitive restraint giving rise to the § 2(c) violation, since the extent to which Haff would benefit or suffer from increased competition is unclear.

[8] Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, *15 U.S.C. § 13(a) (1970)*, provides, in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . 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. . . .

2(c)]." 178 F. Supp. at 232. The court went on to note that HN20[] even if defendants' conduct did constitute a violation of § 2(c), plaintiff nonetheless could not recover under § 4. The court's reasoning is persuasive:

> The only specific injury [plaintiff] sets forth is that he has not been paid commissions due to him . . . Failure to pay these commissions would have no conceivable connection with any subsequent violation of the antitrust laws. . . .
>
> Only one who has been directly injured by a violation of the antitrust laws is entitled to recover damages under § 15. Persons whose only loss is from the interruption or diminution of a profitable relationship with a party directly affected by the violation have been held to have been injured only remotely and indirectly. [Citations **[**31]** and footnote omitted].
>
> It is difficult to see how in this case the claimed injury could be considered **[*1479]** the direct result of the alleged violation. Assuming that Plura sold cups to Stanley at a lower price than it charged competitors of Stanley, this price differential was not the cause of plaintiff's loss of his commission . . . If under his agreement with Plura plaintiff was entitled to the exclusive right to sell to Stanley or was entitled to commissions on all sales to Stanley even though he played no part in them, then his injury was caused by Plura's breach of contract, or possibly by wrongful interference by Stanley with his contractual relationship with Plura. The lower price allowed to Stanley by Plura may have been a source of injury to some competitor of Stanley. It did not cause plaintiff's injury. The fact that elimination of plaintiff's commission may have been economically a condition precedent to the granting of a lower price by Plura does not make the failure to pay that commission a result of the lower price.

Id. at 233.

The First Circuit affirmed, agreeing that HN21[] the granting of a price reduction following a seller's conversion to a direct **[**32]** selling arrangement does not, without more, constitute a violation of § 2(c). 272 F.2d at 603-04. *Robinson* was cited with approval by the Supreme Court in FTC v. Henry Broch & Co., Inc., 363 U.S. at 176 n.18 (1960).

Similarly, in *Larry R. George Sales Co. v. Cool Attic Corp*., plaintiff, a manufacturer's representative for a producer of attic fans, alleged that defendant had violated § 2(c) by paying a commission to a broker under the buyer's control instead of to plaintiff. Relying upon *Robinson* and the Ninth Circuit's "target area" standing test, the Fifth Circuit held that the eliminated manufacturer's representative lacked standing to sue under the antitrust laws since his alleged injury was not competitive in nature:

> The alleged anti-competitive conduct of Defendants was "targeted" at the attic fan and ventilator industry. The alleged illegality on the part of Defendant Cool Attic, even if proved, would have anti-competitive effect only upon that industry. The Plaintiff George would be damaged, if at all, by the ripple effects of the antitrust violation alleged. HN22[] Congress did not intend the antitrust laws to provide a remedy in damages for all injuries **[**33]** which might be conceivably traced to an antitrust violation.
> . . . .
>
> This Court is in agreement with Judge Singleton's holding in Computer Statistics, Inc. v. Blair, 418 F. Supp. 1339 (S.D. Tex. 1976), that HN23[] some anti-competitive effect is necessary to maintain an action under 15 U.S.C. § 13(c) . . . Only if Plaintiff was in the same business and in competition with S.S. Kresge Co. or the Defendants would he have standing under 15 U.S.C. § 15 . . . Like the Plaintiff in *Robinson v. Stanley Home Products*, Plaintiff George may well have suffered an economic loss as a result of Defendant's actions. The non-competitive nature of that loss, however, is fatal to George's attempt to maintain an action under 15 U.S.C. § 13(c).

587 F.2d at 272.

These cases, though decided before *Brunswick, McCready* and *Associated General*, are consistent with them. This court finds no case holding that a broker or manufacturer's representative eliminated by conversion to direct selling has standing to sue for an alleged violation of § 2(c). Accordingly, under both the general standards announced by the Supreme Court and the specific cases discussed above, Haff lacks standing **[**34]** to bring this action. Accordingly,

IT IS HEREBY ORDERED that the complaint be DISMISSED with prejudice in its entirety.

End of Document

Souza v. Estate of Bishop

United States District Court for the District of Hawaii

October 5, 1984

Civil No. 79-0339

Reporter

594 F. Supp. 1480 *; 1984 U.S. Dist. LEXIS 22961 **; 1985-1 Trade Cas. (CCH) P66,397

ALBERT SOUZA, et al., Plaintiffs, v. ESTATE OF BERNICE PAUAHI BISHOP, et al., Defendants, and OLITA MERSEBERG, et al., Indispensable Parties

Core Terms

lease, landowners, standardization, competitors, developers, monopolize, houses, own land, Sherman Act, tying arrangement, monopoly power, monopoly, unfair, tied product, residential, antitrust, homeowner, practices, pendent jurisdiction, condemned, tying product, defendants', plaintiffs', conspiracy, ownership, commerce, dealings, courts, prices, rents

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] Antitrust & Trade Law, Sherman Act

15 U.S.C.S. § 2 reads every person who shall monopolize any part of the trade or commerce among the several states shall be deemed guilty of a misdemeanor.

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 > State Regulation

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > State Regulation

HN2[] Monopolies & Monopolization, Actual Monopolization

See Hawaii Rev. Stat. § 480-9.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Antitrust & Trade Law, Sherman Act

So far as the Sherman Act is concerned, the words "trade or commerce between the several States" would seem to exclude land because land obviously cannot be a part of the trade or commerce between the "several States."

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN4[] Public Enforcement, State Civil Actions

The Hawaii antitrust statute forbids the monopolization of trade or commerce in any "commodity." In common parlance the word "commodity" is not used to describe real estate, and the dictionaries, both general and legal, defining "commodity" use the words "personal" and "movable" and do not use the term "real estate".

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN5[] Public Enforcement, State Civil Actions

The Hawaii Legislature defines the word "commodity" to include "any other business." *Hawaii Rev. Stat. § 480-1(1)*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Real Property Law > Ownership & Transfer > Public Entities

HN6[] Monopolies & Monopolization, Actual Monopolization

An owner of land has monopoly power over his land. He may charge for it what he will or withhold it from the market if he so desires. He is under no compulsion to use the land for the public benefit or sell it at a price that someone can afford to pay. It is obvious that the ownership of land is not in itself illegal despite the monopoly power that goes with it.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

HN7[] Monopolies & Monopolization, Actual Monopolization

Mere size does not make a monopoly illegal.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Real Property Law > Ownership & Transfer > Public Entities

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] Monopolies & Monopolization, Attempts to Monopolize

Monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under 15 U.S.C.S. § 2 even though it remains unexercised. For § 2 of the Act is aimed, inter alia, at the acquisition or retention of effective market control.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN9[] Monopolies & Monopolization, Actual Monopolization

For an antitrust violation, size does not determine guilt; that there must be some "exclusion" of competitors; that the growth must be something else than "natural" or "normal"; that there must be a "wrongful intent," or some other specific intent; or that some "unduly" coercive means must be used.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN10[] Actual Monopolization, Anticompetitive & Predatory Practices

The use of monopoly power to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] Antitrust & Trade Law, Sherman Act

The Sherman Act does not make mere size nor continued exercise of its lawful power an offense when that size and power have been obtained by lawful means and developed by natural growth, absent the manifest purpose or intent to exclude competition.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Real Property Law > Landlord & Tenant > Lease Agreements > Residential Leases

HN12[] Summary Judgment, Burdens of Proof

On a motion for summary judgment after there has been extensive discovery, the plaintiffs must be able to support their theories by showing some evidence on which a fact finding might be based.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN13[] Monopolies & Monopolization, Conspiracy to Monopolize

The plaintiff need not show explicit contractual agreements in order to prove a conspiracy, but it must demonstrate more than that the alleged co-conspirators engaged in a course of conduct, even if conscious of each other's parallel behavior, in which they would have engaged regardless of the others' conduct.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN14[] Tying Arrangements, Sherman Act Violations

A court, in considering a tying case, should regard the injury to competition in the tied product as a factor.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Scope

HN15[] Regulated Practices, Trade Practices & Unfair Competition

Hawaii Rev. Stat. § 480-2 provides that unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN16[] Public Enforcement, State Civil Actions

In construing *Hawaii Rev. Stat. § 480-2* the courts will be guided by the interpretations given by the Federal Trade Commission and the federal courts to section 5(a)(1) of the Federal Trade Commission Act.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN17[] Private Actions, Standing

Hawaii Rev. Stat. § 480-13 provides a private remedy for violations of the *Hawaii Rev. Stat. § 480-9*.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN18[] Supplemental Jurisdiction, Pendent Claims

Unless there is pendent jurisdiction over the claim made under state law, the court is without jurisdiction, since the court has disposed of the claims made under federal law.

Counsel: [1]** Albin H. Goldstein, Charles J. Wisch, San Francisco, California, for Plaintiff.

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Harold W. Nickelsen, G. Richard Morry, J. Stephen Street, Honolulu, Hawaii, for Bishop Estate.

Judges: Smith, District Judge.

Opinion by: SMITH

Opinion

[*1481] Smith, District Judge.

BACKGROUND

This case, in which motions and cross-motions for summary judgment have been filed, presents difficult problems relating to land usage in Hawaii. The Hawaii Legislature has been considering these problems for over two decades and in 1967 enacted the Hawaiian Land Reform Act (Act), Hawaii Rev. Stat., ch. 516, which permits the State under some circumstances to condemn the fee of leased lands and transfer the fee to the lessees of the land. The Supreme Court of the United States in *Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984)*, held that the State land oligopoly, traceable to the monarch, **[**2]** could be regulated and that the Act was constitutional.

In this case the plaintiffs Chun and Merseberg seek relief from the defendants under the Sherman and Clayton Acts, and their Hawaii equivalents and the Hawaii Fair Trade Statutes, because of dealings with the Bishop Estate. [1] In 1966 Chun and Merseberg leased separate residential sites **[*1482]** in the Halawa Valley Estates on Oahu. The Bishop Estate owned the land and leased it to American Factors, which in turn subleased it. Ultimately one Ujimori built houses on the land, and it was he who dealt with the plaintiffs here. The plaintiffs entered into two separate agreements -- one for the purchase from Ujimori of the house and the off-site improvements and the other for the lease of the land. Except for the names and dates, the plaintiffs' leases are identical. Parties to the leases are the Bishop Estate and a joint venture consisting of Central Oahu Land Company and Hawaiian Pacific Industries, lessors, and the plaintiffs, lessees. The terms of the leases are 55 years. The lease rents are $165 per year for forty years; the rents for the remaining fifteen years are to be determined by agreement or by arbitration. There **[**3]** are options to extend the leases, and the rents during the periods of extension are to be similarly determined by agreement or by arbitration. The arbitrations are to some extent controlled by specific formulae. The plaintiffs are to pay all taxes and levies for special improvements, and at the end of the term are privileged to remove all buildings. The effect of all of this is that upon the termination of the leases the lands together with all off-site improvements will revert to the Bishop Estate.

The plaintiffs' transactions were typical of the manner in which the Bishop Estate lands were subdivided and sold, and while the Bishop Estate played no active role in the subdivision of the lands, the construction of off-site improvements, and the construction of the houses, **[**4]** it is clear that the Bishop Estate orchestrated all that was done.

A jury might find that most people desiring to buy homesites on Oahu could not readily find fee land which they could acquire or lease land upon which they themselves could build. A jury might likewise find that the Bishop Estate developed its land as it did because it believed that, for tax and other reasons, it was economically

[1] While the third amended complaint charges the Castle defendants with monopoly, there is no evidence of such, and the plaintiffs do not argue that there is. The fourth amended complaint omits the monopoly charges against the Castle defendants.

advantageous to lease the land rather than to sell it. A jury might also find that these practices resulted in excessive prices and that the Bishop Estate was motivated by profit.

Assuming that the Bishop Estate plan is antisocial, results in excessive prices, and that on the expiration of the leases many leaseholders will suffer some hardship, still the question remains: Were the antitrust laws violated?

THE MONOPOLIZATION CLAIM

HN1[] In 1966 *Section 2* of the Sherman Act, *15 U.S.C. § 2*, read: "Every person who shall monopolize . . . any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor. . . ."

HN2[] *Hawaii Rev. Stat. § 480-9* reads: "No person shall monopolize, or attempt to monopolize, or combine or conspire with any other person to monopolize **[**5]** any part of the trade or commerce in any commodity in any section of the State."

Assuming for purposes of this opinion that the sections of the federal and Hawaii statutes dealing with monopolization apply to land, [2] still the rationale of the monopoly cases is difficult to apply when the subject of the monopoly is land. The ordinary antitrust case involves dealings for goods. The market in cameras, for example, is the **[*1483]** combined willingness of all people to buy cameras. That combined willingness to buy may vary as the quality and price vary. The theory is that competition is healthy and results in lower prices. Each competitor's share of the market depends upon his price and quality. As a competitor's share of the market increases, the share of some of his competitors decreases. One competitor with market power may create impediments which prevent other competitors from entering the market. Not so when the subject matter is land. The quantity of land is finite. That quantity does not increase or decrease as the price fluctuates. Landowners may compete in price, and one may sell more land than another at a given time; but normally what one landowner does with his own land **[**6]** does not prevent any other landowner from doing what he will with his own land.

[7]** An owner of land has monopoly power over his land. He may charge for it what he will or withhold it from the market if he so desires. He is under no compulsion to use the land for the public benefit or sell it at a price that someone can afford to pay. I think it obvious that the ownership of land is not in itself illegal despite the monopoly power that goes with it.

Historically the Bishop Estate has been the largest landowner in Oahu. ***HN7***[] Mere size, however, does not make a monopoly illegal. *United States v. International Harvester Co., 274 U.S. 693, 708, 47 S. Ct. 748, 71 L. Ed. 1302 (1927)*; *United States v. United States Steel Corp., 251 U.S. 417, 451, 64 L. Ed. 343, 40 S. Ct. 293 (1920)*; *Deesen v. Professional Golfers' Association, 358 F.2d 165, 171* (9th Cir.), *cert. denied*, *385 U.S. 846, 17 L. Ed. 2d 76, 87 S. Ct. 72 (1966)*; *United States v. Aluminum Co., 148 F.2d 416, 430 n. 2 (2d Cir. 1945)*; *Bailey's Bakery, Ltd. v. Continental Baking Co., 235 F. Supp. 705, 718 (D. Hawaii 1964)*, *aff'd*, *401 F.2d 182 (9th Cir. 1968)*, *cert. denied*, *393 U.S. 1086, 21 L. Ed. 2d 779, 89 S. Ct. 874 (1969)*.

I conclude, therefore, that the monopoly power enjoyed by the **[**8]** Bishop Estate over its own vast lands was not in itself illegal, notwithstanding the language in *United States v. Griffith, 334 U.S. 100, 92 L. Ed. 1236, 68 S. Ct. 941*

[2] This assumption is correct only if there is considerable judicial stretching of the words used in the statutes. ***HN3***[] So far as the Sherman Act is concerned, the words "trade or commerce between the several States" would seem to exclude land because land obviously cannot be a part of the trade or commerce between the "several States." ***HN4***[] The Hawaii statute forbids the monopolization of trade or commerce in any "commodity." In common parlance the word "commodity" is not used to describe real estate, and the dictionaries, both general and legal, defining "commodity" use the words "personal" and "movable" and do not use the term "real estate." In *Moore v. Jas. H. Matthews & Co., 550 F.2d 1207 (9th Cir. 1977)*, the word "commodity" was held not to include land (cemetery lots). But ***HN5***[] the Hawaii Legislature defines the word "commodity" to include "any other business." *Hawaii Rev. Stat. § 480-1(1)*. Perhaps leasing land is a business, and while there was no dealing for the business of leasing land, perhaps the definition includes land with which the business dealt.

HN6[] -

(1948). There the Court said that "monopoly HN8[] power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised. For § 2 of the Act is aimed, *inter alia*, at the acquisition or retention of effective market control." Id. at 107. (Footnote and citation omitted.) [3] If the quoted language is taken literally, then the monopoly power which the Bishop Estate had over its own land was illegal. But the Court in *Griffith* was obviously using the word "monopoly" in the context of competitors and was talking about the effect of a monopoly on competitors. The Court cited United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945), for its authority. In that case Judge Learned Hand said:

> Nevertheless, it is unquestionably true that from the very outset the courts have at least kept in reserve the possibility that the origin of a monopoly may be critical in determining its legality; and for this they had warrant in some of the congressional **[**9]** debates which accompanied the passage of the Act. This notion has usually been expressed by saying that HN9[] size does not determine guilt; that there must be some "exclusion" of competitors; that the growth must be something else than "natural" or "normal"; that there must be a "wrongful intent," or some other specific intent; or that some "unduly" coercive means must be used. At times there has been emphasis upon the use of the active verb, "monopolize," as the judge noted in the case at bar. What engendered these compunctions is reasonably plain; persons may unwittingly find themselves in possession of a monopoly, automatically so to say: that is, without having intended either **[*1484]** to put an end to existing competition, or to prevent competition from arising when none had existed; they may become monopolists by force of accident. Since the Act makes "monopolizing" a crime, as well as a civil wrong, it would be not only unfair, but presumably contrary to the intent of Congress, to include such instances.

Id. at 429-30. (Citations omitted.)

[10]** During the oral arguments, the court asked counsel for plaintiffs at what time the Bishop Estate's ownership became illegal. Counsel answered that the Sherman Act restraints applied when the Bishop Estate chose to put the land in commerce. The Sherman Act, however, does not regulate the price between an owner and a buyer. The Sherman Act comes into play when an owner uses the power of his ownership to affect competition. HN10[] As stated in *Griffith*, "the use of monopoly power . . . to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." Id. at 107.

The District Court of Hawaii reached the same conclusion in Bailey's Bakery, 235 F. Supp. at 718, where it was said that "the HN11[] Sherman Act does not make mere size nor continued exercise of its lawful power an offense when that size and power have been obtained by lawful means and developed by natural growth -- absent the *manifest* purpose or intent to exclude competition." (Footnote omitted.)

The courts have frequently condemned leasing. In the cases where leasing has been condemned, however, it is clear that the leasing was employed as an anticompetitive device. *See Hanover Shoe,* **[**11]** Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968); Greyhound Computer Corp. v. International Business Machines Corp., 559 F.2d 488 (9th Cir. 1977); United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945); United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521, 98 L. Ed. 910, 74 S. Ct. 699 (1954).

In this case there is no evidence from which a jury might find that what the Bishop Estate did was anticompetitive. The plaintiffs contend that people want to buy land for homesites in fee and that leases are less desirable. If the Bishop Estate leased only, then if leases were less desirable, the landowners who wished to sell in fee would have been benefited. If other landowners wished to lease, they were free to do so. In any event, the actions of the Bishop Estate did not in any way infringe on the capacity of other landowners to do as they wished with their own land.

The plaintiffs contend that the following clause [4] in Bishop Estate development contract injured competitors:

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[3] *But see* footnote 10 in *Griffith*, where it is said that "mere size is not outlawed by § 2." 334 U.S. at 107, *quoting* United States v. United States Steel Corp, 251 U.S. 417, 451, 64 L. Ed. 343, 40 S. Ct. 293 (1920).

> DEVELOPER and any organizations controlled by it or any assignees of development rights hereunder **[**12]** shall not directly or indirectly during the term of this agreement without the prior written approval of BISHOP undertake the development of any other land in Central Oahu comprising the ahupuaas from Halawa to Waipio inclusive (except land of the Trustees of the Bernice P. Bishop Museum, land of The Queen's Hospital at South Halawa and land now owned in fee simple by Oahu) *which may interfere with the speedy and orderly subleasing of said land*, provided that nothing herein shall prevent DEVELOPER or any organizations controlled by it in the normal course of their business from supplying materials or credit to other persons undertaking the development of such land.

(Emphasis supplied.) There is no evidence, however, that there was any shortage of developers. Apart from that, the contract itself requires no more than that the developer diligently perform his contract and not engage in other development activity which would prevent him from doing so.

[13]** Plaintiffs also contend that the Bishop Estate by reason of its power was able to deal with its developers in such a way that the developers made no profits **[*1485]** out of the initial sale of a residence but recovered their profit over a period of time out of the rents to be paid. The net result was a low initial cost to the home buyer. Plaintiffs theorize that other landowners had no capacity to make development contracts which would result in such low initial costs, and for that reason other developers could not enter the residential lease market. It is not shown that there were landowners who wanted to but did not enter the residential lease market because of the Bishop Estate's low initial cost. ***HN12***[] On a motion for summary judgment after there has been extensive discovery, the plaintiffs must be able to support their theories by showing some evidence on which a fact finding might be based. There is no such evidence here. [5]

[14]** A jury might find that the prices charged by the Bishop Estate, bearing in mind the value of the reversion, were exorbitant and that only because of its monopoly was it able to charge such prices. But the ownership of the land carried with it the right to fix the price and as I see it the right to fix the method in which it should be paid, *i.e*., in cash or in the reversionary value of the land, improved as it would be. [6]

On the facts presented here, a jury could not find the Bishop Estate to be in violation of *Section 2* of the Sherman Act nor of *Section 480-9 of the Hawaii Revised Statutes.*

THE STANDARDIZED LEASE

Plaintiffs urge that the defendants' actions in connection with the standardization of the **[**15]** lease form was equivalent to price-fixing and was a violation of Section 1 of the Sherman Act and *Section 480-4 of the Hawaii Revised Statutes.* As previously indicated, the development patterns of the Bishop Estate and the Castle defendants were similar in the general results reached. There was no uniformity in the prices paid or in the terms of the leases, and the details of the leases differed. All leases had to be approved by the FHA for FHA financing. Both defendants had been leasing for about a decade when in 1960 the FHA contacted all of the large landowners in Hawaii relative to the standardization of a lease form. The leases to the plaintiffs here were on forms approved by the FHA in 1963. The correspondence between the FHA and the landowners indicates that it was the FHA which

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[4] This clause differs from the clause in the Castle development contract.

[5] For the purposes of this theory, the plaintiffs ignore the fact that the Castle defendants' dealings with developers were very similar to those of the Bishop Estate. In another context, the plaintiffs argue that the similarity of the development contracts was evidence of parallel conduct.

In Tax Zones 4-2 to 4-6, where both the Castle defendants and the Bishop Estate owned land in the years between 1946 and 1977, the Castle defendants sold 5,376 leaseholds, and the Bishop Estate sold 3,069. Castle was one of the smaller large landowners, having 2.45% of the land on Oahu, while Castle & Cook, Inc. had 11.13% and the James Campbell Estate had 13.20%.

[6] Consider a tract of land that has been leased for growing crops and either of necessity or by contract the lessee would have to cut brush, level the land, and perhaps dig ditches. Would the lease be invalid merely because, at the end of the lease, the lessor would get back land which had been improved?

was urging the standardization. The landowners did meet with each other and discuss the clauses in the standardized form of lease. There is no suggestion in any of the evidence that the FHA was seeking to improve the landowners' position. Rather, it appears that the FHA was on the homeowners' side and wanted clauses in the standardized form which would favor them. For instance, FHA insisted on the **[**16]** elimination of the consent to assignment clause and was successful. The lease forms used here provide for assignment without the consent of the lessor. It does not appear that the landowners agreed and presented a package to the FHA. Rather the landowners agreed reluctantly to some FHA demands. The evidence does not prove a contract between the Bishop Estate and the Castle defendants; rather it proves an acquiescence in some demands made by the FHA.

However, if it can be said that there was some sort of a contract between the landowners to standardize the lease form and **[*1486]** that such was in violation of the antitrust laws, still the problem of damages remains. The standardization of the lease form did not bring about the lease-only policy; rather leasing had been the policy for many years. If the plaintiffs were injured by the standardization, it does not appear here just how. It is true that the plaintiffs' theoretical power to negotiate was diminished, but, assuming (contrary to all of plaintiffs' arguments on the monopolization issue) that they had a power to negotiate, they do not point to any clause in the standardized lease that was more onerous than the equivalent **[**17]** clause in previous leases; they do not single out any particular clause in the standard form that was onerous and as to which they would have negotiated; and they do not show how any damages flowed from their lack of power to negotiate.

On the facts presented here, a jury could not find that the plaintiffs suffered any damage because of the defendants' consents to the standardized lease form.

THE CONSPIRACY CLAIM

The plaintiffs assert that the Bishop Estate and the Castle defendants violated Section 1 of the Sherman Act and *Hawaii Rev. Stat. § 480-4* by agreeing that they would engage in a lease-only policy, thus restricting the sale of residential lots in fee. The defendants deny any combination or conspiracy. The plaintiffs, conceding that there is no direct evidence of the conspiracy, claim that it may be inferred from a conscious parallel behavior of the defendants.

The acts of the defendants were parallel in that they employed the same general scheme in leasing their land. The defendants made master leases to developers. The effects of the leases were that the developers subdivided the lands and built the on- and off-site improvements and sold those improvements to the homeowners. **[**18]** The land was then sublet to the homeowners for a fixed period, with rights of renewal. The defendants required the developers to sell the houses at no profit and to take their compensation over a period of time by sharing the rentals. The details of the development contracts made by the Bishop Estate differed among developers and also differed from those of the Castle defendants. Except as to rent and term, the lease forms used by the defendants for the homeowner lessees were identical after the standardization.

By reason of the business, political, and social relationships of the principals and the trustees, the defendants had an opportunity to discuss their mutual problems; they exchanged information and lease forms; and they presented at times a common front in the political arena in matters affecting land ownership and land usage, such as federal income taxes and the efforts of the Hawaii Legislature to impose restrictions on the leasing of land.

The crucial question is whether the defendants' conduct toward the plaintiffs stemmed from independent decision or from an agreement, tacit or express. *Theatre Enterprises v. Paramount Film Distributing Corp., 346 U.S. 537, 540,* ***[**19]*** *98 L. Ed. 273, 74 S. Ct. 257 (1954)*. The Court of Appeals for the Ninth Circuit has stated that "[***HN13***[] the plaintiff] need not show explicit contractual agreements in order to prove a conspiracy, but it must demonstrate more than that the alleged co-conspirators engaged in a course of conduct, even if conscious of each other's parallel behavior, in which they would have engaged regardless of the others' conduct." *Dahl, Inc. v. Roy Cooper Co., 448 F.2d 17, 19 (9th Cir. 1971)*. In *Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665 (9th Cir. 1980)*, the court stated:

> Summary judgment may properly be granted in an antitrust action on an allegation of conspiracy where there are understandable and legitimate business reasons for a defendant's conduct. We believe that appellees have

> supplied an entirely plausible and justifiable explanation of their conduct, one consistent with proper business practices. Absent any evidence of an agreement with Glen-Webb, Ranchers' refusal to deal with **[*1487]** Blair does not constitute an ***antitrust law*** violation.

Id. at 672. (Citations omitted.)

The defendants' conduct in leasing rather than selling residential lots was based **[**20]** on business judgment. It was the business judgment of the Bishop Estate that its investment in its own land was the best investment that it could make. The philosophy was expressed in 1963 by Trustee Midkiff in this language:

> The value of the Bishop Estate in 1884 was $300,000. The assessed value of 1962 are over 209 million. Holding Mrs. Bishop's lands since the Trust's inception 75 years ago has resulted in increasing its value 696 times since 1884. No other type of corpus, securities, etc. can show any such gain.

The record confirms that the judgment of the defendants was in fact sound. The plaintiffs do not deny that the defendants were motivated by profit; rather, in their argument as to monopolization, they vehemently argue that profit was defendants' motive. The cooperation of the large landowners in agreeing on a lease form is evidence of parallel conduct, but again the landowners wanted to facilitate the financing of their purchase, 90% of which was done through FHA and VA. This constitutes a legitimate business purpose.

It does not appear "that the allegedly parallel acts were against each conspirator's self interest, that is, that the decision to act was not **[**21]** based on a good faith business judgment." *Zoslaw v. MCA Distributing Corp., 693 F.2d 870, 884 (9th Cir. 1982)*, *cert. denied*, *460 U.S. 1085, 103 S. Ct. 1777, 76 L. Ed. 2d 349 (1983)*.

On the facts presented here, a jury could not find that the defendants violated Section 1 of the Sherman Act or *Section 480-4 of the Hawaii Revised Statutes.*

THE TYING ARRANGEMENT

The plaintiffs assert that the Bishop Estate requirement that the house be built and bought before a sublease was made was in effect a tying arrangement (in violation of Section 1 of the Sherman Act and *Hawaii Rev. Stat. §§ 480-4(a)* and *480-5*) in which the houses were the tying product and the leases were the tied product. The argument is that the homeowner in taking the tied product was required to accept the less desirable lease instead of the more desirable fee.

The concepts underlying the rule against tying do not fit this case. A principal difficulty lies in considering the lease of land and the purchase of a house for a residential dwelling as separate products. The Ninth Circuit, in *Hirsh v. Martindale-Hubbell, Inc., 674 F.2d 1343, 1347* (9th Cir.), *cert. denied*, *459 U.S. 973, 74 L. Ed. 2d 285, 103 S.* ***[**22]*** *Ct. 305 (1982)*, quoting *Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 507, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)*, said: "'There is, at the outset of every tie-in case, . . . the problem of determining whether two separate products are in fact involved. '" It may be that there is some kind of a market for houses apart from the land, just as there may be a market for automobile engines apart from the whole motor car, but certainly the adjudicated cases are not based on such unusual divisions of a market. We do not visualize residences apart from the land on which they are located. It is the house and the land on which it is located which constitute the package which the ordinary homeowner considers. In this case the plaintiffs bought the package because they wanted to live in the area, and the houses suited their needs. I think that there was a market for residential houses located on a definite lot and that there were neither separate markets nor separate products.

Assuming that there were separate markets, there is no proof in this case that the Bishop Estate had any dominance in the market for the tying product, *i.e.*, houses. As previously stated, **[**23]** the Bishop Estate did have a monopoly power over its own land. But, as to the tying product, while the Bishop Estate in its development contracts directed that the houses be built and reserved the right to approve the plans, and in effect required the homeowner to take the package, there is nothing to show that the houses were unique, that any builder **[*1488]** could not duplicate them, or that there was a lack of builders.

Assuming that the Bishop Estate had some economic power over houses, still it is not shown just how the exercise of that power could affect competitors in the tied product market, *i.e.*, leases of land. Most of the cases in which there has been a finding of an illegal tying arrangement relate the arrangement to a restraint of competition in the market for the tied product. Thus, in *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*, a consumer suit, the policy of the defendant was condemned because of the effect that it had on competing manufacturers of shoe machinery. In *International Salt Co. v. United States, 332 U.S. 392, 92 L. Ed. 20, 68 S. Ct. 12 (1947)*, an action by the United States, the **[**24]** focus was on the injury to competitors in the tied product -- salt. In *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*, an action by the United States, the tying product was land, and the injury was the restriction of trade in the transportation market. In *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*, where no Sherman Act violation was found, the Court said:

> Tying arrangements, we may readily agree, flout the Sherman Act's policy that competition rule the marts of trade. Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources and thus direct the course its economic development will take. Yet "tying agreements serve hardly any purpose beyond the suppression of competition." *Standard Oil Co. of California v. United States, 337 U.S. 293, 305 [93 L. Ed. 1371, 69 S. Ct. 1051]* (1949).

Id. at 605. (Footnote omitted.)

In *Jefferson Parish Hospital v. Hyde, 466 U.S. 2, 104 S. Ct. 1551,* ***[**25]*** *80 L. Ed. 2d 2 (1984)* the court said:

> It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable "per se." The rule was first enunciated in *International Salt Co. v. United States, 332 U.S. 392, 396, 68 S. Ct. 12, 15, 92 L. Ed. 20 (1947)*, and has been endorsed by this Court many times since. The rule also reflects congressional policies underlying the antitrust laws. In enacting § 3 of the Clayton Act, *15 U.S.C. § 14*, Congress expressed great concern about the anticompetitive character of tying arrangements.

Id. at 1556-57. (Footnotes omitted.)

I am aware that in *United States v. Loew's Inc., 371 U.S. 38, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962)*, the Court struck down a tying arrangement that resulted in block-booking. The Supreme Court agreed with the district court finding "that since each defendant by reason of its copyright had a 'monopolistic' position as to each tying product, 'sufficient economic power ' to impose an appreciable restraint on free competition in the tied product was present as demanded by **[**26]** the *Northern Pacific* decision." *Id. at 48*. Notwithstanding this language, it is not clear to me whether the Court condemned block-booking because of its effect on competition, or whether it considered that the use of monopoly power based on a copyright to require block-booking was an evil in and of itself. Nonetheless I believe that ***HN14***[] a court, in considering a tying case, should regard the injury to competition in the tied product as a factor. In this case no such injury is proved. As stated in the section of this opinion dealing with the monopolization claim, the fact that one landowner deals with his own land does not prevent any other landowner from dealing with his own land.

On the facts presented here, a jury could not find that there was an unlawful tying arrangement in this case.

[*1489] UNFAIR TRADE PRACTICES AND UNFAIR METHODS OF COMPETITION

HN15[] *Hawaii Rev. Stat. § 480-2* provides that "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." In enacting this statute, the Hawaii Legislature used language similar to that of Section 5(a)(1) of the Federal Trade Commission Act (*15 U.S.C. § 45(a)(1)*). **[**27]** ***HN16***[] *Hawaii Rev. Stat. § 480-3* provides: "It is the intent of the legislature that in construing *section 480-2* the courts will be guided by the interpretations given by the Federal Trade Commission and the federal courts to section 5(a)(1) of the Federal Trade Commission Act." ***HN17***[] *Section 480-13* provides a private remedy for violations of the Act. The plaintiffs make claims under these statutes.

HN18[] Unless there is pendent jurisdiction over the claim made under *Hawaii Rev. Stat. § 480-2*, the court is without jurisdiction. It may well be that, since the court has disposed of the claims made under federal law, there can be no pendent jurisdiction. Thus, in *United Mine Workers v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*, the Court said: "Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." (Footnote omitted.) The Court cited *Wham-O-Manufacturing Co. v. Paradise Manufacturing Co., 327 F.2d 748, 752-754 (9th Cir. 1964)*, [7] but later decisions of the Court of Appeals for the Ninth Circuit, while approving the dismissal of state claims when the federal claims **[**28]** have been denied prior to trial, seem to make the exercise of pendent jurisdiction discretionary. *Schmidt v. Oakland Unified School District, 662 F.2d 550 (9th Cir. 1981)*; *Sunbeam Lighting Co. v. Pacific Associated Lighting Inc., 328 F.2d 300 (9th Cir. 1964)*. In any event, I decline to exercise pendent jurisdiction.

There is no judicial economy to be served in view of the court's disposal of the federal claims.

All of the considerations which persuaded the Supreme Court to abstain in *Railroad Commission v. Pullman Co., 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941)*, are present here. The claims touch a sensitive area of social policy in Hawaii. *See* *Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984)*. They also present difficult problems in the interpretation of the law of Hawaii. The path to be followed is not clear. While *Hawaii Rev. Stat. § 480-3* states that decisions of the courts and the Fair Trade **[**29]** Commission shall be the guidelines, those decisions are fashioned for a regulatory scheme in which the Federal Trade Commission has both legislative and judicial power. *Humphrey's Executor v. United States, 295 U.S. 602, 79 L. Ed. 1611, 55 S. Ct. 869 (1935)*. A problem may arise as to the extent that the provisions of *Section 480-2* do incorporate, or should be interpreted by, the provisions of the Hawaii Unfair Practices Act (Hawaii Rev. Stat., ch. 481) and/or the Hawaii Deceptive Trade Practices Act (Hawaii Rev. Stat., ch. 481A). It is necessary to interpret the broad words "unfair methods of competition" and "unfair or deceptive acts or practices." This task is complicated by the fact that most of the concepts involved in the fair trade world grew out of the market dealings in the trade and commerce of movable property and services, and not out of dealings in land.

To paraphrase the Supreme Court in *Railroad Commission v. Pullman Co., 312 U.S. at 501*, I should refrain from exercising pendent jurisdiction out of regard for the independence of the government of Hawaii.

CONTRACTS OF ADHESION

For the reasons previously stated, I refuse to take pendent jurisdiction of the claims **[**30]** made in plaintiffs' eighth cause of action.

End of Document

[7] *United Mine Workers, 383 U.S. at 726 n. 16*.

Ind. Fed'n of Dentists v. Ftc

United States Court of Appeals for the Seventh Circuit

February 9, 1984, Argued ; October 11, 1984

No. 83-1700

Reporter
745 F.2d 1124 *; 1984 U.S. App. LEXIS 17804 **; 1984-2 Trade Cas. (CCH) P66,229

INDIANA FEDERATION OF DENTISTS, an unincorporated association, Petitioner, v. FEDERAL TRADE COMMISSION, Respondent

Prior History: [1]** Petition for Review of an Order of the Federal Trade Commission.

Core Terms

dentists, dental, x-rays, patient's, insurers, dental care, healthcare, diagnostic, dental treatment, anticompetitive, clinical, rule of reason, competitors, copies, directive, relevant market, boycott, concerted refusal, group boycott, proper course, formulating, adherence, concerted, plans, anti trust law, insurance company, cooperate, ethical, refuse to comply, radiographs

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Scope

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

HN1[] **Trade Practices & Unfair Competition, Federal Trade Commission Act**

See § 5 of the Federal Trade Commission Act, 15 U.S.C.S. § 45(a)(1).

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN2[] **Regulated Industries, Higher Education & Professional Associations**

There are two categories of antitrust analysis: in the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality--they are "illegal per se". In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.

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**

The common attribute of per se illegal group boycotts is a concerted attempt by a group of competitors at one level to protect itself from competition from non-group members who seek to compete at that level. The court has stated that group boycotts are illegal per se only if they are used to enforce agreements that are themselves illegal per se.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN4[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Once per se illegality is established, there is a conclusive presumption that the conduct is unreasonable in violation of the Federal antitrust laws. If, however, the defendants' concerted conduct is not designed to drive out competitors, but to achieve some other goal, the court must engage in a rule of reason analysis. In this circuit, it is necessary under the rule of reason to show anticompetitive effects, or actual harm to competition, to establish an antitrust violation.

Administrative Law > Judicial Review > Reviewability > Factual Determinations

Antitrust & Trade Law > ... > US Federal Trade Commission Actions > Remedial Powers > Federal Trade Commission Act

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > Judicial Review

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > US Federal Maritime Commission

HN5[] **Reviewability, Factual Determinations**

Under *15 U.S.C.S. § 45(c)*, the findings of the Federal Trade Commission (FTC) as to the facts, if supported by evidence, shall be conclusive. According to the settled law in the United States Court of Appeals for the Seventh Circuit, the FTC may draw reasonable inferences from the record. The FTC's findings of fact are to be accorded great deference and are to be upheld if supported by substantial evidence. Thus, the court's review is limited to a determination of whether the FTC applied incorrect legal standards which prejudiced its findings against petitioners and whether the administrative decision is supported by substantial evidence in the hearing record before the examiner.

Business & Corporate Compliance > ... > Transportation Law > Water Transportation > US Federal Maritime Commission

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

HN6[] **Water Transportation, US Federal Maritime Commission**

The United States Supreme Court defines substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

HN7[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

The classic "group boycott" is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level. Typically, the boycotting group combines to deprive would-be competitors of a trade relationship which they need in order to enter (or survive in) the level wherein the group operates.

Admiralty & Maritime Law > Maritime Contracts > General Overview

Healthcare Law > Healthcare Litigation > Actions Against Healthcare Workers > General Overview

Torts > Malpractice & Professional Liability > Healthcare Providers

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Strikes & Work Stoppages

Military & Veterans Law > Servicemembers > Enlisted Personnel

HN8[] **Admiralty & Maritime Law, Maritime Contracts**

The term "boycott" is not limited to concerted activity against competitors of members of the boycotting group.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Healthcare Law > Healthcare Litigation > Antitrust Actions > Insurers

HN9[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

The broad label of "group boycott" generally applies to conduct involving a concerted refusal to deal, commonly defined as an agreement by two or more persons not to do business with other individuals, or to do business with them only on specified terms.

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 > Public Enforcement > US Federal Trade Commission Actions > Judicial Review

HN10[] Sherman Act, Claims

The rule of reason is the established standard of analysis for determining whether a Federal antitrust violation has occurred. The rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN11[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive. Additionally, the per se rule is not employed until after considerable experience with the type of challenged restraint. In accord with these legal principles, the law in the United States Court of Appeals for the Seventh Circuit is that a per se analysis should not be applied, and has never been applied by the United States Supreme Court, to concerted refusals that are not designed to drive out competitors but to achieve some other goal.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN12[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The inquiry mandated by the rule of reason is whether the challenged agreement is one that promotes competition or one that suppresses competition. According to the United States Supreme Court, under a rule of reason analysis, a court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN13[] **Regulated Practices, Market Definition**

Under the rule of reason, a showing of anticompetitive effect in the relevant market is an essential predicate of antitrust liability.

Counsel: Bruce W. Graham, Trueblood, Fountain, Graham & O'Reilly, Lafayette, Indiana, for Petitioner.

Howard Shapiro, Federal Trade Commission, Washington, District of Columbia, for Respondent.

Judges: Pell and Coffey, Circuit Judges, and Fairchild, Senior Circuit Judge. Fairchild, Senior Circuit Judge, concurring in result.

Opinion by: COFFEY

Opinion

[*1126] COFFEY, Circuit Judge

The Indiana Federation of Dentists ("IFD") petitions this court to review an order of the Federal Trade Commission ("Commission") requiring the IFD and its member dentists to "cease and desist from engaging" in a collective refusal to comply with the group dental health care insurers' directive to submit copies of a patient's dental radiographs along with the patient's insurance claim form. We conclude that under a rule of reason analysis, the evidence presented at the administrative hearing failed to establish that the conduct of the IFD and its member dentists had an anticompetitive effect in a relevant market. Accordingly, we vacate the Commission's "cease and desist" order.

I

The parties admit that the controversy in **[**2]** this case arises from two alleged cost-containment provisions that insurance companies include within their group dental health care plans. [1] These provisions are entitled " predetermination of claims" and "least expensive adequate course of treatment." According to the former plan, the dentist and patient may, at their discretion, submit a proposed course of dental treatment to the insurer for review.

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[1] The record reveals that group dental health care plans originated in Indiana in the early 1970's. These plans were, at the time of this lawsuit, included in collective bargaining agreements for the benefit of union-member employees. Neither the ALJ nor the Commission found that the alleged cost-containment provisions included within these plans actually lowered the insurers' dental costs.

The insurer, in turn, will provide the dentist and patient with an estimate of the insurance benefits to be paid for the proposed treatment. The "least expensive adequate course of treatment" plan provides that for **[*1127]** all courses of dental treatment, whether proposed or completed, the group dental health care insurer will pay benefits only for the least expensive treatment that is "commonly accepted as providing good dental care." *Indiana Federation of Dentists, 101 F.T.C. 57, 159 n.4 (1983)*.

[3]** In an effort to enforce these alleged cost-containment provisions, the group dental health care insurers direct dentists to submit copies of a patient's dental radiographs ("x-rays") along with the patient's insurance claim form. The claim form and x-rays, if submitted, are initially reviewed by lay personnel employed by the insurance company. [2] These lay employees have the authority to approve the proposed or completed course of dental treatment. If an insurer's lay employee questions a particular course of treatment, the claim form and x-rays are transmitted to a licensed dentist, selected and hired by the insurer to review dental claims. Based upon an analysis of the claim form and x-rays alone, without a patient case history much less a complete dental examination, the insurer's employed dentist determines the least expensive type of treatment that will, from the insurer's standpoint, provide "good dental care."

[4]** The instant case concerns the practice of the 84 current and 8 former IFD member dentists who collectively refused to comply with the group dental health care insurers' directive to submit copies of a patient's dental x-rays along with the patient's insurance claim form. The IFD maintains that "[p]roper diagnosis and treatment planning predicates the doctor correlating *all* diagnostic aids, with a history and with all clinical findings." *Id. at 119, 129* (emphasis added). In accord with this policy of quality and proper dental care, the IFD member dentists "provide all diagnostic aids [including x-rays] to third parties on an in-office basis and with the consent of the patient." *Id. at 121-22*. [3] Furthermore, it is the IFD policy that the insurers' employed dentists conduct this examination and review of all diagnostic and clinical aids used in formulating a proper course of dental treatment. Pursuant to Indiana law, "[a]ny person . . . who . . . offers to diagnose or professes to diagnose . . . any of the lesions or diseases of the human oral cavity, teeth, gums, maxillary or mandibular structures" is practicing dentistry and must be **[**5]** licensed. *Ind. Code §§ 25-14-1-1*, *25-14-1-23* (1982). The IFD asserts that the unlicensed lay personnel employed by group dental health care insurers to review claims engage in the unlawful practice of dentistry when they examine and "diagnose" dental x-rays for purposes of benefit determination. Thus, the IFD concludes that the submission of dental x-rays to unlicensed lay personnel for diagnostic procedures is aiding and abetting the unlicensed practice of dentistry in violation of Indiana state law. [4]

[6] [*1128]** According to the findings of fact of the Administrative Law Judge ("ALJ"), as adopted by the Commission, there were 3,100 licensed dentists practicing within the State of Indiana in 1974 and 85-88 percent of

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[2] The lay personnel employed by the group dental health insurers to review a patient's claim form and dental x-rays are not licensed to practice dentistry within the State of Indiana, and thus have no formal dental or radiological training.

[3] The group dental health care insurers are commonly referred to as "third parties" or "third party payers." *See* *Indiana Federation of Dentists, 101 F.T.C. at 57, 61*.

[4] The Indiana state legislature created the Board of Dental Examiners to administer and enforce the "laws pertaining to the practice of dentistry and of dental hygiene." *Ind. Code § 25-14-1-13(a)* (1982). In furtherance of this duty, the Board is required to "adopt a code of professional conduct and . . . adopt rules and regulations establishing standards for the competent practice of dentistry or dental hygiene." *Id.* In April 1982, some three and one-half years after the Commission filed its complaint in the instant case, the Board enacted new regulations governing the competent practice of dentistry within the State. According to the Board, "[a]ny person using dental diagnostic materials [including dental radiographs, *see* 828 Ind. Adm. Code 1-4-1(3)] for the purpose of recommending changes in the treatment plan upon which benefits are based is practicing dentistry and must be a dentist." 828 Ind. Adm. Code 1-4-2 (1984). Furthermore, the Board provides that "Indiana dentists shall not knowingly submit dental diagnostic materials to any party involved in the Unauthorized Practice of Dentistry." 828 Ind. Adm. Code 1-4-3. The IFD contends that unlicensed lay personnel do, in fact, examine dental x-rays and recommend changes in dental treatment when they question a course of dental treatment. Accordingly, the IFD claims that submission of a patient's dental x-rays to unlicensed lay personnel for diagnostic procedures is in violation of the Indiana state law as established in 828 Ind. Adm. Code 1-4-3.

those dentists belonged to the Indiana Dental Association ("IDA"). The IDA had an official "Manual on Group Funded Dental Care Programs" ("Manual") recommending the procedures that member dentists follow when treating patients covered by a group dental health care insurance plan. The Manual included a section entitled "I.D.A. Policy Regarding Group Dental Care," providing in pertinent part:

> "The method of authorization of dental health care under pre-payment plans should be limited to determining the eligibility of the patient and extent of liability of the plan and should prevent any interference with the dentist-patient relationship or with the judgment and decision of the dentist. The plan must not *require* the dentist to submit radiographs (x-rays) to a third party."

Indiana Federation of Dentists, 101 F.T.C. at 83 (emphasis original) (footnote omitted). The Manual also contained a form letter, entitled "To All My Patients, **[**7]** " that provided in pertinent part:

> "Dental radiographs (x-rays) are a part of the dentist's legal health records. They are available for valid review by a qualified (representatives) of your insurance company in this office. Radiographs (x-rays) will not be submitted to third parties for their use in determination of benefits (e.g., least expensive adequate procedure, or optional course of treatment) because a determination of an adequate treatment plan can only be made after a knowledge of the following:
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> A. Complete patient evaluation.
>
> B. Radiographs.
>
> C. Additional diagnostic procedures as required."

Id. at 83, 162-63. In addition to formulating these guidelines for member dentists, the IDA undertook a pledge project in 1973 to obtain written pledges from their members that they would not participate in group funded dental health care plans unless such plans were previously approved by the IDA. It was the IDA's position that "proper dental treatment is predicated on a diagnosis from many types of examination and not radiographs alone." *Id. at 90*. According to the IDA statistics, approximately 85 percent of the member **[**8]** dentists agreed to support the IDA policy.

The ALJ found that the "smaller insurers had generally gone along with the Indiana dentists' demands" to not *require* the submission of dental x-rays alone, but to review all diagnostic aids in determining a proper course of dental treatment. The ALJ further found that in July 1971, Aetna Life and Casualty Insurance Co. ("Aetna") insisted that Indiana dentists submit copies of dental x-rays for patients covered under Aetna's group dental plan with International Harvester and the United Auto Workers. Only a "small percentage of dentists" in the Allen County-Fort Wayne, Indiana area complied with Aetna's directive. By mid-1972, some 600 unpaid dental claims had accumulated and "[i]t was the consensus of Harvester, U.A.W. and Aetna that many of these 600 claims were probably meritorious and that they had to be taken care of in some way." *Id. at 98, 172*. Accordingly, Aetna selected and retained a dentist and "arranged for him to go to the office of each dentist concerned and work with the relevant x-rays and any other diagnostic aids in the dentist's files." *Id.* The ALJ found that "[t]his *modus operandi*, of **[**9]** course, came quite close to meeting IDA's unrealistic terms for insurer access to x-rays: 'qualified' personnel to come to the treating dentist's office." *Id.* Similarly, in October 1974, Connecticut General Life Insurance Company, ("Connecticut General") required that Indiana dentists submit copies of dental x-rays for patients covered under Connecticut General's group dental plan with General Motors and the United Auto Workers. The IDA member dentists objected to Connecticut General's policy and eventually the parties entered into a **[*1129]** "gentlemen's agreement" whereby the IDA member dentists were merely asked to submit copies of a patient's dental x-rays but were not required to do so. Nonetheless, the ALJ found that by the spring of 1976 Connecticut General was receiving about 70 percent of its needed x-rays except in the Madison County-Anderson, Indiana area where only "about 2 to 4 out of 40 dentists -- would ever submit x-rays when requested" by Connecticut General. *Id.* at 109, 172.

In August 1976, the petitioner, IFD, was formed as a separate and distinct association of Indiana dentists. [5] The IFD's constitution and by-laws provided that: **[**10]**

> "The Indiana Federation shall represent, protect, maintain, and advance, through activities accomplished by relevant techniques which may lawfully be engaged in by a labor organization, the interests of the dentists within its jurisdiction. The objectives of this Federation shall include, but not be limited to the following:
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> > a.) To represent dentists in all socio-economic matters, negotiations and grievances with employers, third, and fourth parties or any group that is involved in financing or delivery of dental care. The ultimate purpose being to promote better patient care and to prevent abuses and correct inequities in the delivery of dental care to the public."

Id. at 74-75, 118, 171. As of February 1979, the IFD had 84 current and 8 former members concentrated within the localities of its three chapters: Anderson, Indiana and surrounding Madison County (46 members); Ft. Wayne, Indiana and surrounding Allen County (19 members); and Lafayette, Indiana and the surrounding counties of Carrol, Clinton, Tippecanoe, and White (27 members). Two of the dentists largely responsible for organizing the IFD, Dr. David McClure of Anderson, Indiana **[**11]** and Dr. Dan Rohn of Anderson, Indiana, had served on the Council of Dental Care Programs for the IDA formulating "policies, standards and principles for evaluating group-funded dental care programs," and in that capacity had co-chaired the IDA's pledge project.

In April 1977, the IFD member dentists adopted a "work rule" setting forth the IFD's policy that a proper dental diagnosis and treatment planning requires a review of all diagnostic and clinical aids, not simply a review of the patient's x-rays and insurance claim form. According to the IFD:

> "Proper diagnosis and treatment planning predicates the doctor correlating all diagnostic aids, with a history and with all clinical findings. *No one facet of this process is now, or ever has been recognized* **[**12]** *by the profession as a substitute for the complete process*. To represent otherwise would subject the patient to substandard care.
>
> The patient's dentist, therefore, has a moral and legal responsibility to not allow a determination of his patient's condition to be made for any purpose, without the benefit of a complete examination which takes into account all of the elements described."

Id. at 119, 129, 176 (emphasis added). Additionally, the IFD drafted a form letter for its members use when replying to a group dental health care insurer's request to submit copies of a patient's dental x-rays along with the patient's insurance claim form. The letter provided:

> "Reference your request for x-rays for the above named patient. It is the policy of this office to provide all diagnostic aids to third parties on an in-office basis and with the consent of the patient. It is my belief that proper diagnosis and treatment planning predicates the doctor correlating all diagnostic aids with a history and all clinical findings. *No one facet of this process is now, or ever has been recognized by the profession as a* ***[*1130]*** *substitute for the complete* **[**13]** *process*. To represent otherwise would subject the patient to substandard care.
>
> If you will have your consultant contact my office to set up an appointment, I will furnish records and ask the patient to be present for an examination. If you do not feel that this is possible, the Indiana Federation of Dentists, of which I am a member, will help you, if possible, to provide a local consultant."

Id. at 122 (emphasis added).

The ALJ found that in January 1977, Connecticut General breached its "gentlemen's agreement" with the IDA and instituted a practice of insisting that Indiana dentists submit copies of a patient's dental x-rays along with the patient's insurance claim form. Dr. Rohn and other officers of the IFD immediately confronted the Connecticut General management to voice their disapproval over this change in policy. Following this meeting, Connecticut

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[5] According to the ALJ's findings of fact, as adopted by the Commission, the IFD was organized as a labor union in an attempt to qualify for exemption from the Federal antitrust laws under the Clayton Act § 6, *15 U.S.C. § 17*.

General "refrained from making any further requests for x-rays from Madison County (the Anderson area) for fear of a confrontation which would end all existing cooperation and snarl the payment of GM worker's claims." *Id. at 123, 172*. The ALJ further found that between April **[**14]** 1976 and January 1978, Metropolitan Life Insurance Co. of New York ("Metropolitan"), the group dental health insurer for the 450-500 employees of Brockway Glass in Madison County, directed Indiana dentists to submit copies of their patient's dental x-rays for benefit determination. The IFD member dentists refused to comply with this directive, and according to the ALJ, "Metropolitan simply declined to pay on claims when x-ray requests were refused." *Id. at 123*. In response, the personnel manager of Brockway Glass and the local union president "made efforts to talk IFD's Dr. McClure into submitting x-rays but were unsuccessful." *Id. at 123-24, 172-73*.

In October 1978, the Commission issued a complaint against the IFD, charging it with a violation of the Federal Trade Commission Act § 5, *15 U.S.C. § 45(a)(1)*, which provides that ***HN1***[] "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." [6] The complaint alleged that the IFD and its members **[**15]** had "engaged in acts, practices, and methods of competition to eliminate, prevent, or hinder competition among dentists with respect to cooperation by dentists with dental health care benefits programs containing predetermination and least expensive adequate course of treatment provisions." *Id. at 59, 165-66*. Specifically, the Commission alleged that the IFD was:

> "Promulgating, adopting, publishing, and distributing to its members a purported 'work rule' that details certain uniform courses of conduct for dentists in their dealings with third party payers; and Urging payers, purchasers and beneficiaries of dental health care benefits plans to eliminate provisions of such plans that [the IFD] finds unacceptable."

Id. at 61. The complaint further alleged that the IFD's practice had the following effects:

> "A. Competition among dentists in Indiana has been hindered, restrained, foreclosed, and frustrated; **[*1131]**
> B. The cost of dental health care services in Indiana has been or may be stabilized, fixed, or otherwise tampered with;
>
> C. Consumers have been or may be deprived of the benefit of third-party payers' cost-containing **[**16]** measures, including lower or potentially lower costs for dental health care services and dental health care benefits insurance;
> D. Consumers have been or may be denied the benefits of a second dentist's opinion as to the adequacy of proposed dental treatment; and
> E. Consumers have been limited in their opportunity to select dentists who cooperate with dental health care benefits programs."

Id. at 62.

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[6] The record reveals that the IDA was named as a coconspirator in the Commission's complaint but not as a respondent because in November 1978, the Commission and the IDA entered into a consent decree that provides in pertinent part:

> "*It is further ordered*, That respondents . . . shall cease and desist from engaging in any activity, course of conduct, practice, or policy that in whole or in part:
>
> A. Requests, urges, recommends or suggests that dentists, or has the purpose or effect of requiring or organizing dentists to, (1) refuse to submit radiographs or such other pre-treatment and post-treatment reports, analyses and materials (except where post-treatment radiographs are not taken in the course of treatment and would expose the patient to unnecessary radiation) as third-party payers request for use in benefit determination or (2) refuse to deal in any particular way with any one or more third-party payers."

Indiana Dental Association, 93 F.T.C. 392, 398 (1979); *43 Fed. Reg. 53,768 (1978)*. *Accord* *Texas Dental Association, 100 F.T.C. 536, 540 (1982)*.

[17]** Following an administrative hearing in October 1979, the ALJ issued a 132 page "Initial Decision" in March 1980. The ALJ found that "the members of IFD stand committed to a concerted refusal to furnish their patients' x-rays to dental health insurers. . . . There is abundant evidence that IFD has actually carried out the IDA/IFD boycott scheme as planned." *Id. at 121, 153*. [7] **[**19]** According to the ALJ, this group boycott began with the IDA and "it was primarily consciousness of the antitrust risk inherent in IDA's organized boycott of Indiana's dental health care insurers -- much magnified by the Supreme Court's 1975 ruling in *Goldfarb [v. Virginia State Bar, 421 U.S. 773, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975)]* -- which led to the organization . . . of IFD. . . ." *Indiana Federation of Dentists, 101 F.T.C. at 115*. The ALJ ruled that the IFD "was formed in 1976 to join and continue a concerted refusal by many dentists in Indiana to submit radiographs (x-rays) to dental health insurers either automatically or on request." *Id. at 153, 160*. The ALJ concluded that the IFD's participation in this concerted refusal constituted a **[**18]** group boycott and was a *per se* violation of the Federal antitrust laws. [8] The ALJ added, in the **[*1132]** alternative, that if

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[7] The ALJ made the following preliminary rulings:

> (1) The IFD's alleged anticompetitive activity had a "substantial effect upon interstate commerce" and thus the commission had jurisdiction over the complaint pursuant to *15 U.S.C. § 45(a)(1)*, *Indiana Federation of Dentists, 101 F.T.C. at 77-78, 153* (on appeal the Commission affirmed this decision, *see* *101 F.T.C. at 161-64*);
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> (2) The IFD was organized to "carry on business in substantial part for the profit of its members" and thus was a corporation for purposes of the Federal Trade Commission Act § 4, *15 U.S.C. § 44*, subject to the Commission's jurisdiction, *Id. at 75-76, 153, 160*;
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> (3) The "IFD is not and never has been a labor union within the meaning of section 6 and 20 of the Clayton Act," *15 U.S.C. § 17*, and thus did not satisfy the labor union exemption from the Federal antitrust laws, *Id. at 76, 153, 160*; and
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> (4) The McCarran-Ferguson Act, *15 U.S.C. §§ 1012*, *1013(b)*, which exempts the practice of insurance from Federal antitrust laws did not apply in the instant case because the IFD did not engage in the business of insurance and even though the illegality concerned the insurance industry, the McCarran-Ferguson exemption does not apply to boycotts, *Id.*

The IFD does not appeal any of these decisions.

[8] According to the Supreme Court in *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*, ***HN2***[] there are two categories of antitrust analysis:

> "In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are 'illegal *per se*.' In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."

435 U.S. at 692. The *per se* analysis in Federal ***antitrust law*** applies to certain types of group boycotts. *See, e.g., Klor's v. Broadway-Hale Stores, 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)* (retailers combined with appliance manufacturers and distributors to boycott competing retailer); *Fashion Originators' Guild v. F.T.C., 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941)* (organization of dress manufacturers and fabric designers boycotted retailers and manufacturers who dealt in copies of originals or refused to promise not to deal in such copies). According to the settled law in this circuit, "the ***HN3***[] common attribute of *per se* illegal group boycotts is 'a concerted attempt by a group of competitors at one level to protect itself from competition from non-group members who seek to compete at that level.'" *U.S. Trotting Ass'n v. Chicago Downs Ass'n, Inc., 665 F.2d 781, 788 (7th Cir. 1981)* (en banc) (quoting *Smith v. Pro Football, Inc., 193 U.S. App. D.C. 19, 593 F.2d 1173, 1178 (D.C. Cir. 1978))*. More recently, this court has stated that group boycotts are illegal *per se* only if they are used to enforce agreements that are themselves illegal *per se. See* *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, slip op. at 11 (7th Cir. 1984)*; *Vogel v. American Society of Appraisers, 744 F.2d 598, slip op. at 3 (7th Cir. 1984)*. We note, however, that the foundation for this statement initially appeared in *Marrese v. Am. Academy of Orthopaedic Surgeons, 706 F.2d 1488, 1493 (7th Cir. 1983)*, a case that was subsequently vacated by this court, and later appeared in *Wilk v. American Medical Ass'n, 719 F.2d 207, 221 (7th Cir. 1983)*, a case that relied solely upon the vacated *Marrese* opinion.***HN4***[]

such activity was not a *per se* violation, the record did not establish that the "effect on health safety . . . outweigh[ed] the plainly anticompetitive and anti-consumer effects of the IDA/IFD group boycott of dental health care insurers," and thus the activity was also violative of the Federal antitrust laws under a rule of reason analysis. *Id. at 153, 166*.

[20]** Additionally, the IFD argued at the administrative hearing that its practice was "clearly articulated and affirmatively expressed as [Indiana] state policy," "actively supervised" by the state, and thus exempt from the Federal antitrust laws under the doctrine of state action. *See, e.g., California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*. According to the IFD, its refusal to submit copies of a patient's dental x-rays to lay personnel employed by the group dental health care insurers was in compliance with Indiana state law which prohibits aiding and abetting the unlicensed practice of dentistry. [9] The ALJ equivocated on this issue, initially ruling that "there is probably no violation of the law against unlicensed practice of dentistry" when unlicensed lay personnel simply review claims for approval and have no authority to deny such claims in full or in part. *Indiana Federation of Dentists, 101 F.T.C. at 137*. The ALJ further ruled that even if the unlicensed lay personnel are engaged in the unlawful practice of dentistry, the Indiana law does not permit dentists "to organize a group boycott **[**21]** to help enforce the law." *Id.* [10]

[22]** The IFD appealed the ALJ's "Initial Decision" and in February 1983, the Commission **[*1133]** issued a "Final Order." The Commission adopted the ALJ's findings of fact, agreed with the ALJ's determination that the IFD member dentists had engaged in a "group boycott," but rejected the ALJ's conclusion that such conduct was a *per se* violation of the Federal antitrust laws. The Commission reasoned that a *per se* analysis of this case was improper because the IFD member dentists' refusal to comply with the insurers' x-ray directive was not "wholly

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Once *per se* illegality is established, there is a conclusive presumption that the conduct is unreasonable in violation of the Federal antitrust laws. *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 344, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*; *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*; *Northern Pac. R. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. If, however, the defendants' concerted conduct is "not designed to drive out competitors, but to achieve some other goal," *U.S. Trotting Ass'n v. Chicago Downs Ass'n Inc., 665 F.2d at 788*, the court must engage in a rule of reason analysis. In this circuit "[i]t is necessary under the rule of reason to show anticompetitive effects, or actual harm to competition, to establish an antitrust violation. . . ." *Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1283 (7th Cir. 1983)*; *Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549, 556 (7th Cir. 1980)*.

[9] Pursuant to *Ind. Code § 25-14-1-23*, the practice of dentistry includes:

> "Any person . . . who . . . offers to diagnose or professes to diagnose or treats or professes to treat any of the lesions or diseases of the human oral cavity, teeth, gums, maxillary or mandibular structures. . . ."

[10] The record reveals that the State of Indiana was granted leave to intervene in this lawsuit in July 1979 by the United States District Court for the Southern District of Indiana. The district court found that:

> "The State of Indiana has and is, actively regulating both dentists and the practice of dentistry within the State. . . . Under the mandate of Indiana law, Indiana dentists are prohibited from submitting their dental x-rays to third party insurers who employ 'dental consultants,' who are not licensed to practice dentistry, to read or diagnois [sic] the x-rays."

Indiana Federation of Dentists, 101 F.T.C. at 184. Thus, the district court ruled that "[t]he order proposed by the Secretary of the F.T.C. would infringe on the State's right to regulate the practice of dentistry within the State as reserved to the State under its police powers by the *Tenth Amendment to the Constitution of the United States*." *Id. at 148, 184*. At the administrative hearing, the IFD argued that under the doctrine of collateral estoppel, the district court's ruling precluded any ruling by the ALJ on the issue of state action. The ALJ rejected this argument, determining that the district court's findings of fact and conclusions of law on the merits of this case were not necessary for the judgment of leave to intervene, and thus the doctrine of collateral estoppel was inapplicable. *Id. at 143-52*.

motivated by an anticompetitive purpose" nor was it "aimed principally at excluding competitors." *Id. at 168*. [11] Thus, the Commission analyzed the IFD member dentists' conduct under a rule of reason, finding that:

> "the practical implementation of the [IFD] Work Rule was to refuse to cooperate with claims review programs which relied upon submission of x-rays. The effect of [the IFD member dentists'] conduct was to reduce competition among dentists to cooperate with dental reimbursement plans and, by doing so, to thwart the efforts of individual insurance companies to contain costs by offering coverage for only the **[**23]** least expensive adequate course of treatment."

Id. at 171-72. According to the Commission, the IFD member dentists' concerted refusal to comply with the insurers' directive to submit copies of a patient's dental x-rays along with the patient's claim form "*resulted in reducing or eliminating competition among dentists as to their policy of dealing with third-party payers." Id. at 173* (emphasis added). The Commission further found that:

> "In the absence of such concerted behavior, individual dentists would have been subject to the market forces of competition, creating incentives for them to treat patients and comply with the requests of patients' third-party insurers. By colluding, competitor dentists were freed to some extent from these market forces because they knew other participants in the boycott would also refuse to cooperate."

Id.

In response to the IFD's argument that its conduct did not harm competition because "there was not an **[**24]** absolute 'shut off' of x-rays to insurance companies," the Commission found that the IFD's policy of allowing insurers' to attend the dentist's office and view all diagnostic aids, including the patient's x-rays, was prohibitively expensive. The Commission surmised, without substantial evidentiary support in the record, that "even if the procedure were feasible at a higher cost, coercing parties into adopting such a procedure through collusion of competitors still distorts the competitive process." *Id.* The IFD further asserted that adherence to the IFD policy and accepted dental practice of examining all diagnostic aids before determining the proper course of dental treatment ensures patients of quality dental care and, in effect, promotes competition. According to the IFD:

> "Competition is naturally promoted among dentists who treat only after total diagnosis, in that their total treatment plan will be more successful from both a preventative viewpoint and long term maintenance of oral health. Error is less likely, thus reducing needed corrective work. Proper diagnosis will promote proper services, and satisfied patients will patronize those dentists."

[25]** *Id. at 176*. The Commission found, however, that this procompetitive justification was not supported by the evidence adduced at the administrative hearing. The Commission further found that "Indiana law does not affirmatively express any policy in favor of collusion among dentists in order to prevent or influence the use of x-rays by insurance companies" and thus the doctrine of state action did not exempt the concerted conduct of IFD member dentists from the Federal antitrust laws. [12] Accordingly, **[*1134]** the Commission ruled that the "IFD's conduct constituted an unfair method of competition in violation of Section 5 of the FTC Act." *Id. at 179*. On appeal, the IFD contends that under a rule of reason analysis, the evidence presented at the administrative hearing failed to establish that the conduct of the IFD and its member dentists had an anticompetitive effect in a relevant market. In the alternative, the IFD contends that the state action doctrine exempts the IFD member dentists' conduct from the Federal antitrust laws.

[26] II**

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[11] *See supra* note 8.

[12] The Commission ruled that its consideration of the IFD's state action defense was not barred by the doctrine of collateral estoppel. According to the Commission, when the United States District Court for the Southern District of Indiana granted the State of Indiana leave to intervene in this lawsuit, the court's findings of fact and conclusions of law concerning the State of Indiana's regulation of the dental profession, "were not essential to the judgment ordered" and thus the doctrine of collateral estoppel did not apply.

The issue squarely before this court is whether the collective refusal of the IFD member dentists to comply with the group dental health care insurers' directive to submit copies of a patient's dental x-rays along with the patient's insurance claim form violates the Federal Trade Commission Act § 5. In our review of the Commission's order we are guided by the Congressional language ***HN5***[] of *15 U.S.C. § 45(c) (1982)*, that "[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive." According to the settled law in this circuit, the Commission "may draw reasonable inferences from the record." *Spiegel, Inc. v. F.T.C., 540 F.2d 287, 293 (7th Cir. 1976)* (citing *Consolo v. Federal Maritime Commission, 383 U.S. 607, 620, 16 L. Ed. 2d 131, 86 S. Ct. 1018 (1966))*. The Commission's findings of fact "are to be accorded great deference and are to be upheld if supported by substantial evidence." [13] *Kaiser Aluminum & Chemical Corp. v. F.T.C., 652 F.2d 1324, 1329 (7th Cir. 1981).* **[**27]** *See also American Home Products Corp. v. F.T.C., 695 F.2d 681, 686 (3rd Cir. 1982)*; *RSR Corp. v. F.T.C., 602 F.2d 1317, 1320 (9th Cir. 1979)*, *cert. denied* , *445 U.S. 927, 100 S. Ct. 1313, 63 L. Ed. 2d 760 (1980)*. Thus, our review is limited to a determination of whether "the Commission applied incorrect legal standards which prejudiced its findings against petitioners . . . [and] whether the administrative decision is supported by substantial evidence in the hearing record before the examiner." *L.G. Balfour Company v. F.T.C., 442 F.2d 1, 7 (7th Cir. 1971)*.

[28]** In the instant case, the evidence reveals that the members of the IFD collectively agreed upon and drafted a dental policy statement, entitled IFD "work rule," setting forth the IFD position that "[p]roper diagnosis and treatment planning predicates the doctor correlating all diagnostic aids, with a history and with all clinical findings." *Indiana Federation of Dentists, 101 F.T.C. at 119, 129*. This policy of quality and proper dental care comports with the Indiana dentists' code of professional conduct, as drafted by the Indiana Board of Dental Examiners, that the competent practice of dentistry requires "minimum standards of performance in diagnosis or treatment as measured against generally prevailing peer performance." 828 Ind. Adm. Code 1-1-15(b) (1984). The IFD policy also complies with the American Dental Association's position that "[t]he dentist's primary obligation of service to the public shall include the delivery of quality care, competently and timely, within the bounds of the clinical circumstances presented by the patient. Quality of care shall be a primary consideration of the dental practitioner." ADA Principles of Ethics and Code of Professional **[**29]** Conduct at 2 (1983). Moreover, the IFD policy of quality and proper dental care provides that the dentist "has a moral and legal responsibility to not allow a determination of his patient's condition to be made for any purpose, without the benefit of a complete **[*1135]** examination which takes into account" all diagnostic aids, with a complete patient history and all clinical findings. *Indiana Federation of Dentists, 101 F.T.C. at 119, 129, 176*. Implicit within this IFD policy of quality and proper dental care is a determination that the review of x-rays *alone* is ineffective and insufficient when formulating a proper course of dental treatment.

According to the ALJ's findings of fact, as adopted by the Commission, an x-ray establishes *only*:

> "tooth decay, an abscess, bone loss around the teeth or pathology in the bone itself.
>
> * * *
>
> *Even a trained dentist can not determine the choice of restorative material just by looking at an x-ray, because that choice varies with how well the patient takes care of his teeth, which, in turn, affects how long the restorative material will last. . . . [Moreover] x-rays will not show the patient's mental* **[**30]** *condition, which is said to have considerable bearing on the treatment*."

Id. at 129-30 (emphasis added). For these reasons, the ALJ found that "*the experts -- on all sides -- seemed to agree that an x-ray or other diagnostic aid alone is not enough for an accurate diagnosis." Id. at 131* (emphasis added). Similarly, the American Dental Association provides that a proper "diagnosis and treatment plan cannot be made from radiographs alone. Benefits shall not be determined solely on the basis of radiographic evidence. . . . *Proper dental treatment is predicated on a diagnosis from many types of examination and not radiographs alone*." ADA Policies on Dental Care Programs 1974:653 at 34-35 (1984) (emphasis added). Thus, the IFD policy of

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[13] ***HN6***[] The Supreme Court defines substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." ***Consolo v. Federal Maritime Commission, 383 U.S. at 619-20*** (quoting *Edison Co. v. Labor Board, 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938))*. *See also Steadman v. SEC, 450 U.S. 91, 99-100, 67 L. Ed. 2d 69, 101 S. Ct. 999 (1981)*.

quality dental care comports not only with the Indiana dental code and the American Dental Association code of professional conduct, but also with the American Dental Association's policy statement that a proper dental diagnosis involves many types of examinations and the ALJ's finding that an x-ray alone is not enough for an accurate dental diagnosis.

Indeed, just as a competent and qualified **[**31]** physician performs numerous tests for a recurring headache, to rule out a possible brain tumor, blood clot, migraine condition, dysfunction of the eyes, ears, or mouth, ruptured blood vessel, or drug reaction; a competent and qualified dentist, when prescribing a proper course of dental treatment, must examine and review the entire oral cavity, including the teeth, gum and mouth tissue, tongue, maxillary and mandibular bone structure, and loss of bone structure, along with a case history, x-rays, and all clinical findings. A thorough examination of this nature assures the patient of quality dental care and protects the dentist from future claims of negligence and possible dental malpractice. The evidence in this case establishes that the IFD member dentists collectively adhered to their policy of quality and proper dental care, refusing to comply with the group dental health care insurers' directive to submit copies of a patient's x-rays without the benefit of examining and reviewing all diagnostic aids, a case history, and all clinical findings. Instead, the dentists uniformly responded to the insurers' x-ray directive with a form letter, prepared by the IFD, that provided in pertinent **[**32]** part:

> "It is the policy of this office to provide all diagnostic aids to third parties on an in-office basis and with the consent of the patient. . . . If you will have your consultant contact my office to set up an appointment, I will furnish records and ask the patient to be present for an examination."

Indiana Federation of Dentists, 101 F.T.C. at 122. In light of the evidence presented at the administrative hearing, it is clear that the collective refusal of the IFD member dentists to comply with the insurers' x-ray directive resulted from the dentists' adherence to a legal, moral, and ethical policy of quality dental care that requires a complete examination of all diagnostic aids before formulating a proper course of dental treatment. Accordingly, the focus of our review is whether the conduct of the IFD member dentists in **[*1136]** adopting and collectively adhering to a policy that complies with the established, accepted, and approved standards of quality dental care constitutes a group boycott in violation of the Federal Trade Commission Act § 5.

A. GROUP BOYCOTT

In *Phil Tolkan Datsun v. Greater Milwaukee, Etc., 672 F.2d 1280 (7th Cir. 1982),* **[**33]** this court set forth the general rule that:

> "'**HN7**[↑] *The classic "group boycott" is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level*. Typically, the boycotting group combines to deprive would-be competitors of a trade relationship which they need in order to enter (or survive in) the level wherein the group operates.'"

672 F.2d at 1284 (emphasis added) (quoting *Smith v. Pro Football, Inc., 193 U.S. App. D.C. 19, 593 F.2d 1173, 1178 (D.C. Cir. 1978))*. *See also* *Kreuzer v. Am. Academy of Periodontology, 237 U.S. App. D.C. 43, 735 F.2d 1479, 1493 (D.C. Cir. 1984)*; L. Sullivan, *Handbook of the Law of Antitrust* 230, 232 (1977). Contrary to the classic group boycott, the instant case does not involve a group of competitors banning together to protect themselves from non-group competitors. The record reveals that the IFD member dentists simply provide patients with quality dental care and pursuant to the terms of a **[**34]** collective bargaining agreement, the group dental health care insurers pay for the dentists' services. The record contains no evidence that the dentists compete with the insurers to attract patients, provide dental services, or prescribe dental treatment. Indeed, the ALJ found that "neither IFD nor any dentist member stands in the relation of competitor to any insurer. . . ." *Indiana Federation of Dentists, 101 F.T.C. at 124-25*. In light of the non-competitive market structure, we agree with the Commission that the "conduct by the Indiana dentists involved a group decision to withhold [the submission of] x-rays from [insurance companies] *which were neither customers nor competitors*" and thus, the IFD's conduct was "not aimed principally at excluding competitors." *Id. at 168* (emphasis added). The refusal to comply with the insurers' x-ray directive is not an attempt by the IFD member dentists to protect themselves from competitors; it is an adherence to a legal, moral, and ethical policy of quality and proper dental care. Thus, due to the fact that the group dental health care insurers are not competitors of the IFD member dentists, we hold that the **[**35]** dentists' refusal to comply with the insurers' x-ray directive does not constitute a classic group boycott.

Despite an absence of competition between the IFD member dentists and the group dental health care insurers within the State of Indiana, the Supreme Court has concluded that "the ***HN8***[] term 'boycott' is not limited to concerted activity against . . . competitors of members of the boycotting group." *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 552, 57 L. Ed. 2d 932, 98 S. Ct. 2923 (1978)* ("*St. Paul Fire & Marine"). In St. Paul Fire & Marine*, four medical malpractice insurers in the State of Rhode Island allegedly entered into an agreement whereby three insurers refused to deal with physicians and hospitals within the state, thereby compelling the physicians and hospitals to accept curtailed medical malpractice insurance from the fourth insurer, in alleged violation of the Sherman Act *§ 1*. The insurers argued that their activities were immune from Sherman Act scrutiny under the McCarran-Ferguson Act, *15 U.S.C. §§ 1011-1015*, which excepts **[**36]** the practice of insurance from the Federal antitrust laws. The physicians and hospitals argued that the insurers' activity constituted a boycott and pursuant to the express language of the McCarren-Ferguson Act § 3, *15 U.S.C. § 1013(b)*, the Sherman Act remains applicable "to any agreement to boycott, coerce, or intimidate. . . ." According to the Supreme Court, "*[t]he generic concept of boycott refers to a method of pressuring a party with whom one has a dispute by withholding, or enlisting others to withhold,* ***[*1137]*** *patronage or services from the target*." *438 U.S. at 541* (emphasis added). Based upon this broad definition of the term "boycott," the Court held that "[w]hatever other characterizations are possible, [the insurers'] conduct fairly may be viewed as 'an organized boycott' . . . ." *Id. at 544* (quoting *Fashion Guild v. F.T.C., 312 U.S. 457, 465, 85 L. Ed. 949, 61 S. Ct. 703 (1941))*.

This court has recognized that "'[t]he term "group boycott" . . . is in reality a very broad label for divergent types of concerted activity.'" *Phil Tolkan Datsun v. Greater Milwaukee, etc., 672 F.2d at 1285* **[**37]** (quoting *Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1976)*, *cert. dismissed*, *434 U.S. 801, 54 L. Ed. 2d 59, 98 S. Ct. 28 (1977))*; *U.S. Trotting Ass'n v. Chicago Downs Ass'n, Inc., 665 F.2d at 788*. ***HN9***[] The broad label of "group boycott" generally applies to conduct involving a concerted refusal to deal, commonly defined as "an agreement by two or more persons not to do business with other individuals, or to do business with them only on specified terms." II E. Kintner, *Federal* ***Antitrust Law*** § 10.27 at 155 (1980). The instant case concerns an agreement among the IFD member dentists to adhere to established, accepted, and approved standards of quality dental care by requiring that the group dental health care insurers examine and review all diagnostic and clinical aids before formulating a proper course of dental treatment. In furtherance of a legal, moral, and ethical policy that x-rays alone are ineffective and insufficient in formulating a proper course of dental treatment, the dentists refuse to submit copies of a **[**38]** patient's dental x-rays without the benefit of a complete diagnostic and clinical examination. Instead, the dentists expressly invite the insurers to visit their respective dental offices to review the patient's complete file, including reports compiled by dental specialists, the patient's case history, x-rays, all clinical findings, and examinations of the oral cavity, gum and mouth tissue, teeth, and bone structure.

The ALJ found that "most dentists have typically expressed their willingness to let insurers' 'qualified' experts come to their (the dentists') offices to look at x-rays and other diagnostic aids." *Indiana Federation of Dentists, 101 F.T.C. at 125 n.337*. The ALJ further found that "smaller insurers had generally gone along with the Indiana dentists' demands" to not require the submission of dental x-rays alone, but to review and examine all diagnostic and clinical aids in determining a proper course of dental treatment. Moreover, the evidence reveals that in 1972, dentists in the Allen County-Fort Wayne, Indiana area continually refused to comply with a request by the Aetna Insurance Co. to submit copies of a patient's x-rays along with the patient's **[**39]** dental claim form. Aetna responded by hiring a licensed dentist and "arranged for him to go to the office of each dentist concerned and work with the relevant x-rays and any other diagnostic aids in the dentist's files." *Id. at 98*. In January 1974, Aetna settled upon a plan whereby a licensed dentist would travel from Aetna's Indianapolis office to Anderson, Indiana once a week to review x-rays and conduct in-mouth examinations at an estimated cost of $10 per patient.

In light of the fact that insurers have accepted the dentists' invitation to visit the dental office to examine and review all diagnostic and clinical aids, it is clear that the IFD member dentists did not engage in a *complete* refusal to deal with the group dental health care insurers. The dentists continued to treat all patients, including those covered by group dental health care plans, and thus continued to deal with the insurers on a regular basis. According to the record, the IFD member dentists simply agreed to require that group dental health care insurers do business on the dentists' terms, in compliance with established, accepted, and approved standards of quality dental care. Thus, **[**40]** the group boycott label in the instant case refers to the dentists' concerted effort to ensure quality dental care by requiring insurers to examine and review all diagnostic and clinical **[*1138]** aids before formulating a course of dental treatment for purposes of a benefit determination. The dentists' conduct was neither a classic "group boycott" intended to protect dentists from competitors nor a complete refusal to deal with insurers in their efforts to control spiraling dental costs. In effect, the IFD member dentists adopted and implemented a policy that comports with legal, ethical, and moral standards of quality dental care but conflicts with the practice of group dental health care insurers to formulate a course of dental treatment and to determine insurance benefits based solely upon an insurance claim form and copies of a patient's dental x-rays.

B. RULE OF REASON

In reviewing the anticompetitive nature of the IFD member dentists' conduct, we initially note the commission's observation that the "allegation of unfair methods of competition [against the IFD] is based on Sherman Act principles." *Id. at 180 n.24*. Indeed, the respondent, FTC, admits **[**41]** in its brief that the Commission analyzed this case under the Sherman Act *§ 1*, *15 U.S.C. § 1*, and the Federal Trade Commission Act § 5, *15 U.S.C. § 45*. *See also Id. at 124, 153*. [14] Accordingly, our review of the Commission's order is guided by the legal principles of Federal ***antitrust law*** established under both the Sherman Act and the Federal Trade Commission Act. Foremost among these legal principles is that ***HN10***[] "[t]he 'rule of reason' is the established standard of analysis for determining whether [a Federal] antitrust violation" has occurred. *Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1283 (7th Cir. 1983)*. *See also Arizona v. Maricopa County Medical Society, 457 U.S. 332, 343, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*; *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. The rule of reason "requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable **[**42]** restraint on competition." *Arizona v. Maricopa County Medical Society, 457 U.S. at 343*. *See also Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775 (1984)*. According to the Supreme Court, "[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." *Arizona v. Maricopa County Medical Society, 457 U.S. at 344*. *See also N.C.A.A. v. Bd. of Regents of Univ. of Okl., 468 U.S. 85, 104 S. Ct. 2948, 2960, 82 L. Ed. 2d 70 (1984)*; *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 1560 n.25, 80 L. Ed. 2d 2 (1984)*; *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. at 50 n.16*. This principle of *per se* unreasonableness "avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries. . . ." *Northern Pac. R. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*; **[**43]** *Broadcast Music, Inc. v. CBS, 441 U.S. 1, 8 n.11, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*; *Arizona v. Maricopa County Medical Society, 457 U.S. at 344*.

The Supreme Court further provides that ***HN11***[] "*[p]er se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. at 49-50*. *See* **[**44]** *also Northern Pac. R. Co. v. United States, 356 U.S. at 5* (certain agreements or practices because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed **[*1139]** to be *per se* unreasonable). Additionally, "the *per se* rule is not employed until after considerable experience with the type of challenged restraint." *Broadcast Music, Inc. v. CBS, 441 U.S. at 19 n.33*. *See also Lekto-Vend Corp. v. Vendo Co., 660 F.2d 255, 265 n.11 (7th Cir. 1981)*, *cert. denied*, *455 U.S. 921, 71 L. Ed. 2d 461, 102 S. Ct. 1277 (1982)*; *Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549, 555 (7th Cir. 1980)*. In accord with these legal principles the law in this circuit is well-settled that a *per se* analysis "should not be applied, and has never been applied by the

[14] According to the Supreme Court in *F.T.C. v. Cement Institute, 333 U.S. 683, 691-92, 92 L. Ed. 1010, 68 S. Ct. 793 (1948)*, "soon after its creation the commission began to interpret the prohibitions of § 5 as including those restraints of trade which also were outlawed by the Sherman Act, and . . . this Court has consistently approved that interpretation of the Act." *See also* 11 von Kalinowski, *Antitrust Laws and Trade Regulation* § 121.01 at 121-22 (1983).

Supreme Court, to concerted refusals that are not designed to drive out competitors but to achieve some other goal." U.S. Trotting Ass'n v. Chicago Downs Ass'n, Inc., 665 F.2d at 788 (quoting Smith v. Pro Football, Inc., 593 F.2d at 1180). *See also* Kreuzer v. Am. Academy of Periodonotology , 735 F.2d at 1491; **[**45]** P. Kissam, ***Antitrust Law*** *and Professional Behavior*, 62 Texas L.R. 1, 35-36 (1983). Based upon the Commission's finding that the conduct of the IFD member dentists is "not wholly motivated by an anticompetitive purpose, . . . is not aimed principally at excluding competitors," Indiana Federation of Dentists, 101 F.T.C. at 168, and our previous analysis of the market structure between dentists and insurers within the State of Indiana, it is clear that the IFD member dentists are not attempting "to drive out competitors." Rather, the dentists are adhering to a legal, moral, and ethical policy of quality and proper dental care, requiring that the insurers examine and review all diagnostic aids before denying or approving a proper course of dental treatment. The record clearly reveals that the IFD member dentists' conduct is not manifestly anticompetitive, nor has it been the subject of prior Federal antitrust analysis, thus we agree with the Commission that the IFD member dentists' conduct in adhering to their policy of quality dental care must be analyzed under a rule of reason. *Cf.* Kreuzer v. Am. Academy of Periodonotology, 735 F.2d at 1492 **[**46]** (if the boycott amounts to a public service, sufficient questions of competitive effect are raised to allow release from *per se* treatment); Wilk v. American Medical Ass'n, 719 F.2d 207, 221 (7th Cir. 1983), *cert. denied*, *467 U.S. 1210, 104 S. Ct. 2398, 81 L. Ed. 2d 355 (1984)* (the anticompetitive effect of a boycott in the medical profession is too uncertain to be amenable to *per se* treatment). [15]

[47]** The Supreme Court precedent clearly provides that ***HN12***[] "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." National Soc. of Professional Engineers v. United States, 435 U.S. at 691. According to the Court, under a rule of reason analysis:

> "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 **[*1140]** may help the court to interpret facts and to predict consequences."

Chicago Board of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918). The **[**48]** rule of reason analysis "does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." National Soc. of Professional Engineers v. United States, 435 U.S. at 688. Thus, ***HN13***[] "[u]nder the rule of reason, a showing of anticompetitive effect in the relevant market is an essential predicate of antitrust liability." Phil Tolkan Datsun v. Greater Milwaukee, etc., 672 F.2d at 1287. *See also Jefferson Parish Hosp.* Dist. No. 2 v. Hyde, 104 S. Ct. at 1567. In this circuit "it is . . . well established that any rule of reason analysis requires a showing of anticompetitive market effect. To hold otherwise would ignore the very purpose of the [Federal] antitrust laws which were enacted for the protection of competition, not competitors." U.S. Trotting Ass'n v. Chicago Downs Ass'n, Inc., 665 F.2d at 790 (quoting Lektro-Vend Corp. v. Vendo Co., 660 F.2d at 268). **[**49]** *See also* Wilk v. American Medical Ass'n, 719 F.2d at 227 (under rule of reason analysis plaintiff must show that effect of conduct is to restrict competition rather than promote it); Dos Santos v. Columbus-Cuneo-Cabrini Med. Center, 684 F.2d 1346,

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[15] In *National Soc. of Professional Engineers v. United States*, the Supreme Court reasoned that professional services, including the medical profession, "by their nature . . . may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason." 435 U.S. at 696. We note, however, that the Court has applied a *per se* analysis in cases involving the medical profession; refusing "to tolerate manifestly anticompetitive conduct simply because the health care industry is involved." *Jefferson Parish Hosp.* Dist. No. 2 v. Hyde, 104 S. Ct. at 1565-66 n.42. In the instant case, the conduct of the IFD member dentists is not manifestly anticompetitive. Moreover, our rule of reason analysis stems from the fact that the conduct of the IFD member dentists is not designed to drive out competitors but to promote a legal, moral, and ethical policy of quality and proper dental care. *See* U.S. Trotting Ass'n v. Chicago Downs Ass'n, Inc., 665 F.2d at 787.

1352 (7th Cir. 1982) (under rule of reason analysis plaintiff must show the challenged restraint has an adverse impact on competition in a relevant market). [16] Moreover, by requiring a showing of an anticompetitive effect in a relevant market we assure the consumer that the challenged activity actually harms competition, and thus we uphold the intended purpose of the Federal antitrust laws as a "consumer welfare prescription." *N.C.A.A. v. Bd. of Regents of Univ. of Okl., 104 S. Ct. at 2964* (quoting *Reiter v. Sonotone Corp., 442 U.S. 330, 343, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979))*. *See also* *Products Liability Ins. v. Crum & Forster Ins., 682 F.2d 660, 663-64 (7th Cir. 1982)*; R. Bork, *The Antitrust Paradox* 66 (1978); 21 Cong. Rec. 2455, 2456-63 (March 21, 1890) (statement of Sen. Sherman).

[50] C. ANTICOMPETITIVE EFFECT**

In light of the pertinent case law, we review the Commission's findings of a relevant market and the anticompetitive effect that the IFD member dentists' conduct had therein. We initially note that the Commission's analysis of the relevant market consisted of a single paragraph placed within a footnote of the "Final Order":

> "As in any rule of reason case, attention must be paid to market definition in order to assess competitive effects. No elaborate analysis is required here, since the record shows that under IDA's leadership, the conspiracy spanned many, if not most, localities in Indiana. *Under the leadership of IFD, it continued to be strong in the local areas covered by that organization's three chapters*."

Indiana Federation of Dentists, 101 F.T.C. at 173 n.12 (emphasis added). Within this ambiguous relevant market (apparently including the IFD's chapters in Anderson, Ft. Wayne, and Lafayette, Indiana) the Commission found that the "IFD's concerted refusal to furnish x-rays to third-party payers substantially harmed competition among dentists by eliminating incentives for individual dentists to **[**51]** cooperate with cost-containment programs of third-party payers." *Id. at 179*. According to the Commission, this "concerted activity by **[*1141]** competitors resulted in reducing or eliminating competition among dentists as to their policy of dealing with third-party payers." *Id. at 173*. The Commission further found that "[i]n the absence of such concerted behavior, individual dentists would have been subject to market forces of competition, creating incentives for them to treat patients and comply with the requests of patients' third-party insurers." *Id.* Thus, under a rule of reason analysis, the Commission found that within the area of the IFD's three separate chapters, the conduct of the 84 current and 8 former IFD member dentists had an anticompetitive effect *among dentists as to their policy of dealing with third party payers*.

It is important to note that the focus of the FTC's complaint and the basis of the Commission's finding was that the IFD member dentists' conduct harmed competition *among dentists in their policy of dealing with group dental health care insurers*. Neither the ALJ nor the Commission found that the dentists' **[**52]** conduct harmed competition among insurers, in their efforts to provide group dental health care coverage, nor among dentists, in their efforts to attract and treat patients covered by group dental health plans. Indeed, the Commission found that the "complaint did not clearly allege harm to competition in the dental insurance market, and conclusions about competitive harm to this market are unnecessary to our decision." *Id. 101 F.T.C. at 174*. Accordingly, the limited scope of our review is whether substantial evidence supports the commission's finding that the dentists' adherence to a legal, moral, and ethical policy of quality and proper dental care and their refusal to comply with the insurers' x-ray directive, had an anticompetitive effect *among dentists in their policy of dealing with group dental health care insurers*.

The ALJ's "Initial Decision" and the Commission's "Final Order" are replete with references to the *clearly* and/or *plainly anticompetitive* conduct of the IFD member dentists in their policy of dealing with group dental health

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[16] According to the Commission, "[t]o assess the legality of the IFD restrictions under a rule of reason analysis, we must examine their nature, purpose and effect on competition, including an assessment of any possible procompetitive impact." *Indiana Federation of Dentists, 101 F.T.C. at 168-69*. The Commission's statement is not a complete and accurate statement of the rule of reason analysis. An *examination* of the effect on competition is not sufficient, there must be an actual *showing* that the alleged proscribed conduct has an anticompetitive effect in a relevant market. *Phil Tolkan Datsun v. Greater Milwaukee, etc., 672 F.2d at 1287*; *U.S. Trotting Ass'n v. Chicago Downs Ass'n, Inc., 665 F.2d at 790*; *Lektro-Vend Corp. v. Vendo Co., 660 F.2d at 268*.

insurers. Implicit in this unsupported conclusory statement is a factual assumption that dentists in Anderson, **[**53]** Fort Wayne, and Lafayette, Indiana actually competed against one another in dealing with such insurers, and in complying with the insurers' directive to submit copies of a patient's dental x-rays along with the patient's claim form. The record is void of any finding that dentists within these three areas did, in fact, engage in any form of competition in their policy of dealing with insurers or in complying with the insurers' x-ray directive. The record contains no substantial evidence nor thorough analysis of the total number of dental patients within the relevant market; the percentage of dental patients covered by group dental health care plans within the relevant market; the availability and proximity of dentists from surrounding areas of Indiana; the fees charged those patients covered by group dental health care plans, as compared to the fees charged patients without such coverage, within the relevant market; the policy of non-IFD member dentists in dealing with group dental health care insurers within the relevant market; or the general policy of dental insurers throughout the State of Indiana in examining a proposed or completed course of dental treatment for purposes of benefit **[**54]** determination. Indeed, the ALJ found that " *the record here is substantially deficient in evidence* as to just what supplementation of x-rays for diagnoses is the usual practice of the dental health care insurers serving Indiana." *Id. at 132* (emphasis added). Upon examination of the record, the parties' briefs, the ALJ's "Initial Decision," and the Commission's "Final Order" we discern no analysis of the factors which are necessary and essential to a finding that dentists in Anderson, Fort Wayne, and Lafayette, Indiana do, in fact, compete with one another in their policy of dealing with group dental health care insurers. The Commission apparently assumed, without substantial evidentiary support in the record, that because the IFD member dentists acted in concert rather than individually, competition had to exist among and between dentists **[*1142]** in their policy of dealing with the insurers. An equally tenable argument, however, is that the IFD member dentists acted in concert because of their conviction to the legal, moral, and ethical policy of quality and proper dental care that requires a review of all diagnostic and clinical aids in formulating a proper course of **[**55]** dental treatment. *See, e.g., Kreuzer v. Am. Academy of Periodonotology, 735 F.2d at 1494*. Though the Commission's assumption of competition may be valid in the abstract, it is not supported by substantial evidence in the record.

Even if "reasonable inferences" could be drawn from the record to show that dentists in the relevant market did, in fact, compete in their policy of dealing with group dental health care insurers, the record is void of any substantial evidence to support the Commission's finding that the conduct of the IFD member dentists harmed this competition or had an anticompetitive effect. The Commission apparently reasoned that because the IFD member dentists had substantial market power within the Madison County-Anderson, Indiana area and the Allen County-Ft. Wayne, Indiana area, the dentists' collective adherence to their policy of quality and proper dental care altered these areas of the relevant market, allowing the dentists to refuse to comply with the insurers' x-ray directive without having to fear the potential loss of group dental health care patients. In support of this position, the Commission relied upon a letter written by the **[**56]** secretary of the Anderson IFD chapter, claiming that in September 1976, 95 percent of all practicing dentists in Madison County had joined the IFD. The Commission further relied upon a newsletter released by members of the Lafayette IFD chapter alleging that by September 1977, "all but a few dentists" in the four county Lafayette chapter were members of the IFD. Based upon these two separate letters, the Commission concluded that the IFD had substantial market power in two areas of the relevant market and that:

> "in the absence of . . . concerted behavior, individual dentists would have been subject to market forces of competition, creating incentives for them to treat patients and comply with the requests of patients' third-party insurers. By colluding, competitor dentists were freed to some extent from these market forces because they knew other participants in the boycott would also refuse to cooperate."

Indiana Federation of Dentists, 101 F.T.C. at 173. Though the documentary evidence relied upon by the Commission to find market power may be sufficient to warrant an investigation into the practices of the IFD and its member dentists, the **[**57]** evidence falls far short of establishing that the dentists' conduct altered the relevant market to harm competition among dentists in their policy of dealing with group dental health care insurers.

According to the Commission, the harmful effect of the IFD member dentists' conduct in adhering to their legal, moral, and ethical policy of quality and proper dental care was to eliminate "incentives for individual dentists to cooperate with [the insurers'] cost-containment programs" and thus to "thwart the efforts of individual insurance companies to contain costs by offering coverage for only the least expensive adequate course of treatment." *Id. at 171-72, 179*. We note that neither the ALJ nor the Commission delineated the alleged incentives available to dentists for complying with the insurers' x-ray directive. Contrary to a finding of such incentives, the record clearly reveals that even when dentists refused to submit copies of a patient's x-rays along with the patient's claim form, group dental health care insurers continued to examine and process the patients' dental claim. We further note that neither the ALJ nor the Commission found that the submission of **[**58]** a patient's dental x-rays actually lowered the insurers' dental costs, or that the refusal to submit copies of a patient's x-rays actually increased dental costs. Indeed, the Commission expressly declined to consider these issues, claiming that "it is not for . . . the Commission to judge the efficiency of the arrangements **[*1143]** selected by insurance companies to control costs." *Id. at 175*. *See also* D. Clanton, *FTC and the Professions*, 52 Antitrust L.J. 209, 218 n.33 (1983). In light of this evidence, it is clear that the Commission applied a "limited rule of reason analysis . . . but did not require elaborate proof of anticompetitive effect." D. Clanton, *FTC and the Professions*, 52 Antitrust L.J. at 218. As a result, the Commission's finding that the IFD member dentists' conduct had an *anticompetitive effect* among dentists in their policy of dealing with group dental health insurers is not supported by substantial evidence in the record.

A review of the evidence presented at the administrative hearing reveals that the IFD member dentists did not refuse to allow insurers access to a patient's dental x-rays. In **[**59]** furtherance of the established, accepted, and approved IFD policy of quality and proper dental care, the IFD member dentists allowed insurers to visit the dental office to review and examine the patient's x-rays along with all of the other diagnostic and clinical aids used in formulating a proper course of dental treatment. The evidence reveals that the IFD member dentists continued to treat patients, including those covered by group dental health care plans, and continued to make dental diagnoses that were subject to review and approval by group dental health care insurers. Thus, the IFD member dentists, did, in fact, compete among themselves and with non-IFD dentists in their billing of patients covered by group dental health care plans and in their policy of dealing with the insurers.

According to the Commission, the IFD member dentists offer to insurers to visit the dental office to review and examine all diagnostic and clinical aids did not reduce the harm to competition.

> "While it is true that respondent was willing to allow *some* arrangements whereby x-rays could be examined by insurers -- in particular, allowing insurers' consultants to make visits to the dentists' **[**60]** offices -- the record is clear that this was prohibitively expensive. . . . Moreover, even if the procedure were feasible at a higher cost, coercing parties into adopting such a procedure through collusion of competitors still distorts the competitive process."

Indiana Federation of Dentists, 101 F.T.C. at 174-75, 125 n.337. [17] The Commission's finding is tempered by evidence in the record that "smaller insurers had generally gone along with the Indiana dentists' demands" and that group dental health care insurers did, in fact, visit dental offices to examine and review all diagnostic and clinical aids, including x-rays. Moreover, as long as the IFD member dentists continued to treat patients covered by group dental health care plans and invite their insurers to the dental office to review and examine all diagnostic and clinical aids, the IFD member dentists continued to compete among themselves and with non-IFD dentists in their policy of dealing with group dental health insurers. Any expenses resulting from the adherence to the IFD policy of quality and proper dental care affected the insurers in their review of dental claims, not the dentists in their **[**61]** competition for patients covered by group dental health care plans or in their competition to deal with the patients' insurers. The record clearly reveals that the IFD member dentists continued to compete in their policy of dealing with group dental health insurers; the dentists simply required that the insurers abide by established, accepted, and

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[17] The ALJ found that:

> "There is unchallenged testimony in this record to the effect that it is not economically feasible and in any event it would be a terrible waste of time to have insurers' professional dental consultants constantly travelling from office to office to talk to dentists (when available) and look at their x-rays."

Indiana Federation of Dentists, 101 F.T.C. at 84.

approved standards of quality and proper dental care, examining and reviewing all diagnostic aids before formulating a proper course of dental treatment.

The record is void of any substantial evidence to support the Commission's finding that the IFD **[**62]** member dentists' refusal **[*1144]** to comply with the insurers' x-ray directive, had an anticompetitive effect among dentists as to their policy of dealing with group dental health care insurers. *Accord Boddicker v. Arizona State Dental Ass'n, 680 F.2d 66, 68 (9th Cir.)*, *cert. denied*, *459 U.S. 837, 74 L. Ed. 2d 79, 103 S. Ct. 83 (1982)* (no arguments presented to demonstrate an adverse effect on competition between dentists). In effect, the Commission's finding of a Federal antitrust violation, based upon the insufficient evidence presented in this case, is a rubber-stamp approval of the group dental health care insurers' practice to formulate a course of dental treatment based solely upon dental x-rays and an insurance claim form, in violation of established, accepted and approved standards of quality dental care. There is no doubt that judicial sanction of such a practice, under the guise of the Federal Trade Commission Act, runs contrary to public policy and the very purpose of the Federal antitrust laws as a consumer welfare prescription. Indeed, by preventing dentists from joining together to promote standards of quality dental care that **[**63]** comport with the American Dental Association's code of professional conduct and the Indiana dental code, the Commission, with absolutely no expertise or training in the highly advanced field of dentistry, unwisely regulates the dental profession and all of its specialties, including endodontia, exodontia, oral surgery, orthodontia, pedodontia, periodontia, and prosthodontia, to the detriment of consumers. The group dental health care insurers cannot be permitted to forsake standards of quality and proper dental care in an attempt to lower their dental costs, particularly in the instant case where there has been no finding that the review of dental x-rays alone, actually reduces dental costs. According to the evidence presented at the administrative hearing, the IFD member dentists adhered to the legal, moral, and ethical policy of quality dental care, requiring that insurers examine and review all diagnostic and clinical aids before formulating a proper course of dental treatment. The record contains no substantial evidence to support a finding that adherence to the IFD policy had an anticompetitive effect among dentists in their policy of dealing with group dental health care insurers. **[**64]** Thus, we hold that, under a rule of reason analysis, the evidence presented at the administrative hearing failed to establish that the conduct of the IFD and its member dentists had an anticompetitive effect in a relevant market, in violation of the Federal Trade Commission Act § 5. [18]

III

Based upon the foregoing analysis, we vacate the Commission's "cease and desist" order.

Concur by: Fairchild

Concur

FAIRCHILD, Senior Circuit Judge, concurring in result.

This case deals with a significant problem in the operation of group dental insurance in Indiana. The insurance companies have contracted with employers to pay dental bills incurred by employees. The insurer's obligation is limited, however, by the standard **[**65]** of "least expensive adequate course of treatment." An opportunity to examine an x-ray in connection with a claim for services already rendered or pre-authorization of a course of treatment aids the insurer in determining the amount of its obligation to pay, and serves the interests of both insurer and employer in keeping costs under control. Employee patients have an interest in prompt and full payment of their dental bills, as well as in the quality of care. Dentists have an interest in being paid for their service, as well as in freedom to exercise professional judgment in prescribing treatment.

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[18] In light of this court's holding that under a rule of reason analysis the evidence presented at the administrative hearing failed to establish that the conduct of the IFD and its member dentists had an anticompetitive effect in a relevant market, we need not address the issue of state action.

There is little question that the Indiana Dental Association organized boycott of insurers' requests for x-rays had a significant economic impact on the functioning of **[*1145]** group dental plans within Indiana. In 1974 IDA's membership included 85 to 88 percent of licensed dentists in Indiana. IDA's recommendation to its members to refuse to submit x-rays began as early as 1972 and achieved widespread compliance particularly in those counties where IFD would later form chapters. IDA's boycott forced group insurers to withdraw requests for the mailing of x-rays or face growing backlogs **[**66]** in patient claims. The experience of Aetna Insurance Company, provides an example. Aetna contracted to provide dental coverage to International Harvester employees in 23 states and several foreign countries. The Commission found that:

> Only in Indiana did Aetna experience any difficulty in obtaining x-rays for review of dental treatments. Within one year, there was a backlog of approximately 600 unpaid claims, because of Aetna's inability to verify the maximum allowable benefits. In a one-time effort to eliminate this backlog, the company's dental consultant visited the offices of all the dentists who had refused to submit x-rays and reviewed the claims with them, also urging them to submit x-rays in the future. There were two general reactions to his plea: "one, dentists who said despite the fact that you seem fair, I will not send x-rays to you; and others who said I would like to, but I don't dare to." In January, 1974, Aetna's consultants began doing in-mouth examinations of claimants in its Ft. Wayne office; they continued this practice until the end of November, 1978. In that period, the company conducted 4,700 exams at an estimated cost of ten dollars each. (Transcript **[**67]** references omitted.)

By 1976 some leaders of the IDA inspired boycott became concerned that antitrust entanglements would begin to hinder IDA's already prolonged efforts to force group dental insurers to cease requesting submission of x-rays. These individuals decided to form a "dentist union" that they hoped would give dentists "more muscle" in negotiations with insurance carriers and be immune from antitrust liability. In August 1976 IFD was formed with members in at least six Indiana counties.

After formation, IFD actively encouraged its members to continue the IDA boycott. The record shows that companies operating dental insurance plans in counties with high IFD membership continued to face substantial resistance to requests for x-rays as late as January 1977.

Even viewing the IFD group independently of the IDA background, the size of IFD membership in a number of Indiana counties gave IFD the power to frustrate to a significant extent the insurers' need to review x-rays in those counties without going to exorbitant expense.

The substantial problem posed to the insurers by the concerted refusal to supply x-rays is clear. The difficult questions arise from the **[**68]** application of antitrust doctrine.

The underlying issue is the fairness of the practice of refusal, principally as it impacts insurers, but also as it affects employers and employee-patients. The complaint alleged that the concerted refusals were unfair acts or practices. The FTC acknowledged that the record contained some evidence of consumer injury, but noted that neither the parties nor the ALJ had analyzed the issue of unfairness liability and declined to decide it. The FTC also concluded under the unfair methods of competition allegation a per se analysis is inappropriate, and that it must, under the rule of reason, examine the nature, purpose, and effect on competition of the concerted refusals.

Also acknowledging an argument by complaint counsel that the dentists' concerted action may have caused reduced competition among insurers, the FTC declined to make that finding. The FTC did find that the concerted refusals substantially limited competition among dentists. Thus the inquiry must be focused on competition among dentists, and whether concerted refusal to furnish x-rays to insurers curtails such competition.

[*1146] I join in the result reached by the court, **[**69]** vacating the FTC order, because I conclude that the FTC analysis of the effect of the concerted refusal on competition among dentists is deficient.

Conceivably a dentist's willingness or unwillingness to supply x-rays to an insurer may be significant to an employee in choosing his dentist. Assuming that a prospective patient is aware of the practice of particular dentists in refusing or supplying x-rays, and the significance that refusal or cooperation may have to the patient's interest, he may choose one dentist over another. Presumably a patient would consider cooperation desirable because the bill would be paid more promptly. The IFD, however, might argue that refusal is an advantage to a patient because a dentist who decides to refuse puts a value on preserving his independent judgment of the patient's needs.

Pretty clearly, no evidence was developed on the validity of an assumption that a dentist's policy of refusal or cooperation has any significance in competition among dentists, and the FTC decision fails to analyze the proposition. It may well be that evidence could be produced to support a finding that this policy is really an element of competition among dentists **[**70]** and that a concerted policy of refusal does work a real injury to competition. But this analysis has not been made.

This deficiency is the reason I join in the court's result. There is much in the opinion in which I do not join, particularly in the repeated assertion that the concerted refusal resulted from a legal, moral and ethical policy of quality dental care and complied with established, accepted, and approved standards of such care. The relevance of these assertions is not clear. Insofar as they imply a finding that legal, moral and ethical considerations and approved standards were the sole cause of the concerted policy, they are in conflict with a clearly and adequately supported finding of the FTC of an economic motive.

The FTC said;

> Moreover, it is clear that the concern of IDA's members over possible interference in the doctor-patient relationship was not limited to the effect such interference might have on patient welfare. It also extended to issues of professional pride and the economic well-being of Indiana dentists. Dr. McClure, who later became the first president of IFD, said in a speech to the association's Council on Dental Care Programs in 1974. **[**71]** "We are fighting an economic war where the very survival of our profession is at stake. * * * The name of the game is money. The government and labor are determined to reduce the cost of the dental health dollar at the expense of the dentist. There is no way a dental service can be rendered cheaper when the third party has to have its share of the dollar." * * *
> With the formation of IFD, the economic motive became more explicit.

End of Document

[United States v. American Airlines, Inc.](#)

United States Court of Appeals for the Fifth Circuit

October 15, 1984

No. 83-1831

Reporter

743 F.2d 1114 *; 1984 U.S. App. LEXIS 17704 **; 1984-2 Trade Cas. (CCH) P66,232

UNITED STATES of America, Plaintiff-Appellant, v. AMERICAN AIRLINES, INC. and Robert L. Crandall, Defendants-Appellees

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of Texas.

Disposition: Reversed and remanded.

Core Terms

monopolization, Sherman Act, solicitation, airlines, district court, conspiracy, cases, probability of success, monopoly power, passengers, competitors, probability, antitrust, requisite, percent, prices

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & 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**

In a review of a dismissal for failure to state a claim Under *Fed. R. Civ. P. 12(b)(6)*, a court must accept all well-pleaded facts as true and must view them in a light most favorable to the plaintiff.

Antitrust & Trade Law > ... > US Department of Justice Actions > Criminal Actions > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **US Department of Justice Actions, Criminal Actions**

See *15 U.S.C. S. § 2*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Monopolies & Monopolization, Attempts to Monopolize

The Sherman Act, *15 U.S.C.S. § 2* is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved. The role of *§ 2* is: to make the prohibitions of the Act all the more complete and perfect by embracing all attempts to reach the end prohibited by *§ 1*, that is, restraints of trade, by any attempt to monopolize even although the acts by which such results are attempted to be brought about be not embraced within the general enumeration of *§ 1*.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Willfulness

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN4[] Monopolies & Monopolization, Attempts to Monopolize

To establish illegal monopolization under *15 U.S.C.S. § 2*, two elements must be shown: the possession of monopoly power in the relevant market, and the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Monopoly power is the power to control price or exclude competition. If these two elements are shown, the offense of actual monopolization is complete; it is well established that there is no additional requirement that the power actually be exercised.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

HN5[] Monopolies & Monopolization, Attempts to Monopolize

The offense of attempted monopolization has two elements: specific intent to accomplish the illegal result; and a dangerous probability that the attempt to monopolize will be successful. When evaluating the element of dangerous probability of success, a court does not rely on hindsight but examines the probability of success at the time the acts occur.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] Monopolies & Monopolization, Attempts to Monopolize

The requirement that an accused's conduct have a dangerous probability of success expresses a significant antitrust principle that the antitrust laws protect competition, not competitors, and its related principle that the Sherman Act does not reach practices only unfair, impolite, or unethical.

Antitrust & Trade Law > Sherman Act > Defenses

Criminal Law & Procedure > Defenses > General Overview

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Elements

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] Sherman Act, Defenses

If a defendant had the requisite intent and capacity, and his plan if executed would have had the prohibited market result, it is no defense to a charge of violation of attempted monopolization under the Sherman Antitrust Act, *15 U.S.C.S. § 2* that the plan proved to be impossible to execute.

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN8[] Antitrust & Trade Law, Sherman Act

15 U.S.C.S. § 1 of the Sherman Act provides that: every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal.

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John J. Hanson; Robert E. Cooper, Gibson, Dunn & Crutcher, Los Angeles, California, for Appellee.

Judges: Johnson, Higginbotham and Davis, Circuit Judges.

Opinion by: DAVIS

Opinion

[*1115] W. EUGENE DAVIS, Circuit Judge:

The question presented in this antitrust case is whether the government's complaint states a claim of attempted monopolization under *section 2* of the Sherman Act against the defendants, American Airlines, and its president Robert **[**2]** L. Crandall, for Crandall's proposal to the president of Braniff Airlines that the two airlines control the market and set prices. The district court dismissed the complaint for failure to state a claim under *Federal Rule of Civil Procedure 12(b)(6)* on the ground that the failure to allege an agreement to monopolize was a fatal defect in the complaint and that more than an allegation of solicitation to monopolize was required to state a claim for attempted monopolization. We disagree and reverse.

I.

In February 1982, American Airlines (American) and Braniff Airlines (Braniff) each had a major passenger airline complex, or "hub" at the Dallas-Fort Worth International Airport (DFW). [1] These hubs enabled American and Braniff to gather passengers from many cities, concentrate them at DFW, and then arrange connections for them on American and Braniff flights to other cities. The hub systems gave American and Braniff a marked competitive advantage over other airlines that served or might wish to serve DFW. In addition, the limitations on arrivals imposed by the Federal Aviation Administration (FAA) after the 1981 air traffic controllers' strike impeded any significant expansion or **[**3]** new entry by airlines into service at DFW. These limitations helped enable American and Braniff to maintain their high market shares in relation to other competitors.

In February 1982, American and Braniff together enjoyed a market share of more than ninety percent of the passengers on non-stop flights between DFW and eight **[*1116]** major cities, and more than sixty percent of the passengers on flights between DFW and seven other cities. The two airlines had more than ninety percent of the passengers on many flights connecting at DFW, when no non-stop service was available between the cities in question. Over all, American and Braniff accounted for seventy-six percent of monthly **[**4]** enplanements at DFW.

For some time before February 1982, American and Braniff were competing fiercely for passengers flying to, from and through DFW, by offering lower fares and better service. During a telephone conversation between Robert Crandall, American's president, and Howard Putnam, Braniff's president, the following exchange occurred:

> Crandall: I think it's dumb as hell for Christ's sake, all right, to sit here and pound the * * * out of each other and neither one of us making a * * dime.
> Putnam: Well --
> Crandall: I mean, you know, goddamn, what the * * * is the point of it?
> Putnam: Nobody asked American to serve Harlingen. Nobody asked American to serve Kansas City, and there were low fares in there, you know, before. So --
> Crandall: You better believe it, Howard. But, you, you, you know, the complex is here -- ain't gonna change a goddamn thing, all right. We can, we can both live here and there ain't no room for Delta. But there's, ah, no reason that I can see, all right, to put both companies out of business.
>
> Putnam: But if you're going to overlay every route of American's on top of over, on top of every route that Braniff has -- I can't just **[**5]** sit here and allow you to bury us without giving our best effort.
> Crandall: Oh sure, but Eastern and Delta do the same thing in Atlanta and have for years.
> Putnam: Do you have a suggestion for me?

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[1] Many airlines structure their services around major airports in network complexes termed hubs. The term derives from the fact that the routes of an airline maintaining a hub operation resemble the hub and spokes of a wheel, with the major airport, for example, DFW, as the hub and the routes to other cities radiating like spokes.

Crandall: Yes. I have a suggestion for you. Raise your goddamn fares twenty percent. I'll raise mine the next morning.
Putnam: Robert, we --
Crandall: You'll make more money and I will too.
Putnam: We can't talk about pricing.
Crandall: Oh bull * * *, Howard. We can talk about any goddamn thing we want to talk about.

Putnam did not raise Braniff's fares in response to Crandall's proposal; instead he presented the government with a tape recording of the conversation.

The United States subsequently sought an injunction under section 4 of the Sherman Act [2] **[**6]** against American Airlines and Crandall based on an alleged violation of *section 2* of the act which forbids an attempted monopolization. On a motion by the defendants, the district court dismissed the government's complaint for failure to state a claim under *Fed.R.Civ.P. 12(b)(6)*. [3]

The government asserts that the district court erred in holding that (1) an agreement is required for the offense of attempted monopolization; and (2) an attempt must amount to more than a solicitation to commit a crime.

II.

The language of the Sherman Act, its legislative history, the general criminal law relating to attempt and the jurisprudence **[*1117]** relating to attempt specifically under the Sherman Act, lead us to the same conclusion: the government need not allege or prove an agreement to monopolize in order to establish an attempted joint monopolization under *section 2* of the Sherman Act. [4]

[7]** *Section 2* of the Sherman Act, *15 U.S.C. § 2*, provides, ***HN2***[] in pertinent part:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

HN3[] The Sherman Act "is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved." *United States v. Yellow Cab Co., 332 U.S. 218, 226, 67 S. Ct. 1560, 1564, 91 L. Ed. 2010, 2017 (1947)*. [5] The role of *section 2* is:

to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by *[Section 1]*, that is, restraints of trade, by any attempt to monopolize . . . even although the acts by which such results are attempted to be brought about . . . be not embraced within the general enumeration of *[Section 1]*.

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[2] Section 4 provides in relevant part:

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of *sections 1 to 7* of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited.

[3] The district court's opinion and order is reported in *United States v. American Airlines, Inc., 570 F. Supp. 654 (N.D.Tex. 1983)*.

[4] ***HN1***[] In a review of a dismissal for failure to state a claim, we must accept all well-pleaded facts as true and must view them in a light most favorable to the plaintiff. *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982)*, *cert. denied*, ***459 U.S. 1105, 103 S. Ct. 729, 74 L. Ed. 2d 953 (1983)***, *Battle v. Liberty National Life Insurance Co., 493 F.2d 39 (5th Cir. 1974)*, *cert. denied*, ***419 U.S. 1110, 95 S. Ct. 784, 42 L. Ed. 2d 807 (1975)***.

[5] *See* *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4, 78 S. Ct. 514, 517, 2 L. Ed. 2d 545, 549 (1958)*, *United States v. American Tobacco Co., 221 U.S. 106, 181, 31 S. Ct. 632, 648-49, 55 L. Ed. 663, 694 (1911)*.

Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 61, 31 S. Ct. 502, 516, 55 L. Ed. 619, 645 (1911). **[**8]** [6] In creating the Sherman Act, Congress deliberately chose not to define all of the activities which might contravene the Act, in order to avoid creating loopholes. *Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60, 53 S. Ct. 471, 474, 77 L. Ed. 825, 829 (1933)*. Instead it gave the Sherman Act "a generality and adaptability comparable to that found to be desirable in constitutional provisions." *Id.*

Our first step in the analysis of the requisites of attempted monopolization **[**9]** is a consideration of the elements of the completed offense of monopolization.

HN4[] To establish illegal monopolization two elements must be shown: (1) the possession of monopoly power in the relevant market, and (2) "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778, 786 (1966)*. [7] Monopoly power is "the power to control price or exclude competition." *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 1004, 100 L. Ed. 1264, 1278 (1956)*. Accord, *United States v. Grinnell Corp., 384 U.S. at 571, 86 S. Ct. at 1704, 16 L. Ed. 2d at 786*. If these two elements are shown, the offense of actual monopolization is complete; it is well established that there is no additional requirement that the power actually be exercised. *United States v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 945, 92 L. Ed. 1236, 1243 (1948)*; **[**10]** *American Tobacco Co. v. United States, 328 U.S. 781, 810-13, 66 S. Ct. 1125, 1139-41, 90 L. Ed. 1575, 1594* ***[*1118]*** *(1946)*; *United States v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945)*. In *American Tobacco*, the Court explained:

> It is undoubtedly true . . . that trade and commerce are "monopolized" within the meaning of the federal statute, when, as a result of efforts to that end, such power is obtained that a few persons acting together can control the prices of a commodity moving in interstate commerce. It is not necessary that the power thus obtained should be exercised. Its existence is sufficient.

328 U.S. at 811, 66 S. Ct. at 1140, 90 L. Ed. at 1595.

[11]** Applying these principles to the case at hand, we conclude that if Putnam had accepted Crandall's offer, the two airlines, at the moment of acceptance, would have acquired monopoly power. At that same moment, the offense of joint monopolization would have been complete.

Since the Act does not list or define the activities which may constitute the offense of attempted monopolization, we must examine the facts of each case, mindful that the determination of what constitutes an attempt, as Justice Holmes explained, "is a question of proximity and degree." *Swift & Company v. United States, 196 U.S. 375, 402, 25 S. Ct. 276, 281, 49 L. Ed. 518, 527 (1904)*. [8] In *Swift*, the Court stated further that "when that intent and the

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[6] Accordingly, the Act has not been viewed or "interpreted as if it were primarily a criminal statute. . . ." *United States v. United States Gypsum Co., 438 U.S. 422, 439, 98 S. Ct. 2864, 2874, 57 L. Ed. 2d 854, 870 (1978)*.

[7] See also *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480, 487 (5th Cir. 1984)*, *Mid-Texas Communications Systems, Inc. v. American Telephone & Telegraph Co., 615 F.2d 1372, 1385-86 (5th Cir. 1980)*, *cert. denied*, ***449 U.S. 912, 101 S. Ct. 286, 66 L. Ed. 2d 140 (1980)***, *Almeda Mall, Inc. v. Houston Lighting & Power Co., 615 F.2d 343, 351 (5th Cir. 1980)*, *cert. denied*, ***449 U.S. 870, 101 S. Ct. 208, 66 L. Ed. 2d 90 (1980)***.

[8] Justice Holmes, a leading authority on the law of attempt, had more than one occasion to explain the principles of attempt. In The Common Law (1881), he observed that "eminent judges have been puzzled where to draw the line [between what constitutes attempt and what does not], or even to state the principle on which it should be drawn . . . But the principle is . . . similar to that on which all other lines are drawn by the law. Public policy, that is to say, legislative considerations, are at the

consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result." *Swift, 196 U.S. at 396, 25 S. Ct. at 279, 49 L. Ed. at 524*. ***HN5***[] The offense of attempted monopolization thus has two elements: (1) specific **[**12]** intent to accomplish the illegal result; and (2) a dangerous probability that the attempt to monopolize will be successful. *Transource International, Inc. v. Trinity Industries, Inc., 725 F.2d 274, 282 (5th Cir. 1984)*, *Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 276 (5th Cir. 1978)*, *cert. denied*, *440 U.S. 939, 99 S. Ct. 1289, 59 L. Ed. 2d 499 (1979)*. When evaluating the element of dangerous probability of success, we do not rely on hindsight but examine the probability of success at the time the acts occur. *Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980, 992 (5th Cir. 1983)*, *cert. denied*, *465 U.S. 1100, 104 S. Ct. 1594, 80 L. Ed. 2d 126 (1984)*.

[13]** The government unequivocally alleged that Crandall proposed to enlist his chief competitor in a cartel so that American and Braniff, acting together, could control prices and exclude competition at DFW; as Crandall explained to Putnam, "we can both live here and there ain't no room for Delta." As a result of the monopolization, Braniff would "make more money and I will too."

Both Crandall and Putnam were the chief executive officers of their airlines; each arguably had the power to implement Crandall's plan. The airlines jointly had a high market share in a market with high barriers to entry. American and Braniff, at the moment of Putnam's acceptance, would have monopolized the market. Under the facts alleged, it follows that Crandall's proposal was an act that was the **[*1119]** most proximate to the commission of the completed offense that Crandall was capable of committing. Considering the alleged market share of American and Braniff, the barriers to entry by other airlines, and the authority of Crandall and Putnam, the complaint sufficiently alleged that Crandall's proposal had a dangerous probability of success.

HN6[] The requirement that an accused's conduct have a dangerous **[**14]** probability of success expresses a significant antitrust principle that the antitrust laws protect competition, not competitors, and its related principle that the Sherman Act does not reach practices only unfair, impolite, or unethical. *Dimmitt Agri Industries, Inc. v. CPC International, Inc., 679 F.2d 516 (5th Cir. 1982)*, *cert. denied*, *460 U.S. 1082, 103 S. Ct. 1770, 76 L. Ed. 2d 344 (1983)*; *Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579 (7th Cir. 1971)* (Stevens, J.).

In *United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974)*, *cert. denied*, *419 U.S. 1114, 95 S. Ct. 792, 42 L. Ed. 2d 812 (1975)*, we set forth the general requirements for criminal attempt. The defendant (1) "must have been acting with the kind of culpability otherwise required for the commission of the crime which he is charged with attempting," and (2) "must have engaged in conduct which constitutes a substantial step toward commission of the crime." *499 F.2d at 376*. While similar, the common law requirement of a substantial step toward commission and dangerous probability of success are not **[**15]** the same. While both exact a relationship between an attempt and the offense, they differ in important ways. The focus of dangerous probability of success is upon the likelihood of the prohibited result, whereas the focus of the substantial step toward commission is upon a defendant's intent. The move along the increasing scale of proximity of attempt to offense carries with it a corresponding shift in focus from intent alone to substantive result. The inquiry is by necessity into the defendant's intent but under the Sherman Act that inquiry also includes a predictive examination of the results if the intent were accomplished. As Justice Stevens, then Judge, put it in *Kearney*: " In an antitrust context we must consider the firm's capacity to commit the offense, the scope of its objective, and the character of its conduct. The ultimate concern is the firm's actual or threatened impact on competition in the relevant market." *452 F.2d at 598*. We acknowledge longstanding debate over the requirement of dangerous probability of success, and that substantial arguments that specific intent alone ought to suffice have been made. See, e.g., *Cooper, Attempts and Monopolization:* **[**16]** *A Mildly*

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bottom of the matter; the considerations in this case being the nearness of the danger, the greatness of the harm, and the degree of apprehension felt." O. Holmes, Jr., *The Common Law* 68 (1881).

In *Commonwealth v. Peaslee, 177 Mass. 267, 59 N.E. 55 (1901)*, Justice Holmes, writing for the Massachusetts Supreme Judicial Court, held that "if the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable" that the act will constitute an attempt. *177 Mass. at 272*. "Every question of proximity," Justice Holmes stated, "must be determined by its own circumstances . . . analogy is too imperfect to give much help." *Commonwealth v. Kennedy, 170 Mass. 18, 48 N.E. 770, 771 (1897)*.

Expansionary Answer to the Prophylactic Riddle of Section Two, 72 Mich.L.Rev. 373 (1974); indeed, one circuit does not require proof of dangerous probability. See *Lessig v. Tidewater Oil Co., 327 F.2d 459* (9th Cir.), *cert. denied*, *377 U.S. 993, 84 S. Ct. 1920, 12 L. Ed. 2d 1046 (1964)*. We note, however, both that dangerous probability remains an element of attempted monopolization in this circuit and that in concluding that the government here stated a claim we do not retreat from its proof requirements. We see Crandall's alleged conduct as uniquely unequivocal and its potential, given the alleged market conditions, as being uniquely consequential. In sum, our decision that the government has stated a claim does not add attempt to violations of *Section 1* of the Sherman Act or lower the incipiency gate of *Section 2*.

Finally, we note one final consequence of our reasoning. ***HN7***[] If a defendant had the requisite intent and capacity, and his plan if executed would have had the prohibited market result, it is no defense that the plan proved **[**17]** to be impossible to execute. As applied here, if Putnam from the beginning never intended to agree such fact would be of no aid to Crandall and American.

The district court, relying on *American Tobacco Co. v. United States, 328 U.S. 781, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946)* and *Zenith Radio Corp. v. Matsushita Electric Industrial Co., 513 F. Supp. 1100 (E.D.Pa. 1981)*, concluded that an agreement was a necessary element of an attempt to monopolize. We disagree with the district court's interpretation of these cases.

[*1120] In *American Tobacco*, the government alleged that the tobacco company defendants had conspired in restraint of trade, attempted to monopolize, conspired to monopolize, and had succeeded in monopolizing the relevant markets. The trial court's jury charge stated that "an essential element of the illegal monopoly or monopolization charged in this case is the existence of a combination or conspiracy to acquire . . . the power to exclude competitors to a substantial extent," and that a completed agreement was an "indispensable ingredient of each of the offenses charged. . . . " *328 U.S. at 785-86, 66 S. Ct. at 1127, 90 L. Ed. at 1581*. **[**18]** The Supreme Court's grant of certiorari, however, was "limited to the question whether actual exclusion of competitors is necessary to the crime of monopolization under *§ 2* of the Sherman Act." *328 U.S. at 784, 66 S. Ct. at 1126, 90 L. Ed. at 1580*. The Supreme Court neither discussed nor decided whether an agreement was required to establish attempted monopolization.

The private plaintiffs in *Zenith Radio* alleged that numerous electronics products manufacturers had engaged in a massive, worldwide conspiracy in violation of both *sections 1* [9] and *2*. Plaintiffs bottomed their *section 2* case on the existence of the conspiracy. The district court granted summary judgment in favor of defendants on the attempted monopolization claim because of lack of proof of a conspiracy. 513 F. Supp. at 1318-1321. On appeal, the Third Circuit reversed the district court in most respects after concluding that there was sufficient evidence to raise a material issue of fact regarding the participation of all except three of the twenty-four defendants in the alleged conspiracy. *In Re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238 (3d Cir. 1983)*. **[**19]** The attempted monopolization charge accordingly was reinstated. Because plaintiffs' attempt case was predicated on a conspiracy theory, the Third Circuit did not discuss specifically whether the offense of attempted monopolization requires an agreement. The court did state, however, that "only the *section 1* Sherman Act and the Wilson Tariff Act charges require proof of a combination or conspiracy". *723 F.2d at 252*. A fair reading of these cases will not support appellees' contention that an agreement, which is required for a conspiracy, is also an element of attempted monopolization.

In an alternate ground for its dismissal of the complaint, the district court concluded that Crandall's proposal was a solicitation and that the common **[**20]** law, at the time of the enactment of the Sherman Act, required proof of more than a solicitation to establish an attempt.

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[9] *15 U.S.C. § 1* ***HN8***[] provides, inter alia:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several State, or with foreign nations, is declared to be illegal. . . .

Appellees argue that in 1890 the common law so clearly held that an attempt required more than a mere solicitation, that Congress intended to incorporate that well-accepted principle into section 2 of the Sherman Act. Our study of the authorities, however, leads us to the conclusion that there was no clear consensus among the pre-1890 cases on the issue. Less than half of the forty-two state jurisdictions had addressed the issue, even peripherally, by 1890. The jurisdictions which had confronted the question were evenly split. [10] These cases demonstrate that the answer to the question of whether a solicitation could be an attempt at common law was neither old nor well-recognized; to the contrary it was unsettled and still evolving. It **[*1121]** follows that in enacting the Sherman Act, Congress could not have supposed that a solicitation could never be an attempt. See *Associated Gen. Contractors v. Carpenters, 459 U.S. 519, at 533 n. 28, 103 S. Ct. 897, at 906 n. 28, 74 L. Ed. 2d 723, at 735 n. 28 (1983)*.

[21]** The district court also cited a number of modern cases in support of its conclusion that an attempt can never encompass a solicitation, [11] and appellees refer us to others. [12] These cases involving murder, sodomy, and other crimes, however, are not instructive in determining the requirements for attempted monopolization. In the cited cases, an agreement to the solicitation would not result in the completion of the substantive offense at the moment of agreement; other physical acts were required for the completed offense.

[22]** The federal courts have generally rejected a rigid or formalistic approach to the attempt offense. Instead they commonly recognize that "the determination whether particular conduct constitutes . . . [an attempt] is so dependent on the particular facts of each case that, of necessity, there can be no litmus test to guide the reviewing courts." *United States v. Ivic, 700 F.2d 51, 66 (2d Cir. 1983)*. Following this analysis, which we consider the better reasoned approach, several federal courts have concluded that a solicitation accompanied by the requisite intent may constitute an attempt.

In *United States v. May, 625 F.2d 186 (8th Cir. 1980)*, a defendant challenged his conviction for "unlawfully attempt[ing] to cause to have concealed, obliterated, or destroyed" government records in violation of *18 U.S.C § 2071*, on the grounds that his telephone call to the person who controlled certain relevant records constituted only a solicitation and was not an attempt. The Eighth Circuit affirmed his attempt conviction.

> May also argues that his . . . conviction must fall because his conduct constituted only a solicitation, **[**23]** not an attempt to commit a crime. Specifically, he contends that the evidence showed only preparation and that no overt act constituting a substantial step in the attempt was shown. We disagree. When May called General Miller, he engaged in a course of conduct designed to culminate in the unlawful concealment of government records.

In *United States v. Robles, 185 F. Supp. 82, 85 (N.D.Cal. 1960)*, a solicitation by letter was held to be an attempt to unlawfully import a narcotic. [13]

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[10] In seven states, a solicitation could constitute an attempt: *State v. Hayes, 78 Mo. 307 (1883)*; *State v. Ames, 64 Me. 386 (1875)*; *Collins v. The State, 50 Tenn. 14 (1870)*; *Mulligan v. The People*, 5 Parker 105 (S. Ct.N.Y.1861); *Griffin v. The State, 26 Ga. 493 (1858)*; *State v. Carpenter, 20 Vt. 9 (1847)*; *State of Connecticut v. Avery, 7 Conn. 266 (1828)*. Other jurisdictions concluded that a solicitation could never be an attempt: *Hicks v. Commonwealth, 86 Va. 223, 9 S.E. 1024 (1889)*, *Lamb v. State, 67 Md. 524*, 10 Atlantic 208 (1887), *State v. Baller, 26 W.Va. 90 (1885)*, *Stabler v. The Commonwealth, 95 Pa. 318 (1880)*, *Cox v. The People, 82 Ill. 191 (1876)*, *McDade v. The People, 29 Mich. 50 (1874)*, *Smith v. The Commonwealth, 54 Pa. 209 (1864)*.

[11] *570 F. Supp. at 661*.

[12] See e.g., *State v. Otto, 102 Idaho 250, 629 P.2d 646 (1981)* (attempted murder); *People v. LaFontaine, 79 Cal. App. 3d 176, 144 Cal. Rptr. 729 (1978)* (attempted lewd or lascivious act upon body of a child under fourteen years old); *Hutchinson v. State, 315 So. 2d 546 (Fla.Dist.Ct.App.1975)* (attempted murder); *Gervin v. State, 212 Tenn. 653, 371 S.W.2d 449 (1963)* (attempted murder); *State v. Bereman, 177 Kan. 141, 276 P.2d 364 (1954)* (attempted sodomy); *Cole v. State, 14 Okla. Crim. 18, 166 P. 1115 (Okla.Crim.App.1917)* (attempted adultery); *State v. Lampe, 131 Minn. 65, 154 N.W. 737 (1915)* (attempted extortion).

[24]** In sum, we reject appellee's contention that the law in 1890 clearly required more than a solicitation to constitute an attempt. We also conclude that the better reasoned authorities support the view that a highly verbal crime such as attempted monopolization may be established by proof of a solicitation along with the requisite intent.

III.

Our decision that the government's complaint states a claim of attempted monopolization **[*1122]** is consistent with the Act's language and purpose. [14] The application of *section 2* principles to defendants' conduct will deter the formation of monopolies at their outset when the unlawful schemes are proposed, and thus, will strengthen the Act.

[25]** Under appellees' construction of the Act, an individual is given a strong incentive to propose the formation of cartels. If the proposal is accepted, monopoly power is achieved; if the proposal is declined, no antitrust liability attaches. If *section 2* liability attaches to conduct such as that alleged against Crandall, naked proposals for the formation of cartels are discouraged and competition is promoted. [15]

[26]** Appellees argue that price fixing is an offense under *section 1* of the Sherman Act and since the government charges that Crandall sought to have American and Braniff fix prices, the government's complaint in reality seeks to have us write an attempt provision into *section 1*. This argument is meritless. Appellees confuse the *section 1* offense of price fixing with the power to control price following acquisition of monopoly power under *section 2*. Under the facts alleged in the complaint, Crandall wanted both to obtain joint monopoly power and to engage in price fixing. That he was not able to price fix and thus, has no liability under *section 1*, has no effect on whether his unsuccessful efforts to monopolize constitute attempted monopolization. See *Multiflex, 709 F.2d at 992*.

Nor do we agree with appellees' suggestion that firms or executives will be subject to liability for ambiguous or "intemperate words". We first note that under the allegations of the complaint Crandall's statements are not ambiguous. Second, a person must specifically intend to monopolize for his conduct to violate *section 2*; without the requisite intent, no liability attaches.

CONCLUSION

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[13] Other cases also have concluded that a solicitation could be an attempt in certain circumstances. See e.g., *United States v. DeBolt, 253 F. 78, 82-83 (S.D.Ohio 1918)* ("mere solicitation" is sufficient for prosecution for attempt to make defective war material); cited with approval in *United States v. Mandujano, 499 F.2d 370, 374 (5th Cir. 1974)*, *cert. denied*, ***419 U.S. 1114, 95 S. Ct. 792, 42 L. Ed. 2d 812 (1975)***; *United States v. Ford, 34 F. 26, 28 (W.D.N.C. 1888)* ("In some cases words spoken are *acts* sufficient to constitute an attempt to commit a crime, if they are of such a character as to be well calculated and adapted to accomplish the crime intended.") (emphasis in original).

[14] We reject appellees' argument that because the courts previously have not been faced with a factual situation similar to the case at bar, that the conduct cannot violate the antitrust laws. By deliberately choosing not to delineate the myriad activities which would be forbidden by the Act, Congress left to the courts the task of determining whether given conduct constitutes an offense under the Sherman Act. See *United States Gypsum Co., 438 U.S. at 474 n. 14, 98 S. Ct. at 2874 n. 14, 57 L. Ed. 2d at 870 n. 14*; *Appalachian Coals, 288 U.S. at 360, 53 S. Ct. at 474, 77 L. Ed. at 829*, *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272 (2d Cir. 1979)*, 2 P. Areeda & D. Turner, ***Antitrust Law*** para. 1310 (1978).

[15] We disagree with the appellees' contention that our application of *§ 2* would discourage discussion among potential partners in mergers and joint ventures. Parties who wish to engage in substantial mergers or joint ventures, under the pre-screening procedures of the Hart-Scott-Rodino Antitrust Improvements Act, *15 U.S.C. § 18a*, must notify the Justice Department's Antitrust Division and the Federal Trade Commission before consummating the transaction. The government may have no objection to the transaction, or it may sue to block the transaction pursuant to § 16 of the Clayton Act, *15 U.S.C. § 26*. Chances that such a transaction would raise a dangerous probability of successful monopolization, are extremely remote.

Transactions that are too small to be subject to the Hart-Scott-Rodino Act will rarely pose a dangerous probability of successful monopolization. If there are such cases, however, and if in such cases the firm proposing the transaction acts with a specific intent to monopolize, then we see no reason why *§ 2* liability should not attach.

[27]** We hold that an agreement is not an absolute prerequisite for the offense of attempted joint monopolization and that the government's complaint sufficiently alleged facts that if proved would permit a finding of attempted monopolization by defendants. We therefore vacate the dismissal of the complaint and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

COMPACT v. Metropolitan Government of Nashville & Davidson County

United States District Court for the Middle District of Tennessee, Nashville Division

October 18, 1984

No. 3-84-0853

Reporter

594 F. Supp. 1567 *; 1984 U.S. Dist. LEXIS 22697 **; 1984-2 Trade Cas. (CCH) P66,298

COMPACT, et al., Plaintiffs, v. THE METROPOLITAN GOVERNMENT OF NASHVILLE & DAVIDSON COUNTY, TN., et al., Defendants

Core Terms

joint venture, firms, antitrust, contracts, bid, airport, per se rule, Sherman Act, summary judgment, public contract, territories, architectural firm, minority business, anti trust law, conspiracy, enterprise, markets, competitors, horizontal, racial discrimination, projects, courts, price fixing, coalition's, customers, prices, architectural, plaintiffs', consumer, terms

LexisNexis® Headnotes

Public Contracts Law > Business Aids & Assistance > Disabled, Disadvantaged, Minority & Women-Owned Businesses > General Overview

HN1[] **Business Aids & Assistance, Disabled, Disadvantaged, Minority & Women-Owned Businesses**

See *15 U.S.C.S. § 637(d)*.

Public Contracts Law > Bids & Formation > Subcontractors & Subcontracts > General Overview

Public Contracts Law > Business Aids & Assistance > Disabled, Disadvantaged, Minority & Women-Owned Businesses > General Overview

HN2[] **Bids & Formation, Subcontractors & Subcontracts**

Under *15 U.S.C.S. § 637(d)(8)*, a contractor who fails to extend to minority subcontractors the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency may be declared in breach of its contract. And though "maximum practical opportunity" is not defined in the statute, the target generally imposed by federal agencies is approximately 10 percent minority participation.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Antitrust & Trade Law, Sherman Act

See 15 U.S.C.S. § 1 (1976).

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Antitrust & Trade Law, Sherman Act

Although any agreement between businessmen places some restrictions on trade, courts interpret the Sherman Act, 15 U.S.C.S. § 1 (1976) to condemn only those arrangements which are unreasonably restrictive of competitive conditions.

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 > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN5[] Antitrust & Trade Law, Sherman Act

There are two complementary categories of antitrust analysis used by the courts for evaluating the legality of commercial conduct: the per se rule and the rule of reason. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are "illegal per se" -- in the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, 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.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Business & Corporate Law > Joint Ventures > Formation

Mergers & Acquisitions Law > Antitrust > Joint Ventures

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Business & Corporate Law > Joint Ventures > General Overview

HN6[] Types of Contracts, Joint Contracts

A joint venture is defined as a separate enterprise characterized by an integration of operations between and subject to control by its parent firms which results in the creation of significant new enterprise capability in terms of new productive capacity, new technology, a new product, or entry into a new market.

Business & Corporate Law > Joint Ventures > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

HN7[] Business & Corporate Law, Joint Ventures

A court must be guided by the facts, rather than the legal characterizations the parties attach to the facts. Individuals who normally compete directly against one another may not hide the collusive nature of mutual concessions by labeling their agreements "joint ventures."

Business & Corporate Law > Joint Ventures > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Mergers & Acquisitions Law > Antitrust > Joint Ventures

HN8[] Business & Corporate Law, Joint Ventures

A central consideration in assessing the competitive character of a joint venture focuses on whether the individual participants are free to increase their own output.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN9[] Price Fixing & Restraints of Trade, Horizontal Market Allocation

The horizontal division of markets has long been recognized as a patently anticompetitive arrangement between business competitors and, accordingly, has been subject to per se illegal treatment by courts. Allocation of markets -- whether of territories or customers -- tampers with free market forces by reducing or eliminating competition between business rivals, thereby reducing the incentive to increase productivity, to implement innovative strategy and to devise methods to better serve consumers.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

HN10[] Price Fixing & Restraints of Trade, Horizontal Market Allocation

A horizontal allocation of markets is characterized by three elements: (1) concerted action between two or more persons; (2) actual or potential competition between the participants in the conspiracy; and (3) an elimination of competition in the market serviced by the conspirators.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] Antitrust & Trade Law, Sherman Act

The court will not grant relief which will further the objectives of an unlawful conspiracy.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

HN12[] Antitrust & Trade Law, Sherman Act

Summary adjudication is used sparingly in antitrust cases. Almost without exception, summary judgment is appropriate only when the conduct at issue falls clearly within those categories of practices traditionally treated as per se unlawful or when the allegations in the complaint clearly fail to establish a material issue of fact for adjudication.

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Susan Emery McGannon, Esquire, Donelson, Stokes & Bartholomew, P.A., Nashville, Tennessee, Richard M. Riehelin, Samuel W. Bartholomew, Esquire, for Deft Metro Airport Authority and its members #3-#11.

William F. Howard, Esquire, (Deputy Director of Law), Donald W. Jones, Esquire, Nashville, Tennessee, for Defts (1) and (2).

James D. Luther, Esquire, Nashville, Tennessee, for Defts Metro Bd of Education and its members #12-#23.

Peter H. Curry, Esquire, Boult, Cummings, Conners & Berry, Nashville, Tennessee, for Deft Hart-Freeland-Roberts.

Barry L. Howard, Esquire, Wade B. Cowan, Esquire, Gracey, Maddin, Cowan & Bird, Nashville, Tennessee, for Deft Metro Nashville Airport Authority and its members #3-#11.

Judges: Wiseman, Chief Judge.

Opinion by: WISEMAN

Opinion

[*1568] MEMORANDUM

Wiseman, Chief Judge.

The present case examines **[**2]** the limits of lawful commercial conduct by minority businessmen in seeking meaningful participation in contracts for the construction of large government projects. This Court must decide whether all black architectural firms in a particular geographic area, who claim to have consistently been denied all but token shares on public works, may unite in a "joint venture" to demand participation **[*1569]** as a group, refusing to deal with prime contractors in their individual capacities but only on the terms negotiated exclusively by the coalition. This Court concludes that such concerted action, despite its compelling motive to overcome racial discrimination, violates the antitrust laws of the United States and is unequivocally destructive to competition and consumer welfare in the marketplace. For this reason, the Court grants the defendants' motion for partial summary judgment as to those claims in which the plaintiffs' conspired by doing business as COMPACT.

I. *Facts*

In 1981 the Metropolitan Nashville Airport Authority [MNAA] began construction to expand the airport which services the City of Nashville, Tennessee. Early in 1984 MNAA entered the design development phase for **[**3]** the new terminal facility. During the spring of 1984, Gresham and Smith, a large architectural firm based in Nashville, was awarded the contract as the principal contractor for developing the design of the new terminal. Gresham and Smith was selected from among a group of other architectural firms; a number of minority business enterprise [MBE] firms were represented in the group whose bids were rejected.

In May of 1984 the three minority-owned architectural firms in Middle Tennessee -- McKissack, McKissack & Thompson Architects & Engineers, Inc.; L. Quincy Jackson (doing business as a sole proprietor); and Harris Associates -- entered into an agreement to form the Coalition for Equitable Minority Participation In Architectural Contracts in Tennessee [COMPACT]. [1] COMPACT was formed with the purpose of ameliorating the effects of racial discrimination against black architects in Tennessee. Its members believed each individual firm's failure to win the principal contractor position on the design phase of the airport project was attributable directly to racial discrimination by MNAA. Accordingly, the members of COMPACT agreed to band together in a "joint venture" to present a united **[**4]** front for negotiating contracts on projects seeking minority business participation.

Pursuant to the joint venture agreement, COMPACT retained the right to target construction projects it desired to pursue and, once chosen, its members covenanted not to pursue work on such projects in their individual capacities or to associate themselves in any way with the project except in their role as members of COMPACT. Section 5 of the COMPACT agreement provides:

> 5. COMPACT shall delineate specifically and in writing the areas of marketing for architectural contracts which it wishes to pursue on a joint venture basis for the benefit of its members and shall also designate specifically the areas which members are free to pursue in their own private marketing activities apart from COMPACT. **[**5]** *No member shall pursue or accept as an individual firm without agreement of all members of COMPACT in writing in advance, any project which COMPACT has targeted or is pursuing in any way as a potential project for COMPACT*.

(emphasis added). In similar language, Article V of the COMPACT Bylaws empowers COMPACT to target contracts and restrict competition between its individual members.

Although the COMPACT agreement did not limit the Coalition's scope, the initial targets selected were the Metropolitan Nashville Airport Terminal and the Nashville Convention Center -- both public projects. More than just the large expenditures budgeted, COMPACT's members knew that the probable involvement of federal funds made procurement of minority business enterprise participation a condition precedent to a state agency and/or principal contractor's reimbursement by the federal government for performance on the contract. [2] In the context of the Nashville **[*1570]** airport contract, MNAA had adopted and implemented an affirmative action program creating MBE set-aside guidelines consistent with the standards prescribed by federal law. Deposition of Mr. Thomas L. Mertins and Exhibit **[**6]** 1 (August 23, 1984).

On July 3, 1984, a meeting was held at MNAA's office. In attendance were members of COMPACT, and representatives of MNAA, the Federal Aviation Administration and Gresham and Smith. Among the topics discussed -- and made clear -- was the requirement that there be sufficient MBE participation in the design phase subcontracts let out by Gresham and Smith. Deposition of William D. Schock at 7-10 (August 23, 1984). The situation, therefore, was ripe for COMPACT to test its new marketing strategy.

Prior to commencing the terminal design phase of the project, MNAA had maintained an average of nine (9) percent MBE participation across the other construction contracts. Deposition of Thomas L. Mertins **[**7]** at 52-53, exhibit No. 4 (August 23, 1984). However, by uniting all minority architects in the area under COMPACT, and with the knowledge of MNAA's preference for local contractors, the individual members expected to exert monopolistic leverage on Gresham and Smith to force it to accede to COMPACT's demand for a more substantial participation share of the design contract. Testimony of L. Quincy Jackson, transcript at 117, 131-32. Mr. Jackson testified that he refused to accept any correspondence sent by Gresham and Smith which was addressed to him in his individual capacity; he and the other black architects in Nashville would negotiate on participation only through COMPACT. *Id*. at 87, 97, 146.

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[1] Plaintiffs assert in their complaint that their three firms represent the only black-owned architectural firms in Middle Tennessee. Together the three firms represent the membership composition of COMPACT. Complaint at para. 2(a).

[2] ***HN1***[] Pursuant to *15 U.S.C.S. § 637(d)*, "small business concerns owned and controlled by socially and economically disadvantaged individuals" are to be afforded "the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." *15 U.S.C.S. § 637(d) (Supp. 1982)*.

When members of COMPACT finally did meet with Gresham and Smith, COMPACT rejected an offer to "associate" on the project (i.e., to perform a subcontract constituting 10 percent or less of the value of the entire project), and demanded a "joint venture." Although members of COMPACT varied in their interpretation of the meaning of "joint venture," this Court understands the term to contemplate if not a 50 percent interest then one carrying substantial responsibility and decision making authority. **[**8]** *Compare* Testimony of Leatrice McKissack, transcript at 56-57; *with* Testimony of L. Quincy Jackson, transcript at 118; *and* Testimony of Harold Thompson, transcript at 164. Faced with the demand to "split the pie in half," Gresham and Smith simply went elsewhere. [3] It reached an agreement with Williams, Russell, & Johnson, a minority-owned architectural firm based in Atlanta licensed to practice in Tennessee.

MNAA's selection of Gresham and Smith over all of the minority **[**9]** firms, followed by Gresham and Smith's selection of Williams, Russell & Jackson over COMPACT precipitated the instant case. COMPACT and its members filed suit claiming violations of their civil rights under *42 U.S.C. §§ 1981*, *1982*, *1983*, *1985*, *1986*, *1988*, *2000d*; *15 U.S.C. § 1, et seq.*; *T.C.A. § 47-25-101*; and other applicable laws. Following the issuance of a temporary restraining order prohibiting Gresham and Smith from retaining Williams, Russell & Jackson as associate architects, this Court heard testimony on the propriety of a preliminary injunction, at which time the possible antitrust implications of the COMPACT agreement became apparent. The Court dissolved the TRO and refused issuance of a preliminary injunction. On direction by the Court both sides briefed the antitrust issue, the defendants submitting their position in the form of a motion for summary judgment. Following oral argument on the defendants' motion and after consideration of the **[*1571]** already voluminous documents, transcripts, depositions and pleadings in the case, and the testimony of witnesses in open court, the Court concludes that the COMPACT agreement constitutes a *per se* violation of *Section [**10] 1* of the Sherman Act and, accordingly, grants the defendants' motion for partial summary judgment dismissing the plaintiffs' claims regarding construction of the airport.

II. *Minority Business Enterprise Participation as a Discrete Submarket in Public Contracts*

To gain insight on the competitive impact of COMPACT's operation, one must first examine the market in which Tennessee architects do business and the reasons minority architects may have felt compelled to band together to form COMPACT. The majority of architectural services in Middle Tennessee are performed by white-owned firms. A variety of factors may explain why white firms are dominant, but chief among them is the simple fact that of the 341 licensed architects in Davidson County, Tennessee, 311 are white and 30 are black. 1980 Census, Detailed Occupation of the Civilian Labor Force, Davidson County, Tennessee, EOS, Table 1 (1980). [4]

[11]** Testimony before the Court portrayed a system in which public contracts usually were headed by white firms, serving as prime contractors, with subcontracts awarded to minority firms. The plaintiffs claim that the principal reason motivating the white firms to award these contracts to minority firms was to satisfy the affirmative action guidelines promulgated by the public agency in charge of the project. In order to satisfy the minority participation obligation but, at the same time, keep such participation at the threshold minimum, the white-owned prime contracting firm would solicit bids from each of the three Middle Tennessee minority architectural firms (the plaintiffs) and then set each against the other so that one would underbid the other. The plaintiffs claim that the inevitable and consistent result of the practice was that the minority architectural firms in Nashville would never procure more than a token share of the entire project.

The plaintiffs claim that the system has been the *modus operandi* in Middle Tennessee for years and that only after being excluded from the prime contractor position on the airport contract did the three minority firms decide to take matters **[**12]** into their own hands in an attempt to increase their bargaining power so as to obtain larger shares of

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[3] Prior to entry into this phase of the construction, architectural work on the airport facility was performed by way of a joint venture between Gresham and Smith and Reynolds, Smith and Hill, a Florida firm. MNAA, however, believed that the design phase for the terminal building would be conducted most efficiently if directed by a single architectural firm. Deposition of Thomas L. Mertins, at 27-28. Accordingly, MNAA ended the joint venture upon entry into the design phase and awarded the prime contractor position to Gresham and Smith.

[4] The Court takes judicial notice of the census figures pursuant to *Rule 201 of the Federal Rules of Evidence.*

the contracts. Testimony of L. Quincy Jackson, Transcript at 132 (August 17, 1984). By combining into a "joint venture" under COMPACT, the three minority firms attempted to eliminate competition among themselves. If a prime contractor was required by law to have minority participation and the only qualified minority business enterprise was COMPACT, then it stood to reason that COMPACT would be able to dictate the terms under which it would agree to participate. [5]

This Court finds that as a matter of law minority business enterprise set-aside shares on public contracts represent a discrete submarket for architectural services in which only qualified **[**13]** minority firms may compete. [6] ***HN2***[] Under *15 U.S.C. § 637(d)(8)*, a contractor who fails to extend to minority subcontractors the "maximum practicable opportunity to participate in the performance of contracts let by any Federal agency" **[*1572]** may be declared in breach of its contract. And though "maximum practical opportunity" is not defined in the statute, the target generally imposed by federal agencies is approximately ten (10) percent minority participation.

[14]** The facts in this case support the Court's finding that in the context of public contracts there exists a discrete market for minority architectural services. Gresham and Smith was advised by the MNAA and the FAA as to its duty to procure minority participation. Further, testimony as to custom in the overall architectural market reflects the well established practice by white firms of obtaining minority firm participation when seeking public contracts. In joining together, the member firms of COMPACT did not attempt to increase their market power in the general architectural market for Middle Tennessee, they sought to monopolize the submarket for minority business participation in public contracts. [7] Accordingly, any consideration of the competitive significance of COMPACT's operation must focus on its competitive impact in the submarket and in the general market as a whole.

[15]** III. *The Sherman Antitrust Act*

HN3[] *Section 1* of the Sherman Act provides that "every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal . . ." *15 U.S.C. § 1 (1976)*. ***HN4***[] Although any agreement between businessmen places some restrictions on trade, courts have interpreted the Sherman Act to condemn only those arrangements which are "unreasonably restrictive of competitive conditions." *Standard Oil Co. v. United States, 221 U.S. 1, 65, 31 S. Ct. 502, 55 L. Ed. 619 (1910)*. The Sherman Act protects this nation's free enterprise system by mandating that competition between entrepreneurs be the principal motivating force in the marketplace. And while judicial pronouncements during the last fifty years have varied on the central policy intended by Congress in its enactment

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[5] It is interesting to note that although the COMPACT agreement did not limit COMPACT's jurisdiction to only public contracts, the only two projects targeted at this point are the Nashville Airport Terminal and the Nashville Convention Center -- both public contracts.

[6] The Court finds the concepts of markets and submarkets, though traditionally applied in merger cases, are particularly appropriate to describe the business opportunities for architectural services in this case. The market as a whole is the market for architectural services offered to the entire community. The submarket identified by the Court today constitutes the statutorily mandated set aside share of public contracts reserved exclusively for minority business enterprises, plus any overlapping or additional share mandated by the affirmative action guidelines of a public agency which are not prescribed by statute.

[7] The Court finds that the actions taken by COMPACT and its members raise issues under both *Sections 1* and *2* of the Sherman Act. However, for purposes of this decision, the Court bases its holding on *Section 1* of the Sherman Act, granting the defendants' motion for summary judgment in light of the plaintiffs' *per se* unlawful allocation of markets and price fixing.

The attempt to monopolize the market for MBE set aside shares on public contracts is implicated by today's decision, yet no firm resolution as to that possible *Section 2* claim can be made without a full trial on the merits. *Swift v. United States, 196 U.S. 375, 396, 25 S. Ct. 276, 49 L. Ed. 518 (1905)* (requiring a showing of an attempt to monopolize and a dangerous probability of success); *cf.* *White Motor Co. v. United States, 372 U.S. 253, 264, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963)* (whether a merger tends to "substantially lessen competition" normally requires a trial rather than the use of summary judgment).

of the Sherman Act, the current concensus among both courts and commentators embraces consumer welfare as the objective served by enforcement of the antitrust laws.

A. *Enforceability of the Sherman Act Against COMPACT and its Members*.

COMPACT and its members contend vigorously **[**16]** that their conduct is insulated from antitrust liability under *first amendment* protections guaranteeing freedom of speech, freedom of association, and the right to petition government for redress of their grievances. COMPACT urges that because its members are protesting racial discrimination the *Noerr-Pennington* doctrine permits collusion among competing architects to jointly obtain and then parcel out minority business enterprise shares on public contracts. COMPACT, however, misinterprets the purpose and scope of *Noerr-Pennington* -- the doctrine does not permit individuals to band together and exercise their new-found leverage directly in the marketplace.

The *Noerr-Pennington* doctrine recognizes that in light of the basic constitutional right of all citizens to petition government, individuals have a right to lobby legislative and administrative bodies to pass or repeal laws and regulations that protect their particular interests. *See, generally*, 1 P. Areeda and D. Turner, *Antitrust* ***[*1573]*** *Analysis* ch. 2A (1978). In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*, truckers challenged **[**17]** the lobbying efforts of a group of railroads that had resulted in the enactment of Pennsylvania legislation which imposed detrimental regulation on trucks. In ruling for the railroads, the Supreme Court held that in the absence of bad faith or an intent to harass, such activity was privileged and immune from attack under the antitrust laws. *Id. at 140-45*. The doctrine was expanded to protect those who petition administrative bodies performing quasi-legislative duties in *United States v. Pennington, 381 U.S. 657, 669-70, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)* (United Mine Workers permitted to petition the Secretary of Labor to modify regulations governing the sale of coal).

What is germane to these cases is the basic principal that the Constitution protects *political* activity by citizens when addressing government in its *legislative* capacity. There is no such protection of *commercial* activity by businessmen when dealing with government in its *proprietary* capacity. COMPACT's activities fall squarely within the latter of the two categories. "In the absence of legislation or a valid quasi-legislative ruling, a private person dealing with government as buyer, **[**18]** seller, lessor, lessee, or franchisee has no greater antitrust privilege or immunity than in similar dealings with non-governmental parties." 1 P. Areeda and D. Turner, *Antitrust Analysis* at 52. The fact that COMPACT sought to defeat racial discrimination or that they sought to do so in the context of public contracts is immaterial. COMPACT sought to achieve its goal of meaningful minority participation by demanding a joint venture with Gresham and Smith, not through lobbying efforts before the Tennessee legislature or Congress. In sum, COMPACT's actions were taken in the marketplace and are subject to full scrutiny under the Sherman Act.

B. *Proper Standard of Judicial Analysis*

HN5[] There are two complementary categories of antitrust analysis used by the courts for evaluating the legality of commercial conduct: the *per se* rule and the rule of reason. As Justice Stevens has observed:

> In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality -- they are "illegal per se" -- in the second category are agreements whose competitive effect can only **[**19]** be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. *In either event, 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.

National Society of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978) (emphasis added). Accordingly, regardless of which standard of analysis this Court chooses to apply, the Court will consider COMPACT's conduct only in light of its *competitive significance*. Just as the Supreme Court in *National Society of Professional Engineers*, refused to consider the social merit of an ethical canon prohibiting competitive bidding between engineers, this Court will not weigh the value of COMPACT's avowed goal to overcome racial discrimination in ascertaining the competitive significance -- and legality -- of the coalition's similar prohibition on competitive bidding and other restrictive covenants. *See also* Organization of Minority Vendors, Inc. **[**20]** v. Illinois Central Gulf Railroad, 579 F. Supp. 574, 604-05 (N.D. Ill. 1983) ("the notion that group conduct is somehow outside the scope of the antitrust laws if it has salutory non-economic purposes even though it has economic impact has found little favor in the courts").

[*1574] 1. *Joint Ventures*

The plaintiffs maintain that COMPACT constitutes a "joint venture" between minority-owned architectural firms and, as such, represents a legitimate combination by which, through increased productive capacity, they may more effectively pursue general contractor positions and/or larger subcontractor opportunities on government construction projects. COMPACT maintains further that since the combination is a joint venture the rule of reason is the proper mode of antitrust inquiry for this Court and, as a consequence, summary judgment is improper without an in-depth review of the coalition's impact on competition.

Joint ventures present a difficult concept for antitrust analysis, defying neat classification and precise definition and, by extension, well established rules for evaluating their competitive impact. *See generally*, Pitofski, *Joint Ventures Under the Antitrust* **[**21]** *Laws: Some Reflections on the Significance of Penn-Olin*, 82 Harv. L. Rev. 1007, 1034-38 (1968). This Court defines a joint venture ***HN6***[] as a separate enterprise characterized by an integration of operations between and subject to control by its parent firms which results in the creation of significant new enterprise capability in terms of new productive capacity, new technology, a new product, or entry into a new market. Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv. L. Rev. 1523, 1526 (1982). On one hand, the joint venture provides a method of organization which enables competitors to join together to produce that which is beyond the productive capacity or inclination of its individual members. Conversely, the joint venture threatens to reduce actual or potential competition between rivals by providing a method of operations which engenders collusion detrimental to competition. In the instant case, the issue turns on whether COMPACT's operations create significant new productive capacity in the architectural product market already served by the coalition's members in their individual capacities, or, stated another way, whether the whole is greater than the sum of its parts. **[**22]** *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 21-22, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*. This Court thinks not.

HN7[] A court must be guided by the facts, rather than the legal characterizations the parties attach to the facts. Individuals who normally compete directly against one another may not hide the collusive nature of mutual concessions by labelling their agreements "joint ventures." ***HN8***[] *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598, 71 S. Ct. 971, 95 L. Ed. 1199 (1951)*. A central consideration in assessing the competitive character of a joint venture focuses on whether the individual participants are free to increase their own output. *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85, n. 54, 104 S. Ct. 2948, 82 L. Ed. 2d 70, 52 U.S.L.W. 4928, 4936 n. 54 (1984)*, *citing* Brodley, *Joint Venture and Antitrust Policy, supra*, at 1523, 1550-52, 1555-60. In *NCAA*, the Supreme Court found that the NCAA's policies for negotiating and awarding television rights to broadcast networks on behalf of its member schools violated the Sherman Act since the joint venture **[**23]** arrangement, though assuring broad-based coverage of all its members, had the effect of limiting the volume of television rights available for purchase by the networks. The guarantee, for example, that a small, unranked college receive television coverage of its football games at least once during a two-year period carried with it the opportunity cost of limiting more frequent broadcasts of, what consumers probably would deem the more interesting, Georgia and Michigan games. Saturday afternoon's televised football agenda was the product of a social policy agreed on by the NCAA rather than a medium responsive to the competitive force of consumer demand.

The *NCAA* case is analogous to the present action to the extent that the COMPACT agreement precludes individual members of the coalition from competing for contracts on projects designated for exploitation by COMPACT. In *NCAA* the NCAA designated the entire televised football **[*1575]** product market, prohibiting any of its members for negotiating in their individual capacities for television rights. Similarly, COMPACT's blanket prohibition on its individual members' right to compete for the airport contract preempts competition **[**24]** between COMPACT and its members and, also, between the individual COMPACT members themselves. Net productive capacity of all members of COMPACT is not increased by COMPACT's operation, it is reduced. Consumer welfare is compromised by COMPACT's operation.

In seeking minority participation on the design phase of the airport, Gresham and Smith solicited each minority architectural firm individually inviting them to submit separate bids. Refusing to bid, each firm staked their participation on Gresham and Smith's acceptance of COMPACT's demand for joint venture (i.e. equal control) status -- which was rejected. Had the minority firms been free to bid individually against each other (admittedly for more modest participation shares) and, at the same time, submit their COMPACT joint venture proposal, the architects would have increased the net productive capacity of the group by offering to Gresham and Smith and MNAA the traditional choice of each firm's respective services plus an option for joint services previously not available. [8] The COMPACT arrangement restricts the supply of qualified minority architects available to participate in the construction of the airport -- where before **[**25]** there were three Middle Tennessee minority-owned enterprises offering architectural services from which to choose, now there is only one. The terms of the joint venture restricts the coalition members opportunity to participate in the construction of the airport to COMPACT's "all or nothing" terms.

While joint ventures traditionally have been subject to the rule of reason, *United States v. Penn-Olin Chemical Co., 378 U.S. 158, 84 S. Ct. 1710, 12 L. Ed. 2d 775 (1964)*, federal courts will not hesitate to apply the *per se* rule to impose *Section 1* liability upon a finding of some intrinsic or ancillary aspect of the joint venture agreement which falls within the well-defined parameters of the *per se* rule. *Timken Roller Bearing Co. v. United States* ***[**26]*** *, 341 U.S. at 598*, ("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 labelling the project a 'joint venture. '"); *Engine Specialties, Inc. v. Bombardier, Inc., 605 F.2d 1, 8 (1st Cir. 1979) cert. denied*, *446 U.S. 983, 100 S. Ct. 2964, 64 L. Ed. 2d 839 (1980)* ("the nomenclature 'joint venture ' does not automatically exempt a combination from the per se rule which is found to have elements inherently offensive to the antitrust laws"). The principal task of this Court, then, is to examine the COMPACT agreement to ascertain whether any of its terms may be characterized as *per se* unlawful restraints of trade.

2. *Horizontal Allocation of Territories and Customers*

Plaintiffs argue that the COMPACT agreement does not violate the antitrust laws since it does not specifically limit competition between its members. The plaintiffs point to Paragraph 5 of the COMPACT contract claiming that its language demonstrates that the arrangement between the architects is merely "an agreement to agree." Plaintiff's Brief Opposing Summary **[**27]** Judgment at 3. Although the Court agrees that Paragraph 5 does in fact represent an "agreement to agree," it reaches an opposite conclusion as to the legality of the provision. The Court interprets Paragraph 5 as an agreement between competitors to conspire to allocate territories, customers and contracts and to fix the price of minority architect participation on public contracts.

Paragraph 5 of the COMPACT contract provides:

> **[*1576]** 5. COMPACT shall delineate specifically and in writing the areas of marketing for architectural contracts which it wishes to pursue on a joint venture basis for the benefit of its members and shall also designate specifically the areas which members are free to pursue in their own private marketing activities apart from COMPACT. No member shall pursue or accept as an individual firm without agreement of all members of COMPACT in writing in advance, any project which COMPACT has targeted or is pursuing in any way as a potential project for COMPACT.

Unlike the traditional notion of a joint venture -- a well-defined common undertaking in pursuit of a single transaction or series of transactions -- the COMPACT agreement is open-ended and **[**28]** without parameters defining the scope of the venture. The COMPACT agreement provides for the creation of a common "clearinghouse" through

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[8] Additionally, the bid specifications of Williams, Russell and Johnson, the firm chosen by Gresham and Smith, would have been subjected to more rigorous scrutiny had it been subject to competition from bids by each of the individual member firms of COMPACT.

which all Middle Tennessee minority-owned architectural firms may come together, discuss any and all potential contracts, and then decide whether joint pursuit or competition among themselves best serves the interests of each member of the group.

The plaintiffs assert that because they are black their actions are tied to the crusade against racial discrimination and are therefore immune from antitrust liability. What they ignore, however, is that Congress has enacted legislation aimed specifically at redressing the effects of racial discrimination: the Civil Rights Act of 1871, 42 U.S.C. §§ 1981-1986, and affirmative action set asides for minority business enterprise participation in public contracts, 15 U.S.C. § 637(b) (1976). [9] Private conspiracies in restraint of trade simply are not an available option. If the individual member firms of COMPACT believed that they were subject to racial discrimination in MNAA's selection of Gresham and Smith as the prime contractor on the design phase of the airport construction, or that they systematically **[**29]** were being excluded from other contracting opportunities, their remedy in the federal courts lay in seeking redress under the Civil Rights Act, not by way of a private self-help remedy that violates the Sherman Act.

HN9[] The horizontal division of markets has long been recognized as a patently anticompetitive arrangement between business competitors and, accordingly, has been subject to *per se* illegal treatment by courts. Allocation of markets -- whether of territories or customers -- tampers with free market forces by reducing or eliminating competition between business rivals, thereby reducing the incentive to increase productivity, to implement innovative strategy and to devise methods to better serve consumers. ***HN10***[]

[30]** A horizontal allocation of markets is characterized by three elements: (1) concerted action between two or more persons; (2) actual or potential competition between the participants in the conspiracy; and (3) an elimination of competition in the market serviced by the conspirators. 2 E. Kitner, *Federal* ***Antitrust law*** § 10.42 (1980). One of the admitted purposes of COMPACT's formation is to eliminate competitive bidding between its members. This Court finds the arrangement falls squarely within the *per se* rule uniformly applied by federal courts condemning a cooperative or coalition's allocation of territorial regions of exclusive jurisdiction to its members. *United States v. Topco Associates, 405 U.S. 596, 607-08, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)* ("it is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act"); *United States v. Sealy, 388 U.S. 350, 357, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967)*; *Timken Roller Bearing Co. v. United States, 341 U.S. at 598-601* (regardless of the justifications presented by problems in international trade, allocation of territories between **[**31]** international **[*1577]** cartel members is *per se* unlawful). In *Topco Associates*, the Supreme Court applied the *per se* rule to strike down a cooperative association's assignment of sales zones to each of approximately twenty-five small to medium-sized supermarkets. The Court observed:

> One of the classic examples of a per se violation of *§ 1* is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. . . . This Court has reiterated time and time again that "horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition." *White Motor Co. v. United States, 372 U.S. 253, 263, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963)*.

Id. at 608. Although plaintiffs' counsel argue that no allocation of territories was intended nor occurred, the testimony of the plaintiffs themselves does not support their position. Officers of each of the three minority architectural firms stated that they intended to increase their bargaining power by eliminating competition between themselves.

Alternatively, the plaintiffs contend that the language of Paragraph **[**32]** 5 does not contemplate the division of territories, but rather the delineation of "subject matter areas." Plaintiffs' Brief Opposing Summary Judgment at 3. The plaintiffs cannot avoid the antitrust laws through amorphous definition. Regardless of the semantic

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[9] As the Court observed above, MNAA seems to have been successful in providing minority business enterprises the maximum practicable opportunity to participate in the construction of the new airport facility. In most cases, MNAA was able to meet the targets specified in its affirmative action program.

characterization, a horizontal allocation of any element of the market for which businessmen or professionals compete represents a *per se* violation of the Sherman Act. *See, e.g., United States v. Cadillac Overall Supply, 568 F.2d 1078, 1088 (5th Cir.)*, *cert. denied*, *437 U.S. 903, 98 S. Ct. 3088, 57 L. Ed. 2d 1133 (1978)* (applying *per se* rule to horizontal allocation of customers); *United States v. Consolidated Laundries Corp., 291 F.2d 563, 574-75 (2d Cir. 1961)*; (territories and customers); *United States v. Pennsylvania Refuse Removal Association, 242 F. Supp. 794, 798-99 (E.D. Pa. 1965)* *aff'd* *357 F.2d 806 (3d Cir. 1966)*, *cert. denied*, *384 U.S. 961, 16 L. Ed. 2d 674, 86 S. Ct. 1588 (1966)* (territories and customers).

3. *Agreements to Refrain from Bidding*

COMPACT's demand for joint venture status with Gresham and Smith on the terminal design phase of the airport construction together with **[**33]** its members' refusal to deal in their individual capacities represents a genre of price fixing. COMPACT's operation stabilizes the price of minority business enterprise participation on government contracts insofar as the COMPACT agreement prevents individual minority-owned firms from bidding on designated projects and requires the firms to come together to exchange price and performance data in setting a joint bid and determining how to split up the work and profits. In *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221, 60 S. Ct. 811, 84 L. Ed. 1129 (1940)*, the Supreme Court stated:

> Any combination which tampers with price structures is engaged in unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces.

The concept of "price fixing" has been given broad application to condemn a wide variety of practices, far exceeding the conventional image of the smoke-filled backroom in which competitors wrangle over how much each shall charge the public for their common product. The **[**34]** *per se* rule applies full force to conduct which has only the indirect effect of fixing or, more appropriately to this case, stabilizing prices. *General Cinema Corp. v. Buena Vista Distribution Co., 532 F. Supp. 1244, 1256-57 (C.D. Cal.)*, *aff'd* *681 F.2d 594 (9th Cir. 1982)* (condemning as *per se* illegal price fixing "split of product agreements" under which movie theater operators and agreed to divide "first rights of negotiation" with film distributors for newly-released feature films). In *National Society of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d* **[*1578]** *637 (1978)*, the Supreme Court ruled that the elimination of competitive bidding pursuant to the Society's ethical canons, though technically not price fixing, constituted a *per se* unlawful conspiracy "interfering with the setting of price by free market forces." [10] Similarly, in this case, the agreement by each COMPACT member to refrain from bidding COMPACT-designed contracts and to pursue those projects only under the banner of COMPACT represents an attempt to peg the price of minority participation.

[35]** The plaintiffs' impress upon the Court that their three firms employ the great majority of black architects in the Middle Tennessee area. Assuming the position is correct, COMPACT's election to pursue a particular public contract eliminates competitive bidding between the majority of MBEs for the minority business set aside share of the project. [11] If only one entity bids on a contract, the persons who control the entity have the ability to set the terms -- and the price -- of the contract.

While the COMPACT arrangement is not bid rigging nor price fixing as such, there is little difference in terms of the anticompetitive impact. *See* *United States v. Koppers Co., Inc., 652 F.2d 290, 293-96 (2d Cir.)*, *cert. denied*, *454 U.S. 1083, 70 L. Ed. 2d 617, 102 S. Ct. 639 (1981)*. An agreement between competitors **[**36]** that creates a joint

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[10] Although Justice Stevens' opinion in *National Society of Professional Engineers* appears to rest heavily on the application of the rule of reason, this Court agrees with the reading given by a number of other federal courts that the *per se* rule actually was applied to condemn the Society's prohibition on competitive bidding. *See* *Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647-48, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980)*; *General Cinema Corp. v. Buena Vista Distribution Co., 532 F. Supp. 1244, 1256 and n.7 (C.D. Cal.)*, *aff'd* *681 F.2d 594 (9th Cir. 1982)*.

[11] What the members of COMPACT did not foresee was the Gresham and Smith would look outside the immediate area to procure a qualified minority architect to satisfy MNAA's affirmative action objectives.

venture having the power to direct individual competitors to refrain from bidding on contracts interferes with the free market price structure.

> The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions. Those who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system.

United States v. Socony-Vacuum Oil Co., 310 U.S. at 221.

An examination of the provisions of settlement decrees entered in cases involving bid rigging supports this Court's position that joint bidding arrangements between competitors on construction projects is impermissible absent a showing that the work specifications contained in the bid cannot be performed without such a combination, *United States v. New England Concrete Pipe Corp*., 1959 Trade Cas. **[**37]** (CCH) para. 69,481 (D. Mass. 1959), or that the joint venture is to be undertaken to produce a product not currently made by any of the joint venturers, or that the product cannot be made competitively by just one of the participants. *United States v. General Electric Co., 1962 Trade Cas. (CCH) P 70,367 (E.D. Pa. 1962)*; *see also* *United States v. Bituminous Concrete Association, Inc., 1960 Trade Cas. (CCH) P 69,878 (D. Mass. 1960)*; *United States v. Lake Asphalt and Petroleum Co. of Massachusetts, 1960 Trade Cas. (CCH) P 69,835 (D. Mass. 1960)*. In the instant case, the combination between minority architects is not necessary to enable the firms to perform the design work sought.

The plaintiffs argue that if their conduct is to be subjected to antitrust scrutiny, then the recent decision in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70, 52 U.S.L.W. 4928 (1984)*, directs this Court to apply the rule of reason. In *NCAA*, the Supreme Court **[*1579]** carved out an exception to the *per se* rule's applicability to price fixing conspiracies in light of the nature of the industry. **[**38]**

> What is critical is that this case involves an industry [i.e., college football] in which horizontal restraints in competition are essential if the product is to be available at all.
>
> As Judge Bork has noted: "Some activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." R. Bork, *The Antitrust Paradox* 278 (1978). What the NCAA and its member institutions market in this case is competition itself -- contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. . . . The integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted **[**39]** such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed that otherwise would be unavailable. In performing its role, its actions wide consumer choice . . . and hence can be viewed as pro-competitive.

National Collegiate Athletic Association, 52 U.S.L.W. at 4932. Plaintiffs seek to draw an analogy to their situation, claiming that minority participation is impossible without joint action among all minority architects. This Court disagrees. As the Court has observed throughout the opinion, if participation on public contracts by individual firms has been prohibited by a conspiracy to exclude minority businesses, then the Civil Rights Act affords the individual victims redress by way of a private cause of action. The Court rejects the plaintiffs' position that minority architectural services can be marketed effectively only through a joint venture. There simply is no similarity between the college football industry and the architectural profession. Procompetitive efficiencies are **[**40]** generated, rather than reduced by competition between minority architectural firms. Elimination of such competition compromises consumer welfare and, hence, runs afoul of *Section 1* of the Sherman Act.

IV. *The Propriety of Summary Judgment*

COMPACT's failure to procure joint venture status with Gresham and Smith on the airport contract motivated the joint venture and its individual members to seek alternative redress via a claim of racial discrimination under the Civil Rights Act. ***HN11***[] This Court, however, will not grant relief which will further the objectives of an unlawful conspiracy. *Board of Regents of the University of Oklahoma v. National Collegiate Athletic Association, 546 F. Supp. 1276, 1327 (E.D. Okla. 1982)*, *aff'd in part, remanded in part* *707 F.2d 1147 (10th Cir. 1983)*, *aff'd* *468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70, 52 U.S.L.W. 4928 (1984)* ("it would be unseemly for the Court having found an overt violation of the antitrust laws, to allow the violation to continue for even a single day . . ."). In light of this Court's determination that COMPACT violates the Sherman Act, the Court is compelled to grant the defendant's motion for summary judgment on those **[**41]** claims involving illegal conduct by the individual plaintiffs. *Continental Wall Paper Co. v. Louis Voight & Sons, 212 U.S. 227, 267, 29 S. Ct. 280, 53 L. Ed. 486 (1909)* (affirming summary dismissal of plaintiff's claims in light of the plaintiff's role in a price-fixing conspiracy, stating that the Court would not render "a judgment [which] would, in effect, aid the execution of agreements which constituted [an] illegal combination").

HN12[] Summary adjudication is used sparingly in antitrust cases. *Poller v. Columbia **[*1580]** Broadcasting System, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*; *Ron Tonkin Gran Turismo v. Fiat Distributors, 637 F.2d 1376, 1381 (9th Cir.)* *cert. denied*, *454 U.S. 831, 70 L. Ed. 2d 109, 102 S. Ct. 128 (1981)* ("general reluctance does not preclude the use of summary judgment in antitrust litigation"); *see generally* 2 P. Areeda and D. Turner, *Antitrust Analysis* para. 316 (1980). Usually, the facts presented before the Court are complex and require an extended probe into industry structure, the parties' conduct and the economic nuances raised by the disputed actions. Almost without exception, summary judgment is appropriate **[**42]** only when the conduct at issue falls clearly within those categories of practices traditionally treated as *per se* unlawful or when the allegations in the complaint clearly fail to establish a material issue of fact for adjudication.

As discussed above, the horizontal division of geographic markets, allocation of customers and price fixing are practices which federal courts long have regarded as *per se* illegal. And while the Supreme Court in recent years has carved out exceptions to the *per se* rule and mandated rule of reason analysis be given to certain practices, *see, e.g.,* *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)* (non-price vertical restraints), the Supreme Court consistently has reaffirmed its position that the *per se* rule has continuing vitality particularly in its application to horizontal conspiracies involving price-fixing and division of markets.

Per se treatment of the practices engaged in by COMPACT serve important policies promoting the enforcement of antitrust laws. First, businessmen are given a "bright line" demarcating the division between permissible commercial conduct and that which **[**43]** is proscribed. The "bright line" provides valuable assistance to businessmen in planning their commercial strategies, affording them a measure of predictability as to the risks of antitrust liability for any contemplated scheme. Second, if the history of ***antitrust law*** demonstrates anything it is that "elaborate inquiry into the reasonableness of challenged business practices entails significant costs." *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. Application of the *per se* rule results in judicial efficiency by formalizing the legal conclusion that certain business practices are by their very nature anticompetitive, pernicious and without redeeming value. *Northern Pacific Railway v. U.S., 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)*. The *per se* rule avoids the situation found in many rule of reason cases characterized by documents running into the millions of pages and litigation occupying years of court time. *Broadcast Music, Inc., 441 U.S. at 8, n. 11, 99 S. Ct. at 1556, n. 11*. (the *per se* rule serves to benefit all concerned by avoiding "the necessity for an incredibly complicated and prolonged **[**44]** economic investigation . . . -- an inquiry so often wholly fruitless when undertaken"). While this Court hesitates to enforce the *per se* rule, it will apply it when the conduct challenged clearly warrants such treatment. It is appropriate in this case.

This Court need not conduct an elaborate inquiry into the structure of the architectural industry or the market power of COMPACT and its members to conclude that the COMPACT agreement is anticompetitive. *National Society of Professional Engineers, 435 U.S. at 697*. Proof of the conspirators' market power is unnecessary upon a finding that an agreement represents a naked restraint on trade. *NCAA*, 52 U.S.L.W. at 4934; *Klor's Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207, 213, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*. In *White Motor Co. v. United States, 372 U.S. 253, 259-60, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963)*, the Supreme Court stated that once a party establishes the existence of a horizontal conspiracy to divide markets, fix prices, or group boycott "a trial to show their nature, extent, and degree is no longer necessary." In that case, the Supreme Court affirmed in part and reversed in part the district court's **[**45]** entry of summary judgment against a truck manufacturer **[*1581]** shown to have engaged in a conspiracy with its distributors to allocate territories, fix prices, and impose group boycotts. The Court affirmed summary judgment as to the price fixing count but reversed and remanded the case as to the territorial allocation and customer limitation charges. The Court reversed judgment on these latter claims since they involved *vertically* imposed restraints, which the Court has recognized as potentially procompetitive and, therefore, deserving of full consideration at trial. *Id. at 263-64*. In this case, however, the restraints are *horizontally* imposed between actual competitors and, as the *White* Court observed, lack any possible procompetitive efficiencies which would warrant a full trial. *Id. at 263*.

V. *Conclusion*

This Court finds that COMPACT and its members have violated *Section 1* of the Sherman Act by conspiring to divide markets and to interfere with the bidding structure for public contracts. The conspiracy is *per se* illegal. The Court need not inquire further into the plaintiffs' motives, their market power, or other aspects of the industry in which **[**46]** they do business. The Court grants partial summary judgment against the plaintiffs as to those claims against MNAA, Gresham and Smith, Williams, Russell and Johnson and the Metropolitan Government of Nashville and Davidson County, Tennessee, charging those defendants with conspiring to violate the Civil Rights Act and the Sherman Act with respect to the construction of the airport. The other counts in the plaintiffs' complaint challenge actions taken against each of the plaintiffs in the individual and/or firm capacities. The Court finds that these matters continue to present issues for adjudication.

End of Document

Haroco, Inc. v. American Nat'l Bank & Trust Co.

United States Court of Appeals for the Seventh Circuit

May 9, 1984, Argued ; October 19, 1984, Decided *

No. 83-2529

Reporter
747 F.2d 384 *; 1984 U.S. App. LEXIS 17552 **

HAROCO, INC., et al., Plaintiffs-Appellants, v. AMERICAN NATIONAL BANK AND TRUST COMPANY OF CHICAGO, WALTER E. HELLER INTERNATIONAL CORPORATION, & RONALD J. GRAYHECK, Defendants-Appellees

Subsequent History: [1]** *Cert. Denied, 469 U.S. 1157 (1985)*

Prior History: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 83 C 1618 -- Bernard Decker, Judge.

Core Terms

racketeering, enterprise, pattern of racketeering activity, organized crime, district court, slip opinion, courts, provisions, injuries, racketeering activity, predicate act, allegations, defendants', mobsters, competitive injury, appears, cases, legislative history, injuries resulting, probable cause, deliberately, conducting, predicate, terms, infiltration, indirect injury, broad terms, mail fraud, proceedings, indictable

LexisNexis® Headnotes

Civil Procedure > ... > Defenses, Demurrers & 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**

On review of a dismissal for failure to state a claim, the court treats all allegations in the complaint as true and view them in the light most favorable to plaintiffs.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

* This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing en banc on the question of the conflict with the Second Circuit cases of Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984); cert. granted, 469 U.S. 1157, 105 S. Ct. 901, 83 L. Ed. 2d 917; Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984); and Furman v. Cirrito, 741 F.2d 524 (2d Cir. 1984).

HN2[] Private Actions, Racketeer Influenced & Corrupt Organizations

See *18 U.S.C.S. § 1964(c)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN3[] Private Actions, Racketeer Influenced & Corrupt Organizations

See *18 U.S.C.S. § 1962(c)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN4[] Private Actions, Racketeer Influenced & Corrupt Organizations

UnderRICO, *18 U.S.C.S. § 1961(1)*, "racketeering activity" is defined in terms of a long list of state and federal crimes, including mail fraud, pursuant to *18 U.S.C.S. § 1341*. A person commits mail fraud by using the mails for the purpose of executing a scheme or artifice to defraud pursuant to *§ 1341*. Under RICO, *18 U.S.C.S. § 1961(5)*, a "pattern of racketeering activity," as required by RICO *§ 1962(c)*, requires at least two acts of racketeering activity within a ten year period. The individual acts of racketeering activity are usually described as the "predicate offenses."

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Business & Corporate Law > ... > Management Duties & Liabilities > Rights of Partners > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN5[] Private Actions, Racketeer Influenced & Corrupt Organizations

RICO, *18 U.S.C.S. § 1961(3)* and *(4)*, define "person" and "enterprise" very broadly. The term "person" includes any individual or entity capable of holding a legal or beneficial interest in property. The term "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN6[] **Racketeer Influenced & Corrupt Organizations, Claims**

To state a claim under RICO, a civil plaintiff must allege more than the occurrence of two predicate acts of racketeering from the list inRICO, *18 U.S.C.S. § 1961*. The elements of a civil RICO claim are set forth in *§§ 1964(c)* and *1962*. The plaintiff must allege an injury to "business or property," and that injury must be "by reason of a violation of *§ 1962*, pursuant to *§ 1964(c)*. To allege a violation of *§ 1962(c)*, the plaintiff must allege that the defendant (1) was employed by or associated with (2) an enterprise engaged in, or the activities of which affected, interstate or foreign commerce, and (3) that the person conducted or participated in the conduct of the enterprise's affairs (4) through a pattern of racketeering activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN7[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

A civil plaintiff, underRICO, *18 U.S.C.S. §§ 1961 et seq.*, need not allege or prove injury beyond an injury to business or property resulting from the underlying acts of racketeering. Allegations of excessive interest charges resulting from an alleged fraudulent scheme to overstate the prime rate satisfy the requirements ofRICO, *18 U.S.C.S. § 1964(c)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN8[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The "by reason of" language, inRICO, *18 U.S.C.S. § 1964(c)*, simply imposes a proximate cause requirement on plaintiffs. The criminal conduct in violation of *§ 1962* must, directly or indirectly, have injured the plaintiff's business or property. A defendant who violates *§ 1962* is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN9[] Private Actions, Racketeer Influenced & Corrupt Organizations

Under RICO, 18 U.S.C.S. § 1962(c), "enterprise" refers to a being different from, not the same as or part of, the "person" whose behavior the act was designed to prohibit, and, failing that, to punish. Section 1962(c), contemplates a separate "person" and "enterprise," because the enterprise may very well be the victim of the racketeering activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN10[] Private Actions, Racketeer Influenced & Corrupt Organizations

RICO, 18 U.S.C.S. § 1962(c), requires separate entities as the liable person and the enterprise which has its affairs conducted through a pattern of racketeering activity.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN11[] Private Actions, Racketeer Influenced & Corrupt Organizations

RICO, 18 U.S.C.S. § 1962(c), requires that the liable "person" be "employed by or associated with any enterprise" which affects interstate or foreign commerce. The use of the terms "employed by" and "associated with" contemplates a person distinct from the enterprise.

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

HN12[] Private Actions, Racketeer Influenced & Corrupt Organizations

A corporation and an association in fact can both satisfy the "enterprise" requirement ofRICO, 18 U.S.C.S. § 1962(c). However, a corporation and an association in fact differ substantially with respect to the "person" element. Where persons associate "in fact" for criminal purposes, each person may be held liable RICO for his, her, or its participation in conducting the affairs of the association in fact through a pattern of racketeering activity. But the nebulous association in fact does not itself fall within the RICO definition of "person." By contrast, a corporation obviously qualifies as a "person" under RICO and may be subject to RICO liability.

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

HN13[] Private Actions, Racketeer Influenced & Corrupt Organizations

UnderRICO, *18 U.S.C.S. § 1962(c)*, the "enterprise" and the "person" must be distinct. However, a corporation-enterprise may be held liable under *§ 1962(a)* when the corporation is also a perpetrator. A "person," such as a corporation-enterprise, acts unlawfully if it receives income derived directly or indirectly from a pattern of racketeering activity in which the person has participated as a principal within the meaning of *18 U.S.C.S. § 2*, and if the person uses the income in the establishment or operation of an enterprise affecting commerce.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

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

HN14[] Private Actions, Racketeer Influenced & Corrupt Organizations

UnderRICO, *18 U.S.C.S. § 1962(a)*, the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations. Thus the corporation-enterprise is liable under RICO when the corporation is actually the direct or indirect beneficiary of the pattern of racketeering activity, but not when it is merely the victim, prize, or passive instrument of racketeering. This is in accord with the primary purpose of RICO, which is to reach those who ultimately profit from racketeering, not those who are victimized by it.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN15[] Private Actions, Racketeer Influenced & Corrupt Organizations

See *18 U.S.C.S. § 1962(a)*.

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

HN16[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

RICO, *18 U.S.C.S. § 1962(c)*, requires only some separate and distinct existence for the person and the enterprise, and a subsidiary corporation is certainly a legal entity distinct from its parent. It is virtually self-evident that a subsidiary acts on behalf of, and thus conducts the affairs of, its parent corporation.

Banking Law > Types of Banks & Financial Institutions > National Banks > Affiliates & Subsidiaries

Business & Corporate Law > Agency Relationships > General Overview

HN17[] **National Banks, Affiliates & Subsidiaries**

A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN18[] **Claims, Fraud**

Fed. R. Civ. P. 9(b) requires that allegations of fraud specify "with particularity" the circumstances of the alleged fraud, applies to fraud allegations in civil complaints under RICO, *18 U.S.C.S. § 1961 et seq.*

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Donald E. Egan, Katten, Muchin, Zavis, Pearl & Galler, Chicago, Illinois, for Defendant.

Judges: Bauer and Cudahy, Circuit Judges, and Kellam, Senior District Judge. [**]

[**] Honorable Richard B. Kellam, Senior District Judge for the Eastern District of Virginia, is sitting by designation.

Opinion by: CUDAHY

Opinion

[*385] CUDAHY, Circuit Judge.

This appeal presents several issues involving civil claims under the federal Racketeer Influenced and Corrupt Organizations ("RICO") statute. *18 U.S.C. §§ 1961-1968*. The central issue concerns the type of injury a private civil plaintiff must allege to support a RICO claim under *18 U.S.C. § 1964(c)*. We must also consider several questions involving the RICO provisions requiring that a "person" conduct or participate in the conduct of the affairs of an "enterprise" through a pattern of racketeering activity, **[**2]** as those terms are defined in RICO. *18 U.S.C. § 1962(c)*. We affirm in part and reverse in part.

I

This is an appeal from the district court's dismissal for failure to state a claim. ***HN1***[] We shall therefore treat all allegations in the complaint as true and view them in the light most favorable to plaintiffs. The case arises from loans made by defendant American National Bank & Trust Company of Chicago ("ANB") to plaintiffs. Plaintiffs are several businesses, Haroco, Inc., Roman Ceramics, Inc., California Originals, Inc. and Mike Wayne Distilled Products Co. Haroco independently and together with other plaintiffs borrowed several million dollars from ANB between 1979 and 1981. Each loan agreement provided that the rate of interest would be "one per cent over the bank's prime rate," and the prime rate was defined as the "rate of interest charged by the bank to its largest and most creditworthy commercial borrowers for 90-day unsecured commercial loans." The defendants, in addition to ANB, are Ronald J. Grayheck, who is an officer and director of ANB, and Walter E. Heller **[**3]** International Corporation ("Heller International"), which is the parent company of ANB. [1]

Plaintiffs brought this action in March 1983 alleging that defendants had defrauded them in the calculation of the prime rate which determined their own variable interest payments. The only alleged injuries were excessive interest charges resulting from defendants' calculation of the prime rate. Plaintiffs included in their complaint three state law causes of action and two counts based on alleged violations of the federal Racketeer Influenced and Corrupt Organizations ("RICO") provisions in *18 U.S.C. §§ 1961-1968*. [2] As we shall explain in more detail below, plaintiffs' RICO claims were predicated on defendants' use of the mails in furtherance of the alleged scheme to **[**4]** defraud plaintiffs by overstating the prime interest rate. Count I of the amended complaint alleged that defendant ANB violated *18 U.S.C. § 1962(c)* by conducting ANB's and Heller International's affairs through a pattern of racketeering activity. Count II alleged that defendants Heller International and Grayheck violated *section 1962(c)* by conducting ANB's affairs **[*386]** through a pattern of racketeering activity.

Defendants moved on three principal grounds to dismiss the RICO counts. First, they argued that plaintiffs failed to allege the requisite causal relationship between their injuries and the RICO violations. Second, defendants argued that plaintiffs failed to allege the requisite relationships between "persons" and the "enterprises," the affairs of which were allegedly conducted through patterns of racketeering activity. Third, defendants argued that plaintiffs had **[**5]** not pleaded the predicate acts of mail fraud with the necessary particularity.

The district court concluded that the plaintiffs had failed to state claims under RICO because they did not allege that they had suffered any injury by reason of a RICO violation in addition to the injuries caused by the alleged mail fraud. The district court held "that a plaintiff's injury to be cognizable under RICO must be caused by a RICO violation and not simply by the commission of predicate offenses, such as acts of mail fraud." *Haroco, Inc. v.*

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[1] According to the complaint, ANB has at all relevant times been either a wholly owned subsidiary of Heller, or a wholly owned subsidiary of American National Corporation, which in turn is a wholly owned subsidiary of Heller.

[2] RICO was enacted as Title IX of the Organized Crime Control Act of 1970, Pub. L. 91-452, 84 Stat. 922.

American National Bank & Trust Co., 577 F. Supp. 111, 114 (N.D. Ill. 1983). The district court therefore dismissed plaintiffs' RICO claims without reaching defendants' other arguments. Because there was no other ground for federal jurisdiction, the district court also dismissed the remaining pendent state law claims.

II

Before proceeding to the specific issues raised on this appeal, we must first sketch RICO's broad civil provisions. This court recently said that the civil RICO provisions are "constructed on the model of a treasure hunt." *Sutliff, Inc. v. Donovan Companies, 727 F.2d 648, 652 (7th Cir. 1984).* **[**6]** We begin the hunt with *18 U.S.C. § 1964(c)*, which provides the private cause of action:

> ***HN2***[] 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 threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

The next step is to examine *section 1962*, which describes the prohibited conduct. In this case, the most relevant portion of the section provides:

> ***HN3***[] 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.

18 U.S.C. § 1962(c). We must next turn to *section 1961*, which provides **[**7]** special statutory definitions for the key terms of *section 1962(c)*. ***HN4***[] "Racketeering activity" is defined in *section 1961(1)* in terms of a long list of state and federal crimes, including mail fraud, *18 U.S.C. § 1341*. A person commits mail fraud by using the mails for the purpose of executing a scheme or artifice to defraud. *18 U.S.C. § 1341*; *United States v. Wormick, 709 F.2d 454, 461-62 (7th Cir. 1983)*. A "pattern of racketeering activity," as required by *section 1962(c)*, requires at least two acts of racketeering activity within a ten year period. *18 U.S.C. § 1961(5)*. The individual acts of racketeering activity, such as the alleged mail fraud in this case, are usually described as the "predicate offenses."

HN5[] RICO also defines "person" and "enterprise" very broadly. The term "person" includes "any individual or entity capable of holding a legal or beneficial interest in property." *18 U.S.C. § 1961* **[**8]** *(3)*. The term "enterprise" includes "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)*.

RICO's terms are obviously very broad. Because various fraud offenses are included in the definition of "racketeering activity," RICO claims (with their treble-damage provisions) have recently become attractive to many plaintiffs in commercial disputes **[*387]** that otherwise might involve only breach of contract, or securities or state law fraud claims. In cases involving allegations of commercial fraud, for example, it is often possible for a plaintiff to allege two acts of mail fraud, thus constituting a "pattern of racketeering activity," and to allege further that the defendant conducted the affairs of an "enterprise" through that pattern of racketeering activity in violation of *section 1962(c)*. Whether RICO's broad terms should be read literally to permit RICO claims in instances of such "garden variety" fraud has recently been the subject of extended debates in the federal courts. The central issue in this case concerns the **[**9]** type of injury a plaintiff must allege to sustain a RICO claim.

III

The district court concluded that the plaintiffs were required to allege some injury in addition to injuries resulting from the predicate acts of racketeering. The courts imposing such a requirement have often referred to the additional injury as a "racketeering injury" or " racketeering enterprise injury." We shall use the term "racketeering injury." The district court focused on the requirement in *18 U.S.C. § 1964(c)* that the RICO plaintiff be injured "by reason of a violation of *section 1962*," and interpreted that language to mean that allegations of injuries resulting only from the predicate acts of racketeering would not support a RICO claim. *577 F. Supp. at 113-15*. Because the only alleged injuries in this case were excessive interest payments resulting from the underlying fraud, the district court dismissed the RICO counts. The district court did not suggest what additional injuries might satisfy section 1964(c).

At the outset we should avoid confusion by distinguishing a "racketeering injury" from the elements of a RICO cause of action spelled out explicitly **[**10]** in the statute. There can be no doubt that ***HN6***[] to state a claim under RICO, a civil plaintiff must allege more than the occurrence of two predicate acts of racketeering from the list in section 1961. The elements of a civil RICO claim are set forth in sections 1964(c) and 1962. The plaintiff must allege an injury to "business or property," and that injury must be "by reason of a violation of section 1962**.**" 18 U.S.C. § 1964(c). In this case we are concerned only with the conduct prohibited by subsection (c) in section 1962, and not with the provisions of subsections (a), (b) or (d). To allege a violation of section 1962(c), the plaintiff must allege that the defendant (1) was employed by or associated with (2) an enterprise engaged in, or the activities of which affected, interstate or foreign commerce, and (3) that the person conducted or participated in the conduct of the enterprise's affairs (4) through a pattern of racketeering activity. *Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1167-68 (5th Cir. 1984)*; *Moss v. Morgan Stanley, Inc., 719 F.2d 5, 17 (2d Cir. 1983),* **[**11]** *cert. denied*, *465 U.S. 1025, 104 S. Ct. 1280, 79 L. Ed. 2d 684 (1984)*.

The "racketeering injury" requirement imposed by the district court here goes farther than this elementary exposition of RICO. The district court required a special kind of injury for RICO claims. That "racketeering injury" is presumably something peculiar to RICO, although the district court here did not explain what the requirement is.

Whether a claim under section 1964(c) requires a racketeering injury has recently been one of the most hotly disputed RICO issues in the federal courts. The district courts in this circuit have disagreed on the issue, [3] **[**12]** and district courts in other circuits **[*388]** are also divided. [4] Although we have not tried to count cases, there does

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[3] In addition to the district court's decision in this case, *Haroco, Inc. v. American National Bank & Trust Co., 577 F. Supp. 111, 114-15 (N.D. Ill. 1983)*, the district court concluded that a racketeering injury is required under RICO in *County of Cook v. Midcon Corp., 574 F. Supp. 902, 919-20 (N.D. Ill. 1983)* (Leighton, J.). District court decisions in this circuit refusing to require a racketeering injury include *Kosch v. Parkway Bank & Trust Co.*, No. 83 C 4832, slip op. at 8-9 (N.D. Ill. March 9, 1984) (Getzendanner, J.); *Addis v. Moser*, No. 83 C 6118, slip op. at 12-18 (N.D. Ill. Feb. 15, 1984) (Marshall, J.); *Swanson v. Wabash, Inc., 577 F. Supp. 1308, 1318-20 (N.D. Ill. 1983)* (Aspen, J.).

[4] District court decisions in other circuits holding squarely that a plaintiff must prove "something more" or a racketeering injury include: *Margolis v. Republic National Bank, 585 F. Supp. 595, 597 (S.D.N.Y. 1984)*; *Bruns v. Ledbetter, 583 F. Supp. 1050, 1056 (S.D. Cal. 1984)*; *Furman v. Cirrito, 578 F. Supp. 1535, 1539-41 (S.D.N.Y. 1984)*, *aff'd*, *741 F.2d 524 (2d Cir. 1984)*; *Hudson v. Larouche, 579 F. Supp. 623, 630 (S.D.N.Y. 1983)*; *Dakis v. Chapman, 574 F. Supp. 757, 761 (N.D. Cal, 1983)*; *Richardson v. Shearson/American Express Co., 573 F. Supp. 133, 137 (S.D.N.Y. 1983)*, *disavowed by author*, *Laterza v. American Broadcasting Co., 581 F. Supp. 408, 414 (S.D.N.Y. 1984)*; *In re Action Industries Tender Offer, 572 F. Supp. 846, 852 (E.D. Va. 1983)*; *Guerrero v. Katzen, 571 F. Supp. 714, 718-19 (D.D.C. 1983)*; *Bankers Trust Co. v. Feldesman, 566 F. Supp. 1235, 1240-42 (S.D.N.Y. 1983)*, *aff'd sub nom.* *Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984)*; *Barker v. Underwriters at Lloyd's, 564 F. Supp. 352, 358 (E.D. Mich. 1983)*; *Harper v. New Japan Securities Int'l., Inc., 545 F. Supp. 1002, 1006-08 (C.D. Cal. 1982)*; *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co., 527 F. Supp. 206, 208-09 (E.D. Mich. 1981)*.

District court decisions from other circuits holding squarely that a RICO plaintiff need not allege a racketeering injury include: *Minpeco S.A. v. Conticommodity Services, Inc.*, No. 81 Civ. 7619, slip op. at 2 (S.D.N.Y. March 28, 1984); *Estee Lauder, Inc. v. Harco Graphics, Inc.*, 621 F. Supp. 689, slip op. at 3 (S.D.N.Y. 1984); *Wilcox v. Ho-Wing Sit, 586 F. Supp. 561, 568-69 (N.D. Cal. 1984)*; *In re Catanella, 583 F. Supp. 1388, 1434-37 (E.D. Pa. 1984)*; *Laterza v. American Broadcasting Co., 581 F. Supp. 408, 414 (S.D.N.Y. 1984)*; *Charing Cross, Inc. v. Riggs Nat'l Bank*, No. 82-2207, slip op. at 10-14 (D.D.C. Oct. 7, 1983); *Slattery v. Costello, 586 F. Supp. 162, 167 (D.D.C. 1983)*; *Yancoski v. E. F. Hutton & Co., 581 F. Supp. 88, 96 & n.19 (E.D. Pa. 1983)*; *Kirschner v. Cable/Tel. Corp., 576 F. Supp. 234, 244 (E.D. Pa. 1983)*; *In re Longhorn Securities Litigation, 573 F. Supp. 255, 269-70 (W.D. Okla. 1983)*; *Ralston v. Capper, 569 F. Supp. 1575, 1580 (E.D. Mich. 1983)*; *Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231, 1240-41 (S.D.N.Y. 1983)*; *Seville Industrial Machinery Corp. v. Southmost Machinery Corp., 567 F. Supp. 1146, 1156-57 (D.N.J. 1983)*, *aff'd in part and rev'd in part, both on other grounds*, *742 F.2d 786 (3d Cir. 1984)*;

not appear to be a clear weight of authority at the district court level either for or against the racketeering injury requirement.

[13]** Among the courts of appeals, the situation is more complicated. In *Schacht v. Brown, 711 F.2d 1343 (7th Cir.)*, *cert. denied*, *464 U.S. 1002, __, 104 S. Ct. 508, 509, 78 L. Ed. 2d 698, (1983)*, the leading Seventh Circuit case on civil RICO, we rejected several arguments which are closely related to the racketeering injury question. After oral argument in this case, the Second Circuit issued three decisions which, together, amount to an en banc ruling by the Second Circuit in support of some sort of racketeering injury requirement. *Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984)*; *cert. granted, 469 U.S. 1157, 105 S. Ct. 901, 83 L. Ed. 2d 917 (1985)*; *Bankers Trust Co. v. Rhoades, 741 F.2d 511 (2d Cir. 1984)*; *Furman v. Cirrito, 741 F.2d 524 (2d Cir. 1984)*. [5] In addition, several recent decisions by this and other courts assume that injuries resulting from the predicate acts of racketeering satisfy RICO's requirements. *Sutliff, Inc. v. Donovan Companies, supra, 727 F.2d at 653-54*; *Alcorn County v. U.S. Interstate Supplies, Inc., supra, 731 F.2d at 1169*; **[**14]** *Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1288 (7th Cir. 1983)*; *Bennett v. Berg, 685 F.2d 1053, 1058-59 (8th Cir. 1982)*, *aff'd en banc*, *710 F.2d 1361, (8th Cir.)*, *cert. denied*, *464 U.S. 1008, 104 S. Ct. 527, 78 L. Ed. 2d 710 (1983)*. [6]

[15]** **[*389]** Courts on both sides of the racketeering injury dispute have claimed that they are merely following the "plain" meaning of *section 1964(c)*. *Compare Bankers Trust Co. v. Rhoades, supra*, slip op. at 5619 (plain meaning requires a distinct RICO injury), *with Furman v. Cirrito, supra*, slip op. at 11 (language is clear and does not require racketeering injury). We therefore suspect that we shall have to do more than stare at the language of *section 1964(c)* to decide this issue.

The initial hurdle for proponents of the racketeering injury is merely to define it, for "a racketeering enterprise injury is a slippery concept whose definition has eluded even those courts professing to recognize it," *Alexander Grant & Co. v. Tiffany Industries, supra, at 413*. Neither the district court nor the defendants in their brief have made any effort to define the requirement, but they are not alone in this respect. Many district courts have imposed on RICO plaintiffs a racketeering injury requirement without explaining what the requirement is. *See, e.g., Hudson v. Larouche, 579 F. Supp. 623, 630 (S.D.N.Y. 1983)*; *Furman v. Cirrito, 578 F. Supp. 1535, 1539-41 (S.D.N.Y. 1984),* **[**16]** *aff'd*, *741 F.2d 524 (2d Cir. 1984)*; *King v. Lasher, 572 F. Supp. 1377, 1382 (S.D.N.Y. 1983)*; *Guerrero v. Katzen, 571 F. Supp. 714, 718-19 (D.D.C. 1983)*; *Barker v. Underwriters at Lloyd's, 564 F. Supp. 352, 358 (E.D. Mich. 1983)*. Those district courts which have rejected a racketeering injury requirement have often remarked on this lack of explanation and the difficulty of definition as major reasons for rejecting it. *E.g., In re Catanella, 583 F. Supp. 1388, 1436-37 (E.D. Pa. 1984)*.

Instead of defining a racketeering enterprise injury, at least two district courts have refused to do so, insisting only that they would know a racketeering enterprise injury when they saw one. *Williamette Savings & Loan v. Blake & Neal Finance Co., 577 F. Supp. 1415, 1430 (D. Ore. 1984)* (citing *Jacobellis v. Ohio, 378 U.S. 184, 197, 12 L. Ed. 2d 793, 84 S. Ct. 1676 (1964)* (Stewart, J., concurring)); *Waste Recovery Corp. v. Mahler, 566 F. Supp. 1466, 1468-69 (S.D.N.Y. 1983)* (citing *Jacobellis v. Ohio, supra*).

Eisenberg v. Gagnon, 564 F. Supp. 1347, 1352-53 (E.D. Pa. 1983); *Windsor Associates, Inc. v. Greenfeld, 564 F. Supp. 273, 278-79 (D. Md. 1983)*.

[5] The panel in *Furman v. Cirrito* explained that the three panels had tentatively reached conflicting results on the issue, and a request for en banc consideration of the other cases was denied. Slip op. 5639. Although the members of the panel in *Furman* disagreed with the other decisions, they felt compelled in light of the denial of en banc consideration, to follow *Sedima* and *Bankers Trust*.

[6] The Eighth Circuit position has been clouded by *Alexander Grant & Co. v. Tiffany Industries, 742 F.2d 408 (8th Cir. 1984)*, which rejects *Sedima* as inconsistent with *Bennett v. Berg*, but finds the racketeering injury requirement of *Bankers Trust* consistent with its own decision. *Alexander Grant & Co.*, slip op. at 6 n.7, 10-11. It is not entirely clear to us how the *Alexander Grant* court distinguishes between the necessity of pleading a racketeering injury as here defined and the necessity of alleging the existence of an enterprise in order to make out a violation of *section 1962(c)*. *Compare id. with supra* at slip op. at 6.

The Second Circuit's recent trilogy of decisions **[**17]** represents the most comprehensive effort to date to define and justify the racketeering injury requirement, and we shall deal with that definition here. As we shall explain in more detail below, the Second Circuit's new definition of the racketeering injury requirement appears to be essentially an amalgamation of proposed limits on RICO which we rejected in *Schacht v. Brown, supra*, as contrary to the language and purpose of RICO. We therefore view *Schacht* as controlling in this case; we could not follow the Second Circuit without essentially overruling *Schacht*.

We must examine in some detail both the precise holdings and the mode of statutory interpretation adopted in *Schacht*. The plaintiffs there alleged that the defendants had engaged in an elaborate fraudulent scheme involving the reorganization of an insolvent insurance company. According to the complaint, the defendants had defrauded the state director of insurance by concealing the extent of the insolvency and by drawing away the company's more profitable business for their own benefit through a reorganization scheme. The defendants allegedly convinced the state director to permit the insolvent **[**18]** company to continue writing unprofitable insurance, thus leading to the further dissipation of the company's remaining assets. *711 F.2d at 1345-46*. The company's losses from the fraudulent scheme were allegedly substantial enough to have injured the company's policyholders and creditors in addition to its shareholders. *711 F.2d at 1348-49*.

This court upheld the RICO counts in *Schacht* against numerous challenges. The defendants' primary attack was that Congress did not intend to apply RICO to "garden variety" business fraud or securities cases. Our treatment of that challenge in *Schacht* sets the tone for our analysis of RICO statutory issues here. We said there:

> **[*390]** We agree that the civil sanctions provided under RICO are dramatic, and will have a vast impact upon the federal-state division of substantive responsibility for redressing illegal conduct, but, like most courts who have considered this issue, we believe that such dramatic consequences are necessary incidents of the deliberately broad swath Congress chose to cut in order to reach the evil it sought; we are therefore without authority to restrict the application of **[**19]** the statute.

711 F.2d at 1353. Our approach to RICO in *Schacht* was based heavily on the Supreme Court's opinion in *United States v. Turkette, 452 U.S. 576, 69 L. Ed. 2d 246, 101 S. Ct. 2524 (1981)*, where the Court said:

> The language of the statute and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure. Indeed, the very purpose of the Organized Crime Control Act of 1970 was to enable the Federal Government to address a large and seemingly neglected problem. The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions. That Congress included within the definition of racketeering activities a number of state crimes strongly indicates that RICO criminalized conduct that was also criminal under state law, at least when the requisite elements of a RICO offense are present. As the hearings and legislative debates reveal, Congress was well aware of the fear that RICO would "move large substantive areas formerly totally within the police power of the State into **[**20]** the Federal realm." In the face of these objections, Congress nonetheless proceeded to enact the measure, knowing that it would alter somewhat the role of the Federal Government in the war against organized crime and that the alteration would entail prosecutions involving acts of racketeering that are also crimes under state law. There is no argument that Congress acted beyond its power in so doing. That being the case, the courts are without authority to restrict the application of the statute.

452 U.S. at 586-87 (citations omitted).

It is true that the legislative history includes relatively little material on RICO's private civil remedy, *see Sedima, S.P.R.L. v. Imrex Co., supra, at 495* ("clanging silence of the legislative history"), but it is also clear that Congress deliberately chose the very broad language of RICO's provisions. Both the proponents and the opponents of RICO recognized the extraordinary breadth of its terms. [7] The opponents argued that the breadth of the statute might chill civil liberties, and the proponents of RICO defended the broad terms on the grounds that narrower terms would provide loopholes through which **[**21]** the primary targets of RICO might escape. Indeed, the unifying thread of RICO's legislative development was a desire to avoid creating loopholes for clever defendants and their lawyers. "In short, Congress chose to provide civil remedies for an enormous variety of conduct, balancing the need to redress a broad social ill against the virtues of tight, but possibly overly astringent, legislative draftsmanship." *Schacht, 711 F.2d at 1354*. As we said more recently in response to a similar challenge:

> But Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden-variety frauds actionable in federal treble-damage proceedings -- the price of eliminating all possible loopholes.

Sutliff, Inc. v. Donovan Cos., supra, 727 F.2d at 654. *See* *Moss v. Morgan Stanley, Inc., supra, 719 F.2d at 21* (it is not the **[*391]** judiciary's role to reassess Congress's balance of costs and benefits of RICO).

[22]** In addition, even if Congress had meant to leave the door open to narrower judicial interpretations of the statute, we said in *Schacht* that many of the provisions of RICO are so broad that "there is simply no legitimate principled criterion" for accomplishing that task. *711 F.2d at 1356*. For example, since Congress itself rejected any attempt to employ the concept of "organized crime" in any colloquial sense in the language of RICO, the courts have thoroughly repudiated the contention that the civil provisions of RICO apply only to organized crime. *See* *Schacht, supra, 711 F.2d at 1353-54*; *Alcorn County, supra, 731 F.2d at 1167*; *Moss v. Morgan Stanley, Inc., supra, 719 F.2d at 21* & n.17; *Bennett v. Berg, supra, 685 F.2d at 1063*; *Cenco, Inc. v. Seidman & Seidman, 686 F.2d 449, 457 (7th Cir.)*, *cert. denied*, *459 U.S. 880, 74 L. Ed. 2d 145, 103 S. Ct. 177 (1982)*. And without reviving the discredited "organized crime" approach, the other deliberately broad terms of RICO, such as "person," "enterprise," "conduct" and "participate," offer few toeholds for courts **[**23]** seeking to narrow RICO's application.

The defendants in *Schacht* argued, as do the defendants here, that the plaintiffs had not alleged the proper type of injury for a RICO claim. We considered and rejected several variations on the theme. First, defendants argued, based on a loose analogy to the antitrust laws, that RICO claims are limited to claims for "competitive" injuries. *See* *North Barrington Development, Inc. v. Fanslow, 547 F. Supp. 207, 211 (N.D. Ill. 1980)*; Note, *Reading the "Enterprise" Element Back Into Rico: Sections 1962 and 1964(c)*, 76 Nw. U. L. REV. 100, 126-28 (1981). We rejected that argument. *711 F.2d at 1356-58*. *See also* *Bennett v. Berg, supra, 685 F.2d at 1058-59* (rejecting competitive injury requirement); *Bunker Ramo Corp. v. United Business Forms, Inc., supra, 713 F.2d at 1287-88* (same).

Although there can be little doubt that criminal infiltration of businesses and injury to free competition in the marketplace were major concerns of Congress in enacting RICO, it is also clear that Congress's concerns extended much farther. *United States v. Turkette, supra, 452 U.S. at 590-91.* **[**24]** We agree that a business competitor harmed by infiltration or by other effects of racketeering might well be able to state a claim under RICO by alleging a "competitive" injury. *See Addis v. Moser*, No. 83 C 6118, slip op. at 14 & n.9 (N.D. Ill. Feb. 15, 1984); *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co., 527 F. Supp. 206, 208-09 (E.D. Mich. 1981)* (competitive injury could in some cases be cognizable under RICO). While a competitive injury might be *sufficient* to sustain a RICO claim, a competitive injury is, under *Schacht* and *Bennett v. Berg*, not *necessary* to state a RICO claim. For a thorough, recent discussion of the competitive injury requirement and relevant legislative history, see *In re Catanella, 583 F. Supp. 1388, 1431-34 (E.D. Pa. 1984)*. [8]

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[7] The court in *Sedima* noted the dangers of deriving legislative intent from parades of horrors in opponents' speeches, slip op. at 5549-50 n.22, but RICO's proponents also recognized the broad scope and the potential for unexpected applications.

[8] Some courts have justified their construction of *section 1964(c)*'s "by reason of" language with an analogy to *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*, in which the Supreme Court held that an antitrust plaintiff must prove "*antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." The analogy has limited usefulness. The central factor in *Brunswick*

[25]** *Schacht* also rejected the argument that civil RICO claims should be limited only to **[*392]** those who are *indirect* victims of racketeering activity. *711 F.2d at 1356-58*. The defendants had argued that those parties directly victimized by the alleged fraud could seek other, pre-existing legal remedies, which Congress had not meant to supplant. RICO, they argued, should be limited to parties who were not themselves the victims of racketeering and who suffered consequential or remote injury from the racketeering. This argument, of course, was very closely related to the claim that civil RICO is limited to competitive injuries. We noted in *Schacht, 711 F.2d at 1355-56*, that Congress was well aware of existing criminal and civil provisions for racketeering activity, but that Congress viewed those remedies as inadequate in the face of organized crime. *See* *United States v. Turkette, supra, 452 U.S. at 586-87*. Congress enacted RICO in order to supplement, not supplant, the available remedies since it thought those remedies offered too little protection for the victims. As we said in *Schacht v. Brown*, "RICO was designed to protect *direct*, and not just second-order, victims of organized crime infiltration." *711 F.2d at 1358.* **[**26]**

Limiting civil RICO recoveries to indirect victims would produce odd consequences and, in some cases of RICO violations, would prevent civil recoveries altogether. Consider, for example, a small business subjected to repeated extortionate demands for protection money. [9] The business would surely be the victim of racketeering activity as defined in *section 1961*. And the owner might well be able to show that the extortionists violated *section 1962(c)* by conducting the affairs of an enterprise through a pattern of racketeering activity. Yet, under an indirect injury requirement, the owner could not sue the extortionists under RICO; instead, RICO's provisions would be limited to indirect victims, if there were any, such as the extortionists' competitors. [10] *See also* *Mauriber v. Shearson/American Express, Inc., 567 F. Supp. 1231, 1240 (S.D.N.Y. 1983)* (example describing problems with indirect injury requirement). The Supreme Court recently explained that Congress enacted RICO primarily to attack the sources of organized crime's economic power. *Russello v. United States, 464 U.S. 16, 104 S. Ct. 296, 302-03, 78 L. Ed. 2d 17 (1983)*. Congress, while **[**27]** concerned with infiltration of legitimate business, also had the broader purpose of separating racketeers from their profits. *Id.* An "indirect injury" requirement would contravene the statute and Congress's intent by preventing the direct victims of racketeering activity from suing under RICO to recover their "contributions" to the racketeers' profits.

Thus, in *Schacht* we rejected the argument that civil RICO actions are limited only to situations involving "organized crime," and we rejected several arguments in support of special RICO injury requirements because we found no basis for them in the language, purpose or legislative history of RICO. We recognized that RICO's language extends beyond those concerns which were the immediate focus of the legislation, but we also recognized that Congress was fully aware **[**28]** of the extraordinary breadth of the language. Even though Congress might not have fully contemplated all of the consequences or applications of those very broad terms, Congress nevertheless deliberately chose to use the broad terms to ensure that the criminal and civil provisions would be effective. Further, even if Congress had meant to invite the courts to limit the broad reach of RICO, it provided few if any textual pegs which could permit courts to develop reasoned, consistent and principled limits without simply redrafting the statute. If, for policy reasons, it appears to be the better course to restrict the scope of RICO, then Congress -- not the courts -- is the body to do it. *711 F.2d at 1353-56*.

In a relatively brief section of the opinion in *Schacht* captioned "Injury 'By Reason of' A *§ 1962(c)* Violation," we addressed an **[*393]** argument couched in terms similar to defendants' argument in this case. Without deciding

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was that the plaintiffs claimed damages suffered by reason of *increased* competition. The Supreme Court recognized that such an award would be "inimical to the purposes" of the antitrust laws, *429 U.S. at 488*, and would "divorce[] antitrust recovery from the purposes of the antitrust laws," *id. at 487*. By contrast, taking RICO's terms at face value might extend RICO *beyond* its expressly contemplated applications, but it in no way *undermines* RICO's purposes. As the Supreme Court has said of RICO, "the aim is to divest the association of the fruits of its ill-gotten gains." *United States v. Turkette, supra, 452 U.S. at 585*. Restrictive standing requirements analogous to those in antitrust laws would too often leave those gains in the hands of the RICO violators. *See* *Schacht, supra, 711 F.2d at 1357-58*; *Bennett v. Berg, supra, 685 F.2d at 1059*; *In re Catanella, supra, 583 F. Supp. at 1433-34*.

[9] This hypothetical is drawn from *In re Catanella, supra, 583 F. Supp. at 1433-34*.

[10] We suspect that competing extortionists would be unlikely to sue under RICO.

whether a racketeering injury requirement should be imposed, and also without defining such a requirement, we concluded that any such requirement had been satisfied by the allegations of injuries resulting from the insurance company's **[**29]** continued operation as procured by the predicate fraud offenses. *711 F.2d at 1358-59*. As noted, defining the racketeering injury requirement has been the primary hurdle for its proponents. The appellants' briefs in *Schacht* offered no useful definition of the asserted requirement other than competitive injury, and they acknowledged the ambiguity of the requirement as developed by the courts up to that time. Since *Schacht* was decided, the debate has continued, and the Second Circuit's recent trilogy offers the most comprehensive effort to date to define the racketeering injury requirement. Our discussion of the requirement in *Schacht, 711 F.2d at 1358-59*, has thus been outdated by courts' further development of the concept. [11] Upon close examination, however, the Second Circuit's proposed definition appears to be only a composite of the various proposed standing or injury limits rejected in *Schacht*. The controlling portions of the *Schacht* opinion are therefore those discussing the proposed competitive and indirect injury requirements and the application of RICO to business frauds.

[30]** We now turn to the Second Circuit's recent cases on the racketeering injury requirement. Although the contours of the Second Circuit's racketeering injury are not yet entirely clear, the Second Circuit's decisions conflict with our decision in *Schacht v. Brown*, and we decline to follow them.

The lead case in the trilogy is *Sedima, S.P.R.L. v. Imrex Co., 741 F.2d 482 (2d Cir. 1984)*, *cert. granted*, *469 U.S. 1157, 105 S. Ct. 901, 83 L. Ed. 2d 917 (1985)*. The plaintiff and defendants in that case had entered into a joint venture for the export of goods to Europe. The plaintiff alleged that the defendants defrauded it by preparing purchase orders, invoices and credit memoranda that they knew falsely overstated purchase prices, attendant costs and shipping and financing charges. Slip op. at 5537. The complaint included three RICO counts based on *18 U.S.C. § 1962(c)* and *(d)*. The district court dismissed the RICO counts on the ground that the plaintiff had failed to allege any injury that was something more than or different from the injuries resulting from the predicate acts of mail and wire fraud. In a lengthy opinion **[**31]** by Judge Oakes, with Judge Cardamone dissenting, the Second Circuit affirmed the dismissal of the RICO counts because the plaintiff had not alleged a "racketeering injury." Slip op. at 5560-62. [12]

The majority in *Sedima* noted that organized crime was the primary target of RICO and expressed its dismay at the application of RICO to many "respected and legitimate" businesses. The majority concluded that the application of RICO beyond its original stated purposes showed that the statute was "ambiguous," slip op. at 5544, and then undertook a thorough examination of RICO's legislative history. **[**32]** [13] The majority's review of the history shows convincingly that the private civil RICO provisions of *section 1964(c)* received relatively little attention from Congress in the enactment of the omnibus Organized Crime Control Act. The issue is what conclusions **[*394]** should be drawn from that fact. The *Sedima* court said:

> The most important and evident conclusion to be drawn from the legislative history is that the Congress was not aware of the possible implications of *section 1964(c)*. If Congress had intended to provide a federal forum for plaintiffs for so many common law wrongs, it would at least have discussed it. If Congress had intended to provide an alternate and more attractive scheme for private parties to remedy violations of the securities laws -- involving decades of statutes, regulations, commentaries, and jurisprudence -- it would at least have mentioned it. The House Judiciary Committee, which authored the provision, would at least have mentioned the

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[11] That portion of the *Schacht* opinion has been the subject of widely varying interpretations. *See* *In re Catanella, supra, 583 F. Supp. at 1435 n.68*, and cases cited therein.

[12] In *Sedima* the Second Circuit also held that before a civil RICO action may be brought, "there must be a 'violation,' that is, criminal convictions on the underlying predicate offenses." *741 F.2d at 503*. That holding conflicts with our decision in *Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1286-87 (7th Cir. 1983)*. The issue is not presented in this appeal.

[13] In *Schacht, supra*, we concluded that while RICO's terms are very broad, the terms in dispute there were not ambiguous. *711 F.2d at 1353-56*. We discuss below the appropriate role for courts when dealing with deliberately broad, as opposed to ambiguous, statutory terms.

> amendment to the full House as a major change in its report had there been any inkling of its possible implications.

Supra at 492. The court then discussed the various "standing" barriers that **[**33]** courts have sought to erect against civil RICO claims and acknowledged the complete lack of consensus on civil RICO's requirements. The *Sedima* majority focused its consideration on the "by reason of a violation of *section 1962*" language in *section 1964(c)* and endorsed some form of racketeering injury requirement. The majority discussed the antitrust analogy relied on by some courts in imposing a competitive injury requirement. The court concluded that Congress did not intend to import all of the concepts of antitrust standing into civil RICO actions, but it said "there is nothing in the legislative history which suggests that Congress did not intend to create *analogous* standing barriers to RICO by using the 'by reason of' language." 741 at 495.

[34]** The majority then attempted to define a racketeering injury. In doing so, it focused on the importance of organized crime in congressional consideration of RICO. In the key passage defining a racketeering injury, the court said:

> RICO was not enacted merely because criminals break laws, but because mobsters, either through the infiltration of legitimate enterprises or through the activities of illegitimate enterprises, cause systemic harm to competition and the market, and thereby injure investors and competitors. It was to help solve this problem that Congress added RICO to the arsenal of weapons used to fight organized crime. It is only when injury caused by this kind of harm can be shown, therefore, that we believe that Congress intended that standing to sue civilly should be granted.

741 F.2d at 496. Finally, the court also said that the plaintiff must "show injury different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter." *741 F.2d at 496*.

On the basis of these statements, it appears that **[**35]** *Sedima* has revived the discredited "organized crime nexus" requirement without quite saying so. *Cf. Alexander Grant & Co. v. Tiffany Industries*, 742 F.2d 408, slip op. at 11 (8th Cir. 1984) (*Sedima* holds that "*section 1964(c)* requires that the injury result from mobster activity or the efforts of organized crime"). The passage defining racketeering injury refers to mobsters and organized crime, slip. op. at 5561, and the rest of the opinion repeatedly emphasizes the references in the legislative history to mobsters, racketeers and particular organized criminal groups. In addition, the *Sedima* panel professed its shock and dismay at the fact that RICO allegations have labeled as racketeers "such respected and legitimate 'enterprises' as the American Express Company, E.F. Hutton & Co., Lloyd's of London, Bear Stearns & Co., and Merrill Lynch." *741 F.2d at 487*.

Of course, the criminal application of RICO has never been limited to "mobsters" or "organized crime." And on the civil side, every circuit that has considered the issue, including the Second, has expressly rejected the notion that "organized crime," in any colloquial sense of the **[**36]** phrase, must **[*395]** be involved in order for RICO to be violated. *See supra* at slip op. at 13. [14]

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[14] Moreover, the white-collar crime alleged in some RICO complaints against "legitimate" businesses is in some ways at least as disturbing as the bringing of RICO claims against "legitimate and respected" defendants. For example, the facts alleged in *Bennett v. Berg, supra, 685 F.2d at 1056-57*, decided by the Eighth Circuit, illustrate concerted white-collar criminal conduct of a type at the core of Congress' concern in enacting RICO. There the defendants included various businessmen, respected lawyers and accountants, and a well-known insurance company. The defendants were alleged to have concocted an elaborate fraudulent scheme which had induced elderly people to invest most of their assets in a retirement village which the defendants, through fraudulent self-dealing and mismanagement, then took to the brink of bankruptcy, leaving the elderly people with neither their assets nor the "life care" they had bargained for. As Judge Pratt said in *Furman v. Cirrito, supra*, Congress

> provided no exception for businessmen, for white collar workers, for bankers, or for stockbrokers. If the conduct of such people can sometimes fairly be characterized as "garden variety fraud," we can only conclude that by the RICO statute Congress has provided an additional means to weed that "garden" of its fraud. It seems almost too obvious to require

[37]** In *Schacht*, after we rejected the contention that RICO was meant to apply only to "organized crime," we disapproved the competitive and indirect injury arguments in part because there seemed to be no way to impose them without reviving the "organized crime" requirement. *711 F.2d at 1356*. We said that we did not "wish that limitation to be revived under the guise of determining the kinds of activity covered by RICO." In view of the *Sedima* court's repeated discussion of organized crime and "mobsters," and the phrasing of the racketeering injury requirement, that seems to be precisely what the Second Circuit has done in *Sedima. See Sedima*, slip op. at 5590-91 (Cardamone, J., dissenting) (racketeering injury requirement is only a euphemism for an organized crime nexus requirement); *Alexander Grant & Co., supra*, slip op. at 11 (finding *Sedima* imposes a requirement of mobster activity or organized crime involvement for racketeering injury). *Cf. Moss v. Morgan Stanley, Inc., supra, 719 F.2d at 21 (2d Cir.)* (rejecting organized crime nexus requirement). *Sedima* accurately describes Congress's central purposes in passing **[**38]** RICO, but the application of RICO has never been limited to those purposes.

Sedima also blended elements of competitive injury and indirect injury into its racketeering injury requirement. The opinion talks not only about mobsters but also about "systemic harm to competition and the market," which thereby injures "investors and competitors." *741 F.2d at 496*. The *Sedima* court said it was not importing every detail of the standing requirements from ***antitrust law***; for example, it said that an actual anti-competitive effect need not be proved if the injury were of the type which would ordinarily threaten competition. *Id.* at slip op. pp. 5561-62 & n.41. However, to the extent that *Sedima* limits civil RICO recoveries to even a general type of competitive injuries rather than strictly to injuries compensable under ***antitrust law***, *Schacht* still rejected that argument in this circuit. *711 F.2d at 1356-58*.

Further, to the extent that *Sedima* closes the civil RICO door except to investors injured by mobsters' infiltration of legitimate business or by systemic harm to competition or to the market, that limitation again seems indistinguishable **[**39]** from the indirect injury requirement rejected in *Schacht. 711 F.2d at 1356-58*. As we said there, "RICO was designed to protect *direct*, and not just second-order, victims of organized crime infiltration." *711 F.2d at 1358*. Where racketeers violate *section 1962* and indirectly injure investors, we do not doubt that RICO may offer investors a civil remedy. But we rejected in *Schacht* any effort to limit RICO to such indirect victims.

Sedima must be read together with the Second Circuit's decision in *Bankers Trust Co. v. Rhoades, supra*, decided the day after *Sedima*. We must consider whether *Bankers Trust* might offer an additional **[*396]** approach to a racketeering injury requirement not already foreclosed in this circuit by *Schacht* and other decisions. We conclude that while *Bankers Trust* differs from *Sedima* in significant ways, the *Bankers Trust* approach to racketeering injury also conflicts with the law of this circuit. *But cf. Alexander Grant & Co., supra*, slip op. at 11 (rejecting *Sedima* for imposing organized crime requirement in conflict with *Bennett v. Berg, supra* **[**40]** , but finding its own decision consistent with *Bankers Trust*).

In *Bankers Trust*, the plaintiff was a creditor who alleged that the defendants had, over a nine year period, engaged in a pattern of bankruptcy fraud by shuffling assets from one owner to another in order to prevent collection of a debt. The plaintiff also alleged that the defendants had, as part of the same effort to prevent collection, instituted numerous frivolous lawsuits against plaintiff and had gone so far as to bribe a state judge in one action. Plaintiff alleged as injuries resulting from defendants' fraudulent conduct its inability to collect its debt and its legal fees incurred in the frivolous and corrupt lawsuits against it.

The Second Circuit held in *Bankers Trust* that the plaintiff had not stated a claim under RICO because it had not alleged an injury "by reason of a violation of *section 1962*." The court held that a violation of *section 1962* occurs "only if there are present both (1) the pattern of racketeering activity, and (2) the use of that pattern to invest in, control, or conduct, a RICO enterprise. It is this confluence that constitutes the violation and, therefore, the

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statement, but fraud is fraud, whether it is committed by a hit man for organized crime or by the president of a Wall Street brokerage firm.

741 F.2d at 529.

confluence **[**41]** that must cause the proprietary injury." *741 F.2d at 516* (footnote omitted). The court said that it agreed with the panel in *Sedima* that a civil RICO plaintiff "must allege a proprietary injury caused by a RICO violation, not just one caused by some of the essential elements of a RICO violation." *Id.* (footnote omitted).

Applying this standard to the complaint in the case, the court concluded that the plaintiff had alleged only injuries caused by the predicate acts. The plaintiff's loss on the debt was caused by the defendants' bankruptcy fraud:

> The fact that later actions by the defendants may have prevented Bankers from remedying the injury caused it in 1976 does not mean that Bankers was injured by the "pattern" of the bankruptcy fraud and the later acts. Similarly, Bankers's forced expenditures of legal fees in connection with frivolous and corruptly conducted lawsuits occurred as a result of the defendants' distinct conduct in pursuing those lawsuits; Bankers's expenses would have been incurred regardless of any other predicate acts performed by the defendants.

741 F.2d at 518. The plaintiff in *Bankers Trust* had **[**42]** argued that there is no meaningful distinction between injury from the predicate acts and injury from the pattern of racketeering activity because a person injured by the predicate acts is *ipso facto* injured by the pattern. The court rejected that argument: "If a plaintiff's injury is that caused by the predicate acts themselves, he is injured regardless of whether or not there is a pattern; hence he cannot be said to be injured *by* the pattern, and the pattern cannot be said to be the but-for cause of the injury." *741 F.2d 517*.

Bankers Trust thus requires that each element of the *section 1962* violation -- including the pattern of racketeering activity *and* the role of the racketeering activity in the investment in, control of, or participation in an enterprise -- contribute to cause the plaintiff's injury. *See* slip op. at 5618-20. A plaintiff's injury is compensable under RICO if and only if each element of the *section 1962* violation is a but-for cause of the injury. *See* slip op. at 5620.

In *Bankers Trust* the court sought to illustrate its racketeering injury requirement with two examples which, the court suggested, would satisfy the **[**43]** requirement:

> Further, we can envision a number of circumstances in which injury could be attributable to a pattern but not to the individual predicate acts. For example, a **[*397]** plaintiff who is victimized by a defendant enterprise's multiple acts of arson may thereafter be denied fire insurance as a result of his fire history; such a plaintiff whose property subsequently suffers innocent fire damage would be unable to obtain reimbursement for the damage, and his monetary loss would be the result of the pattern of predicate acts of the enterprise, rather than any of the individual acts. Or, a plaintiff might be forced to incur an unwanted debt or to take on an unwanted business partner because an enterprise has placed his business in jeopardy by using felonious means to cause a number of his customers to withhold their custom. In each instance, the plaintiff would have suffered an injury to his business or property by reason of the defendants' use of a RICO enterprise and a pattern of racketeering acts; the individual racketeering acts, however, could not be said to have caused the same injury.

741 F.2d at 517.

The court's illustrative **[**44]** examples are inconsistent with the rest of the opinion. In both examples the "racketeering injuries" would depend on the *pattern* of racketeering acts. But earlier in the opinion, the court insisted that all elements of a *section 1962* violation, including the use of the pattern of racketeering activity to invest in, control or conduct an "enterprise," must be but-for causes of the injury. Slip op. at 5618. The injuries in both examples would be entirely independent of the relationship between the racketeering acts and the enterprise which the defendant may have invested in, controlled or conducted. According to the rest of the opinion, therefore, the injuries in the examples would not, without more, be compensable under RICO.

Bankers Trust also appears to conflict with even the narrow view of racketeering injury adopted in *Sedima. See* *Alexander Grant & Co., supra.* As we have said, *Sedima* appears to be primarily concerned with the activities of mobsters infiltrating legitimate businesses. To take another hypothetical example, suppose that "mobsters" threatened a number of shareholders in a small business and forced some of the shareholders to sell **[**45]** their interests in the business for a fraction of their true value. The "mobsters" might thereby acquire control of the business and operate it to the detriment of the remaining shareholders. Such conduct would appear to be at the core of the *Sedima* court's view of RICO. *See* slip op. at 5561-62. Yet according to the opinion in *Bankers Trust*, those shareholders who were threatened and forced to sell out would have no RICO claims because each would have been injured only by one predicate offense and not by the pattern of racketeering activity. Although it is not entirely clear, *Sedima* would appear to permit the selling shareholders to sue under RICO while *Bankers Trust* would not.

The *Bankers Trust* but-for test, applied to each element of the section 1962 violation, is contrary to the law of this circuit. In *Schacht* the plaintiffs' injuries resulted directly or indirectly from the defendants' alleged predicate fraud offenses. The primary victims of the defendants' scheme were the insurance company's creditors and policyholders. The alleged injuries resulted from the continued operation of the insolvent company, permission for which was procured by fraud. **[**46]** The plaintiffs clearly alleged a pattern of racketeering activity, but the pattern itself, apart from the individual acts, was not a but-for cause of the injuries. That is, the alleged injuries were no more than the sum of the injuries resulting from each fraud in the pattern or series. Under *Bankers Trust*, RICO provides no remedy for such injuries resulting from only the individual acts of racketeering or the sum of the acts, and the Second Circuit would find no RICO claim in the *Schacht* situation.

In addition, in several other cases we have upheld RICO claims where the only apparent injuries were those directly resulting from the predicate offenses. *Sutliff, Inc. v. Donovan Companies, supra, 727 F.2d at 653-54*; *Bunker Ramo Corp. v. United Business Forms, Inc., supra,* ***[*398]*** *713 F.2d at 1287-88*. Other circuits have done the same. *Alcorn County v. U.S. Interstate Supplies, Inc., supra, 731 F.2d at 1169 (5th Cir.)*; *Bennett v. Berg, supra, 685 F.2d at 1058-59 (8th Cir.)*. We adhere to our previous views and those of other circuits in rejecting the *Bankers Trust* but-for test as applied to each **[**47]** element of the RICO violation.

In addition, we note that by restricting civil RICO to such indirect injuries as those discussed in the opinion's examples, and by denying RICO claims for the injuries resulting from the extended pattern of racketeering activity in that case itself, *Bankers Trust* reduces RICO's civil provisions to a trivial remedy, available in only a tiny fraction of RICO violations and dependent upon entirely fortuitous facts. As Judge Cardamone stated in his dissent in *Bankers Trust*, "If civil RICO does not provide a remedy on the facts of this totally outrageous case, it never will." *741 F.2d at 518*. [15] The injuries for which RICO recovery was denied in *Bankers Trust* are not distinguishable in any meaningful way from those alleged in *Schacht, Sutliff Inc. v. Donovan Companies, Bunker Ramo, Bennett v. Berg*, or *Alcorn County*. We adhere to our prior decisions and those of other circuits, and we reject the Second Circuit's imposition of a racketeering injury requirement. We conclude that ***HN7***[] a civil RICO plaintiff need not allege or prove injury **[**48]** beyond an injury to business or property resulting from the underlying acts of racketeering. Plaintiffs' allegations of injury in this case -- excessive interest charges resulting from defendants' alleged fraudulent scheme to overstate the prime rate -- satisfy the requirements of *18 U.S.C. § 1964(c)*.

This holding by no means renders superfluous the requirement in *section 1964(c)* that the plaintiff be injured "by reason of" a violation of *section 1962*. As we read this ***HN8***[] "by reason of" language, it simply imposes a proximate cause requirement on plaintiffs. The criminal conduct in violation of *section 1962* must, directly or indirectly, have injured the plaintiff's business or property. A defendant who violates *section 1962* is not liable for treble **[**49]** damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured. This causation requirement might not be subtle, elegant or imaginative, but we believe it is based on a straightforward reading of the statute as Congress intended it to be read.

Finally, it may be useful to other courts if we focus briefly on what we perceive to be the underlying conflict between *Schacht* and *Sedima*. The root of the conflict seems to lie in the fact that, in RICO, we confront a statute which is not ambiguous but which is, above all, deliberately and extraordinarily broad. There are some ambiguities, to be

[15] It should be noted that the plaintiff in *Bankers Trust* had already proven a substantial portion of its allegations in other court proceedings.

sure, but the fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth. *Cf. Sedima, supra*, slip op. at 5543-44.

In defining the key terms of the statute, such as "person," "enterprise," and "racketeering activity," and in leaving undefined such broad terms as "conduct" and "participate," Congress deliberately chose to employ broad terms which would defy judicial confinement. Judge Oakes argues persuasively in *Sedima* that **[**50]** Congress might not have recognized all of the applications of the statute's broad language, particularly with respect to its civil provisions. Nevertheless, Congress still chose to employ that extraordinarily broad language in order to achieve its desired goals. In response to suggestions that the statute be more narrowly tailored to prevent unexpected applications, Congress clearly preferred breadth to precision. *Schacht, supra, 711 F.2d at 1354-55*; *Sutliff Inc., supra, 727 F.2d at 654*.

Even if Congress did not anticipate all of the consequences of RICO, the breadth of the statute, including the civil provisions, was the result of deliberate policy choices **[*399]** on the part of Congress. In these circumstances, to impose special standing and injury requirements cannot in our view be defended as efforts to improve or polish a statute which was carelessly or inartfully drafted. RICO may be very broad, but there was nothing careless about its drafting. When Congress deliberately chooses to unleash such a broad statute on the nation, in the absence of constitutional prohibitions, complaints must be directed to Congress rather than to the **[**51]** courts. *See Schacht, supra, 711 F.2d at 1356*.

With respect to the case before us, it does not seem at all likely that Congress anticipated the application of civil RICO to improperly calculated interest charges by a commercial bank. And this may or may not be an appropriate subject for this federal statute. Nevertheless, it does not seem fitting for us to attempt to narrow the statute in ways which are nearly impossible to rationalize merely to exclude subjects of this kind. For to say that Congress did not anticipate this subject is not to say that Congress would have excluded it if the subject had been brought explicitly to its attention. Congress appears to have preferred a broad statute, even if overinclusion might result.

We do not believe we could limit RICO in the ways argued by the defendants or approved by the Second Circuit without disturbing the policy choices Congress has made. If the safety or stability of the Republic demanded, we might be justified in pursuing such an aggressive jurisprudence. But, particularly at the pleading stage, we seem to be dealing with much smaller stakes -- legal fees and the sensibilities of prominent defendants **[**52]** alleged to be "racketeers." [16] Those stakes do not appear high enough to justify our rejecting Congress' choice of a statute that sweeps broadly.

[53] IV**

Although the district court's dismissal of the complaint cannot be affirmed based on the elusive racketeering injury requirement, the defendants also contend that the dismissal is supported by other arguments not reached by the district court. These issues involve the necessary relationship between a person and an enterprise under *18 U.S.C. § 1962(c)*. The defendants correctly observe that we may reach these issues on appeal, at least where the arguments were presented to the district court and where the present record permits resolution of the issues.

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[16] A number of courts dismayed by civil RICO have commented on the *in terrorem* settlement value that the threat of treble damages may add to spurious claims. After all, the line between fraud and mistake or misunderstanding can be a very fine one. It is, therefore, important that, in the further development of civil RICO, criminal fraud be clearly distinguished from less egregious conduct. On the other side of the scales, however, is another phenomenon with which lawyers and courts are also familiar. The delays, expense and uncertainties of litigation often compel plaintiffs to settle completely valid claims for a mere fraction of their value. By adding to the settlement value of such valid claims in certain cases clearly involving criminal conduct, RICO may arguably promote more complete satisfaction of plaintiffs' claims without facilitating indefensible windfalls. And, in any event, the choice between simple compensatory damages and treble damages, with whatever effect such a choice might have on the caseload of the federal courts, is for Congress to make.

Defendant ANB: ANB argues that it cannot be held liable under section 1962(c) in Count I because the requisite relationship between a person and an enterprise is not alleged. Plaintiffs offer two theories to support their RICO claims against ANB. First, they argue that ANB was both the "person" and the "enterprise" under section 1962(c) so that it conducted its own affairs through a pattern of racketeering activity. Second, they argue that ANB was the "person" conducting the affairs of its parent corporation, Heller International.

We turn first to the plaintiffs' contention that the same **[**54]** corporation may be both the liable "person" and the "enterprise" under section 1962(c). There is now a split in the circuits on this question. In *United States v. Hartley, 678 F.2d 961, 987-90 (11th Cir. 1982)*, *cert. denied*, *459 U.S. 1170, 1183, 74 L. Ed. 2d 1014, 103 S. Ct. 815 (1983),* **[*400]** the Eleventh Circuit held that the corporation at the center of a fraudulent scheme could be both the person and the enterprise under section 1962(c). The Fourth Circuit held precisely the opposite in *United States v. Computer Sciences Corp., 689 F.2d 1181, 1190-91 (4th Cir. 1982)*, *cert. denied*, *459 U.S. 1105, 74 L. Ed. 2d 953, 103 S. Ct. 729 (1983)*. [17] Both cases were criminal RICO prosecutions, but the interpretations of 18 U.S.C. § 1962(c) are equally applicable to civil cases.

[55]** Discussion of whether the same corporation may be both the liable "person" and the "enterprise" under section 1962(c) has proceeded at two levels -- the statutory language and the policies of RICO, and we shall consider both.

In terms of the language, it is clear that a corporation can satisfy the definitions of both "person" and "enterprise" under section 1961. The court in *Hartley* found that there was nothing in the statutory language to prevent the same corporation from being both the liable person and the enterprise. *678 F.2d at 988*. By contrast, the Fourth Circuit in *Computer Sciences* concluded that ***HN9***[] "'enterprise' was meant to refer to a being different from, not the same as or part of, the person whose behavior the act was designed to prohibit, and, failing that, to punish." *689 F.2d at 1190*. Similarly, Judge Shadur concluded in *Parnes v. Heinold Commodities, Inc., 548 F. Supp. 20, 23-24 (N.D. Ill. 1982)*, that section 1962(c) contemplates a separate "person" and "enterprise" because the enterprise may very well be the victim of **[**56]** the racketeering activity.

We are persuaded by the Fourth Circuit in *Computer Sciences* and by Judge Shadur in *Parnes* that section 1962(c) ***HN10***[] requires separate entities as the liable person and the enterprise which has its affairs conducted through a pattern of racketeering activity. *See also Addis v. Moser*, No. 83 C 6118, slip op. at 9-11 (N.D. Ill. Feb. 15, 1984) (following *Parnes*). We do not doubt that a corporation may satisfy the section 1961 definitions of both "persons" and "enterprise," as the court observed in *Hartley. 678 F.2d at 988*. But we focus our attention on the language in ***HN11***[] section 1962(c) requiring that the liable person be "employed by or associated with any enterprise" which affects interstate or foreign commerce. The use of the terms "employed by" and "associated with" appears to contemplate a person distinct from the enterprise. If Congress had meant to permit the same entity to be the liable person and the enterprise under section 1962(c), it would have required only a simple change in language to make that intention crystal clear. **[**57]** Also, we do not think the general principle of liberal interpretation of RICO can be used to stretch section 1962(c) to reach this situation in the face of the subsection's own limits. *See* Pub. L. 91-452, section 904, 84 Stat. 947. *Cf.* Blakey, *The Rico Civil Fraud Action in Context*, 58 NOTRE DAME LAW. 237, 324 n. 181 (1982) (approving of *Hartley* and disapproving of *Computer Sciences*, relying in part on liberal construction clause).

The court in *Hartley* supported its reading of section 1962(c) by also arguing that there is, for RICO purposes, no significant difference between a corporation and an "association in fact," *see* 18 U.S.C. § 1961(4). The court said there should be no practical difference between a complaint or indictment naming a corporation as the enterprise

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[17] The Eighth Circuit appears to agree with the Fourth Circuit's conclusion that section 1962(c) requires an enterprise distinct from the person. *Bennett v. Berg, supra, 685 F.2d at 1061-62* (affirming dismissal of count naming identical defendant and enterprise, but permitting amendment on remand); *Bennett v. Berg, supra*, 710 F.2d at 1364 & n.4 (en banc); *id, at 1365* (McMillian, J., dissenting in part); *Alexander Grant & Co. v. Tiffany Industries, supra*, slip op. at 6 n.6 (*Bennett v. Berg* held count insufficient precisely because of possibility of identity of enterprise and person). The Ninth Circuit also recently followed *Computer Sciences* on the point. *Rae v. Union Bank, 725 F.2d 478, 481 (9th Cir. 1984)*.

one naming an association in fact as the enterprise, with the corporation as a member of the association. *678 F.2d at 989-90*. We agree that ***HN12***[] a corporation and an association in fact can both satisfy **[*401]** the "enterprise" requirement **[**58]** of *section 1962(c)*. *See* *United States v. Turkette, supra, 452 U.S. at 583*. However, a corporation and an association in fact differ substantially with respect to the "person" element. Where persons associate "in fact" for criminal purposes, *see id.*, each person may be held liable under RICO for his, her or its participation in conducting the affairs of the association in fact through a pattern of racketeering activity. But the nebulous association in fact does not itself fall within the RICO definition of "person." We doubt that an "association in fact" can, as such, hold any interest in property or even be brought into court. In the association in fact situation, each participant in the enterprise may be a "person" liable under RICO, but the association itself cannot be. By contrast, a corporation obviously qualifies as a "person" under RICO and may be subject to RICO liability. And it is not obvious that the problem can be resolved by merely alleging that the corporation and its employees constitute an association in fact. For these reasons, we are unpersuaded by the comparison to an association in fact. [18]

[59]** Discussion of this person/enterprise problem under RICO can easily slip into a metaphysical or ontological style of discourse -- after all, when is the person truly an entity "distinct" or "separate" from the enterprise? We are therefore reluctant to base our conclusion on the statutory language without also examining the relevant policies and potential consequences of our conclusion.

At the policy level of the dispute, there are several significant competing arguments. The Eleventh Circuit argued in *Hartley* that where the defendant corporation is the central figure in a criminal scheme, as it was in that case, Congress could not have meant to let the central perpetrator escape RICO liability while subjecting only the sidekicks to RICO's severe penalties. *678 F.2d at 989*. Similarly, plaintiffs here argue that Congress intended to make a "deep pocket" (in the person of the corporation) liable where corporate agents engage in a pattern of racketeering activity redounding to the benefit of the corporation. In *Parnes*, Judge Shadur argued that it would make little sense to hold a corporation liable under RICO for the misconduct of lower level employees, at **[**60]** least where it appears that the corporation is a passive instrument or even a victim of the racketeering activity. *548 F. Supp. at 23-24*.

In our view, the RICO provisions have already taken into account these competing policies in different situations, and a careful parsing of *section 1962* reveals a sensible balance among these policies. We find helpful here Professor Blakey's discussion in *The Rico Civil Fraud Action in Context, supra*, 58 NOTRE DAME LAW. at 307-25. Blakey points out that under the subsections of *section 1962*, the enterprise may play the various roles of victim, prize, instrument or perpetrator. The RICO liability of the enterprise should depend on the role played. In our view, the plaintiffs here and the court in *Hartley* are correct when they argue that the corporate enterprise should be liable where it is the perpetrator, or the central figure in the criminal scheme. In that situation, the corporate deep pocket should certainly be subject to RICO liability. At the same time, the defendants here and Judge Shadur in *Parnes* are surely correct in saying that the corporation-enterprise should not be liable when the corporation is itself **[**61]** the victim or target, or merely the passive instrument for the wrongdoing of others.

In our view, the tensions between these policies may be resolved sensibly and in accord with the language of *section 1962* by reading subsection (c) together with subsection (a). As we read ***HN13***[] subsection (c), **[*402]** the "enterprise" and the "person" must be distinct. However, a corporation-enterprise may be held liable under subsection (a) when the corporation is also a perpetrator. [19] **[**63]** As we parse subsection (a), a "person" (such as

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[18] We agree with the statement in *Hartley* concerning a corporation's responsibility for the acts of its agents. *678 F.2d at 988 n. 43*. However, as we discuss below, those concerns are better addressed in terms of subsection (a) of *section 1962*. The court in *Hartley* was apparently dealing only with subsection (c). There are significant differences between the two subsections, and we must analyze closely the terms of these carefully drafted provisions.

[19] *Section 1962(a)* provides:

> ***HN15***[] It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the

a corporation-enterprise) acts unlawfully if it receives income derived directly or indirectly from a pattern of racketeering activity in which the person has participated as a principal within the meaning of 18 U.S.C. § 2, and if the person uses the income in the establishment or *operation* of an enterprise affecting commerce. Subsection (a) does not contain any of the language in subsection (c) which suggests that the liable person and the enterprise must be separate. ***HN14***[] **[**62]** Under subsection (a), therefore, the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations. This approach to subsection (a) thus makes the corporation-enterprise liable under RICO when the corporation is actually the direct or indirect beneficiary of the pattern of racketeering activity, but not when it is merely the victim, prize, or passive instrument of racketeering. This result is in accord with the primary purpose of RICO, which, after all, is to reach those who ultimately profit from racketeering, not those who are victimized by it. [20]

Applying this reading of subsection (c) to the complaint in this case, we conclude that ANB may not be held liable under section 1962(c) for conducting its own affairs through a pattern of racketeering activity. ANB might be held liable under section 1962(a) if it received the proceeds from the alleged racketeering activity and if it also could be held liable as a principal for those acts. However, plaintiffs here have abandoned any claim they might have stated under section 1962(a). [21]

[64]** Count I does not fail completely, however, for Count I also alleges that ANB violated section 1962(c) by conducting through a pattern of racketeering activity the affairs of its parent corporation, Heller International. That is a good allegation under section 1962(c). ***HN16***[] The subsection requires only some separate and distinct existence for the person and the enterprise, and a subsidiary corporation is certainly a legal entity distinct from its parent. Defendants do not challenge this point but argue only that the allegation does not adequately specify either the relationship between ANB and Heller International or the way in which ANB conducted or participated in Heller International's affairs. However, the complaint alleges that ANB is a wholly owned subsidiary of Heller International, and we think it virtually self-evident **[*403]** that a subsidiary acts on behalf of, and thus conducts the affairs of, its parent corporation. [22] We doubt that more detailed allegations on the subject would serve any useful purpose, and we see no reason to require them.

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meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

[20] Blakey argues that where the enterprise is an "instrument," it should be civilly, but not criminally, liable to third parties under RICO. 58 NOTRE DAME LAW. at 323-25. We see no statutory grounds for such a distinction between civil and criminal liability. *Cf.* Bernstein v. Idt Corp., 582 F. Supp. 1079, 1082-84 (D. Del. 1984).

[21] Paragraph 19 of the complaint appears in part to track the language of section 1962(a), alleging that ANB violated section 1962 by using in the operation of ANB's business income from a pattern of racketeering activity. In this court the plaintiffs have argued only section 1962(c). Defendants suggested in their brief that plaintiffs had abandoned the section 1962(a) allegation, and plaintiffs have not responded to the suggestion. Plaintiffs have therefore abandoned the point.

[22] As the Supreme Court said recently:

> ***HN17***[] A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder.

[65]** *Defendants Grayheck and Heller International*: Defendants also contend that the RICO claims against Grayheck and Heller International do not contain sufficiently specific allegations to withstand a motion to dismiss. In Count II of the amended complaint, plaintiffs seek to hold Grayheck and Heller International liable as persons conducting ANB's affairs through a pattern of racketeering activity. *See* 18 U.S.C. § 1962(c). [23] Defendants argue first that the complaint does not allege that Grayheck or Heller International acted with the requisite fraudulent intent. We reject this argument. The complaint is hardly a model of clarity on the intent issue, and it involves a lengthy trail of cross-references. However, at the end of the trail there are sufficient allegations of Grayheck's intent and Heller International's intent as embodied in its agents.

[66]** Defendants also raise a much broader point. They argue that the allegations in a civil RICO complaint must be as specific as a criminal bill of particulars and must establish probable cause to believe that the defendant committed the predicate racketeering offenses. Defendants rely on Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust Co., 558 F. Supp. 1042, 1045-46 (D. Utah 1983), which squarely supports their position. That court stated in relevant part:

> For a private civil action to lie, the plaintiff must have been injured by a "pattern of racketeering activity." Such a pattern is established by a showing that a party has committed at least two "indictable" acts. 18 U.S.C. § 1961(1) (Supp. 1982). A federal grand jury should return an indictment, only where there is probable cause or a reasonable probability that a crime has been committed. Thus, to properly plead an action under the treble damages provision of RICO, a party must allege two acts of "racketeering" with enough specificity to show there is probable cause the crimes were committed. An offense is not "indictable" merely because it is alleged. Rather, **[**67]** to be indictable it must be "well-founded" and based on probable cause.

558 F. Supp. at 1045 (citations omitted). The court also said:

> A private civil action under RICO is grounded upon the premise that a party has twice engaged in "racketeering activity." **[*404]** The Act defines "racketeering activity" as behavior "indictable" under specified provisions of the United States Code. Before a court can assess the merit of a plaintiff's treble damages claim it must determine whether there is probable cause to believe the named defendant committed the alleged predicate crimes. That determination is possible only if the factual basis of those "acts of racketeering" is set out with particularity. Thus, a factual statement similar to a bill of particulars is needed in pleadings that allege a violation of the RICO treble damages provision.

558 F. Supp. at 1045-46. *See also* Taylor v. Bear Stearns & Co., 572 F. Supp. 667-83 (N.D. Ga. 1983) (complaint must show previous convictions or set out probable cause).

Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 2742, 81 L. Ed. 2d 628 (1984). In *Copperweld* the court held that a parent corporation and a wholly owned subsidiary are incapable of conspiring with one another for purposes of section 1 of the Sherman Act, 15 U.S.C. § 1. That holding does not extend to RICO's provisions in 18 U.S.C. § 1962(c) primarily because the Sherman Act is premised, as RICO is not, on the "basic distinction between concerted and independent action." Copperweld, 104 S. Ct. at 2740. The policy considerations discussed in Copperweld, 104 S. Ct. at 2740-44, therefore do not apply to RICO, which is targeted primarily at the profits from patterns of racketeering activity.

[23] The claim against Heller International is premised on the theory that Heller International acted through Grayheck, who is an officer and director of ANB, and perhaps through other unidentified persons. Heller International is alleged to have thereby conducted or participated in the conduct of ANB's affairs through the alleged pattern of racketeering activity. The terms "conduct" and "participate" in section 1962(c) are quite broad, but it is not obvious to us that they extend to a parent corporation's involvement in racketeering activity solely through the actions of an agent of a subsidiary corporation. However, since the defendants have not raised the point and the district court did not pass on it, we shall not consider it in this appeal as a possible basis for affirming a portion of the dismissal.

To establish its case at trial, a civil plaintiff must surely prove the acts of racketeering, but the **[**68]** district courts in *Bache Halsey* and *Taylor* appear to have moved that requirement up to the pleadings stage. For several reasons, we do not agree that such specificity is required *at the pleadings stage*.

First, a determination of probable cause in the criminal context ordinarily involves some evaluation of the reliability of specific evidence. Even the most specific allegations do not establish probable cause unless they are reliable. We are, to say the least, perplexed as to how a court might undertake such evaluations of reliability in deciding a motion to dismiss under Rule 12. *See Sedima, supra*, slip op. at 5573 & n.56 (relationship between "probable cause" in complaint and plaintiff's burden at trial "remains something of a mystery").

With respect to *Bache* Halsey's discussion of grand juries, it should be recalled that a grand jury has significant investigative powers and resources, including a broad subpoena power. Before it decides whether to indict a person, it has extensive opportunities to discover and evaluate relevant facts. It should be obvious that a civil plaintiff has no similar discovery rights until it files its complaint. **[**69]** Yet the approach of the district court in *Bache Halsey* appears to require a plaintiff to establish a case before any discovery is permitted. The *Bache Halsey* court argued that such specificity was needed in order to evaluate the merits of a claim and to distinguish between well-founded and frivolous claims. *558 F. Supp. at 1046*. While the court's motives are admirable, its approach seems to us to be impractical. We see no grounds for demanding that a civil RICO plaintiff essentially plead evidence and prove the case in the complaint. [24]

Finally, we note that in our prior RICO decisions we have applied ordinary civil standards to pleadings in civil RICO **[**70]** cases. *E.g., Schacht v. Brown, supra, 711 F.2d at 1352-53*. We see no reason to depart from that practice.

It is possible that requiring private RICO plaintiffs to prove at trial the elements of a *section 1962* violation beyond a reasonable doubt could address some of the legitimate concerns about unfair stigmatization of defendants as "racketeers" and other abuses of RICO's criminal dimensions through civil proceedings. *See, e.g., Sedima, supra*, slip op. at 5569. RICO liability must be based, after all, on findings of criminal conduct. RICO does not specify a standard of proof for use in civil RICO actions. In the courts, the appropriate standards of proof in the various forms of civil RICO actions are not yet firmly settled, and the relevant considerations are numerous. *See Sedima, supra*, slip op. at 5569-74 & n.49; *id.* at slip op. pp. 5584-86 (Cardamone, J., dissenting); *United States v. Cappetto, 502 F.2d 1351, 1357 (7th Cir. 1974)*, *cert. denied*, *420 U.S. 925, 43 L. Ed. 2d 395, 95 S. Ct. 1121 (1975)*; *Eaby v. Richmond, 561 F. Supp. 131, 133-34 (E.D. Pa. 1983)*; **[**71]** *State Farm Fire & Casualty Co. v. Estate of Caton,* ***[*405]*** *540 F. Supp. 673, 675-77 (N.D. Ind. 1982)*; *Parnes v. Heinold Commodities, Inc., 487 F. Supp. 645, 647 (N.D. Ill. 1980)*; *Farmers Bank v. Bell Mortgage Corp., 452 F. Supp. 1278, 1280 (D. Del. 1978)*; Note, *Enforcing Criminal Laws Through Civil Proceedings: Section 1964 of the Organized Crime Control Act of 1970*, 53 TEX. L. REV. 1055, 1062-64 & n. 52 (1975); Matz, *Determining the Standard of Proof in Lawsuits Brought Under RICO*, National Law Journal, Oct. 10, 1983, at 21, col. 1. *See also United States v. Spilotro, 680 F.2d 612, 617-19 (9th Cir. 1982)* (interlocutory orders under *18 U.S.C. § 1963(b)*). On the appropriate standard of proof in proceedings with both civil and criminal dimensions, *see generally Herman & MacLean v. Huddleston, 459 U.S. 375, 387-91, 74 L. Ed. 2d 548, 103 S. Ct. 683 (1983)*; *Addington v. Texas, 441 U.S. 418, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979)*; *United States v. Regan, 232 U.S. 37, 48-49, 58 L. Ed. 494, 34 S. Ct. 213 (1914).* **[**72]**

There can be little doubt that *Fed. R. Civ. P. 9(b)*, which ***HN18***[] requires that allegations of fraud specify "with particularity" the circumstances of the alleged fraud, applies to fraud allegations in civil RICO complaints. *See Moss v. Morgan Stanley, Inc., supra, 719 F.2d at 19*. In this case, the complaint adequately specified the transactions, the content of the allegedly false representations, and the identities of those involved. In addition, the identification of the transactions and the description of the alleged scheme to defraud put defendants on fair notice

[24] Some of the district court's language in *Bache Halsey* suggests that the probable cause standard might apply only in a final decision to grant relief after trial. *See 558 F. Supp. at 1045-47*. However, the court relied on that standard to deny a party leave to amend its answer to include RICO counterclaims.

of the time and place of the alleged false representations. *See* *Thornton v. Evans, 692 F.2d 1064, 1082 & n.41 (7th Cir. 1982)*; *Tomera v. Galt, 511 F.2d 504, 508 (7th Cir. 1975)*. *See also* *McGinty v. Beranger Volkswagen, Inc., 633 F.2d 226, 228-29 (1st Cir. 1980)*; *Miscellaneous Service Workers v. Philco-Ford Corp., 661 F.2d 776, 782 (9th Cir. 1981)*; *Felton v. Walston & Co., 508 F.2d 577, 581-82 (2d Cir. 1974)*. There would have **[**73]** been little point in requiring plaintiffs to expand the complaint by also identifying each notice which included an interest rate. The complaint here therefore satisfies *Rule 9(b)*.

For the foregoing reasons, we affirm the district court's dismissal of the portion of Count I alleging that ANB conducted its own affairs through a pattern of racketeering activity. We reverse the remainder of the district court's dismissal of the complaint and remand for further proceedings not inconsistent with this opinion.

End of Document

Nishimura v. Dolan

United States District Court for the Eastern District of New York

October 19, 1984

Civil Action No. 83-0085

Reporter

599 F. Supp. 484 *; 1984 U.S. Dist. LEXIS 22644 **; 1985-1 Trade Cas. (CCH) P66,567

JAMES Y. NISHIMURA, et al., Plaintiffs, v. CHARLES F. DOLAN, et al., Defendants

Core Terms

teams, rights, games, plaintiffs', cablecast, contracts, programming, sports, cable television, subscribers, conspiracy, sublicense, discovery, franchise, anti trust law, seasons, Counts, cable system, defendants', distribute, cable television system, exclusive right, conspired, causal, production and distribution, summary judgment, Cable, exclusive contract, depositions, acquiring

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

HN1[] **Summary Judgment, Motions for Summary Judgment**

A party is entitled to summary judgment only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that it is entitled to a judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. The burden is on the moving party to demonstrate the absence of any material factual issue genuinely in dispute. In determining whether a genuine issue of material fact exists, the non-moving party must be given the benefit of all reasonable doubts. The function of the district court on a motion for summary judgment is not to resolve conflicting claims but to determine whether there are issues of fact to be tried. Stated another way, the key is issue finding and not issue resolution.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] Summary Judgment, Entitlement as Matter of Law

In complex antitrust litigation, summary proceedings are disfavored and sparingly utilized when, as is often the case, resolution turns on issues of motive and intent. That is not to say that summary judgment is never appropriate in antitrust litigation, particularly where motive and intent are not involved.

Civil Procedure > ... > Justiciability > Standing > General Overview

Governments > Courts > Common Law

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 > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Civil Procedure > Judicial Officers > Judges > General Overview

HN3[] Justiciability, Standing

Standing is an important limitation on the right to maintain a private damage action under § 4 of the Clayton Act, *15 U.S.C.S. § 15*. The statute provides that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. Although the language may be read to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation, the courts conclude that Congress did not intend antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to such a violation. The courts instead look to common law principles that limit the availability of damage recoveries. There is a similarity between the struggle of common law judges to articulate a precise definition of the concept of proximate cause, and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages. Plaintiffs must demonstrate a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a material cause of or a substantial factor in the occurrence of damage. If plaintiffs, at this stage of the litigation, cannot demonstrate a sufficient link between their injury and the defendants' alleged conduct, standing will be denied.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN4[] **Private Actions, Standing**

There are inherent limitations in the substantive protection afforded by the antitrust laws: they exclude claims based on conjectural theories of injury and attenuated economic causality that would mire the courts in intricate efforts to recreate the possible permutations in the causes and effects of a defendant's action.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

Constitutional Law > ... > Case or Controversy > Standing > General Overview

Civil Procedure > Preliminary Considerations > Justiciability > General Overview

HN5[] **Private Actions, Standing**

In passing upon constitutional standing issues, which are somewhat different from antitrust standing, the United States Supreme Court requires a substantial causal nexus between injury and conduct. The injury must be "fairly" traceable to the challenged action and relief from the injury must be "likely" to follow from a favorable decision.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN6[] **Private Actions, Standing**

The remoteness limitation relates to a court's denial of standing where a plaintiff's injury is too remote from an antitrust violation. In applying the "elusive" concept of remoteness, courts 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 of the Clayton Act, *15 U.S.C.S. § 15*.

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

HN7[] **Remedies, Damages**

An allegation of improper motive, although it may support a plaintiff's damages claims under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, is not a panacea that will enable any complaint to withstand a motion to dismiss. The availability of the § 4 of the Clayton Act, *15 U.S.C.S. § 15*, remedy to some person who claims its benefits is not a question of the specific intent of the conspirators.

Antitrust & Trade Law > ... > Private Actions > Purchasers > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN8[] **Private Actions, Purchasers**

Absent a demand to purchase that which is the subject of an alleged refusal to deal, there can be no recovery under the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Business & Corporate Law > ... > Corporate Governance > Shareholders > General Overview

HN9[] **Private Actions, Remedies**

A stockholder who suffers loss due to injury to his corporation may not recover damages under the antitrust laws because his injury as a stockholder is indirect, remote, and consequential.

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Paul, Weiss, Rifkind, Wharton & Garrison, a partnership including Professional Corporations, New York, New York, Moses Silverman, Esq., Michael A. Lampert, Esq., for: Defendant Meadowlands Basketball Associates.

Judges: Bartels, District Judge.

Opinion by: BARTELS

Opinion

[*486] BARTELS, District Judge

This case involves a dispute between two cable television companies in Huntington, Long Island, in competition for subscribers to sports programs covering the games of the Yankees, the Mets, the Islanders, and the Nets. Huntington is a town of 54,000 homes, presenting an unusual situation in the cable television systems industry in that two "overbuilt" television systems have franchises and are competing head-to-head **[**2]** for subscribers to their respective systems. Plaintiffs, owning one of the systems, invoke the antitrust laws in challenging the conduct of its competitor-defendant in obtaining exclusive rights to cablecast the games of these four well-known New York professional sports teams. In doing so, the complaint joins the teams as well as the competing cable system operator in violating the antitrust laws. Specifically, the plaintiffs seek treble damages, under § 4 of the Clayton Act, *15 U.S.C. § 15*, for violations of *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*, allegedly arising from various conspiracies to restrain and monopolize competition for the provision of cable television services in Huntington, New York.

The parties having completed extensive "first wave" discovery, defendants presently move for partial summary judgment, *Fed.R.Civ.P. 56(b)*, dismissing the defendant sports teams from the action on the counts of the complaint predicated upon alleged conspiracies to deny plaintiffs access to "essential" cable television sports programming.

At this stage of the litigation, the court is called upon to decide, in essence, whether the teams belong in this lawsuit. The **[**3]** defendants, in making this motion, argue that there are no genuine issues of material fact to be tried upon this issue and that the uncontradicted evidence shows no team participation in the allegedly anticompetitive conspiracies. In contrast, the plaintiffs vigorously argue that triable issues of material fact do exist and, alternatively, that further discovery is required in order to adequately support their position. *Fed.R.Civ.P. 56(f)*.

I. *The Parties*

The individual plaintiff, James Y. Nishimura, is the alter-ego of the three corporate plaintiffs: Communication Systems Corp. ("CSC"), Huntington TV Cable Corp. ("HTVC"), and Home Entertainment Productions, Inc. ("HEP"). He and members of his family own 100% of CSC's outstanding **[*487]** stock, while CSC in turn is the sole parent company of HTVC and HEP. Nishimura is also president and a director of all three corporate plaintiffs. Since 1967 plaintiff HTVC has had a franchise in Huntington, New York, for the operation of a cable television system. In addition to offering its subscribers "basic" cable television service [1] HTVC offers several packages or tiers of "premium" programming services for an additional monthly fee. **[**4]** Plaintiff HEP was organized by Nishimura to purchase premium programming services from third parties for resale to HTVC and its subscribers.

Defendant Charles F. Dolan can similarly be described as the alter-ego of the ten defendant corporations and partnerships listed in the margin. [2] For the sake of convenience and except where otherwise noted, these ownership-affiliated and commonly managed entities will be collectively referred to as "Cablevision." Its businesses include the operation of numerous **[**5]** cable television systems in the New York metropolitan area and the original production of television programming for cable television distribution to its own systems and non-Cablevision systems. The three remaining individual defendants -- Lawrence Meli, Robert J. Sullivan, and John Tatta -- are officers of one or more of the Cablevision entities.

Two of those entities play the most important roles in this scenario. Defendant Sports Channel Associates is a partnership (of which defendant Dolan is one of three general partners) engaged in the original production of professional and amateur sporting-events programming. Since March, 1979, SportsChannel **[**6]** Associates has produced, marketed and distributed a premium cable television service, known as "SportsChannel," throughout the metropolitan area, which consists of a variety of television programs on a year-round basis featuring principally sports events participated in by New York area teams. SportsChannel Associates sells "SportsChannel" to cable system operators not controlled by Cablevision as well as to those owned by Cablevision. An important exception and the cause of this action, as will be discussed *infra*, is the refusal by SportsChannel Associates to sell "SportsChannel" to plaintiff HTVC.

The second Cablevision entity of immediate importance is Cablevision of Huntington which, since December, 1981, has operated a cable television system in direct competition with HTVC in Huntington. Cablevision of Huntington

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[1] "All cable systems offer basic service packages available to all subscribers for one monthly fee. These programs include all local broadcast television shows, satellite-delivered cable network programming and community oriented, locally originated cablecasts . . . Subscribers can pay an extra charge over the basic monthly rate to receive 'pay cable' programming channels consisting of feature films, sports events, cultural and family programming." 1 Ferris, Lloyd, Casey, Cable Television Law para. 5.02 (1983).

[2] Cable Vision Systems Development Company, Communications Management Corporation, Cablevision Systems Holding Company, Atlantic Cable Television Service Corporation, Cablevision Systems Huntington Corporation, Cablevision of Huntington, Cablevision Program Services Company, Cablevision Systems Corporation, Cablevision Consolidations Company and SportsChannel Associates.

offers "SportsChannel" to its subscribers as a premium service, having acquired the rights to do so from its sibling entity, defendant SportsChannel Associates.

The remaining group of defendants of greatest significance for purposes of this motion consists of four New York area professional sports teams [3] (collectively referred to as "the teams"): Nassau Sports **[**7]** Ltd., which stages professional ice hockey games with its team, the New York Islanders ("Islanders"); Meadowlands Basketball Associates, which stages professional basketball games with its team, the New Jersey Nets, formerly known as the New York Nets ("Nets"); Doubleday Sports, Inc., and New York Yankees Partnership, both of **[*488]** which stage professional baseball games with their respective teams, the New York Mets and the New York Yankees ("Mets" and "Yankees"). At least since 1979, each of the teams has had an exclusive contractual relationship with Cablevision permitting a certain number of their games to be cablecast on "SportsChannel."

II. *The Complaint*

Plaintiffs' seventeen-count complaint is prolific in its charges and seeks relief under *sections 1* and *2* of the Sherman Act (Counts I to XI) and **[**8]** also sets forth pendent state antitrust (Count XII) and common law tort claims (Counts XIII to XVII). Defendants' summary judgment motion addresses Counts I through IX and Count XII; the remaining counts neither involve the teams nor allege unlawful conduct in connection with the denial of access to sports programming. The claims contained in the subject counts will be collectively referred to as the "sports claims."

The complaint contains a number of predicate allegations which are incorporated by reference into each of the sports claims. Among the most important of these, all found in paragraph 39 of the complaint, are that the "ability to cablecast to subscribers games of the . . . professional New York teams is essential to successfully compete in the cable television industry in Huntington"; that the games staged by each defendant team constitute "a distinct product for which there is strong demand among cable television subscribers in Huntington"; that these games have no adequate programming substitutes; and that "but for" Cablevision's exclusive control of the sublicensing of rights to cablecast the teams' games, Cablevision of Huntington would not have overbuilt HTVC's system.

[9]** Counts I through IV of the complaint charge the defendants with violating *§§ 1* and *2* of the Sherman Act by conspiring to restrain and monopolize horizontal competition in the cable television trade in Huntington. The alleged means employed by the defendants were the teams' grant of exclusive production and distribution rights to Cablevision followed by Cablevision's refusal to sublicense the teams' games to HTVC so that its own cable system could cablecast the games exclusively. Counts V through VIII charge various horizontal and vertical conspiracies among the defendants in violation of *§ 1* of the Sherman Act, the purpose of these conspiracies being the elimination of competition among the teams, and among the teams and Cablevision, in the production and sale of cablecast rights to the teams' games. In furtherance of such conspiracies defendants have allegedly agreed to limit the number of games available for cablecasting; have participated in a tying arrangement comparable to block booking; have agreed to produce and distribute the games through a single entity (Cablevision); and have refused to deal with plaintiffs and others similarly situated. Finally, Count IX alleges that, **[**10]** in violation of *§§ 1* and *2*, Cablevision conspired with the teams to misuse its monopoly power in its noncompetitive franchise areas within the New York metropolitan area to obtain exclusive production and sublicensing rights and especially to secure exclusive cablecasting rights in Huntington in order to establish a monopoly there.

III. *Background*

A. *Cable Television Franchises in Huntington*

In late 1967, HTVC and the Town of Huntington entered into a non-exclusive franchise agreement for the construction and operation of a cable television system. When it commenced operating in 1971, HTVC was capable of serving eighty percent of Huntington's 54,000 homes, the remainder being in areas where utility lines were

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[3] The complaint originally named a fifth team, Meadowlanders, Inc. ("Devils") as a defendant. Subsequent to the filing of this motion, plaintiffs voluntarily dismissed the Devils without prejudice.

underground and thus more costly to connect than where above-ground utility poles were available. Until 1981, HTVC had a *de facto* monopoly in the provision of cable television to residents in Huntington.

The demise of HTVC's monopoly can be traced back to 1969, when the Town of Huntington awarded a co-franchise to Inter-County Television of Suffolk, Inc. ("Inter-County"). However, the latter took no steps to construct a cable television system, **[*489]** and **[**11]** its franchise remained fallow until Cablevision acquired Inter-County in 1973. Then Inter-County unsuccessfully sought confirmation of its franchise from the New York State Commission on Cable Television ("Cable Commission"), *see N.Y. Exec. Law § 821* (McKinney 1982). Nonetheless, prompted by concern over HTVC's failure to connect homes not accessible by above-ground utility poles, in 1976 the Town of Huntington executed a new franchise agreement with Inter-County requiring it to serve homes in those areas and permitting it to "overbuild" [4] HTVC's existing system. In March, 1978, over the vigorous opposition of HTVC, the Cable Commission approved the new franchise agreement. After two years of construction, during and even after which time HTVC unsuccessfully brought six separate proceedings before the Cable Commission and in the state court to block construction and invalidate the franchise, Cablevision of Huntington began operating in December, 1981. Since that time HTVC and Cablevision of Huntington have been in direct competition for most of Huntington's existing and new subscribers.

[12]** B. *Exclusive Contracts Between Cablevision and the Teams*

Since 1975 Cablevision has entered into a number of contracts with the teams granting it certain exclusive rights in connection with the production and distribution of sports programming for cablecasting the teams' games in the metropolitan area. It is important to note that the contracts covered the entire metropolitan area and not Huntington alone. Because these contracts are of the utmost importance the court believes that the essential features of the contracts shared by all the teams, as well as a summary description of the individual contracts on a team-by-team and chronological basis, should be set forth pointing out those terms governing duration and exclusivity.

1. *Essential Features of the Contracts*

The basic scheme of the several contracts, exceptions to which will be noted on a team-by-team basis, *infra*, was the grant to Cablevision of the exclusive license to produce the game programming and to sublicense cablecasting rights to operators of cable television systems within the teams' "home territory." Such systems would include those owned by Cablevision and those owned by others. Since 1979, when **[**13]** SportsChannel Associates created "SportsChannel," all of the teams' cablecast games have been sublicensed to cable operators as part of the "SportsChannel" premium cable television service. The teams contracts almost invariably gave Cablevision *the right* to sublicense all cable system operators within a given territory (generally the New York metropolitan area and in all cases inclusive of Huntington) but did not *obligate* Cablevision to sublicense all potential sublicensees. The language whereby Cablevision retained sublicensing discretion varied greatly from contract to contract. Some of the contracts specifically provided that Cablevision had no obligation to sublicense non-Cablevision owned systems (such as HTVC) which were competing in the same geographic area against Cablevision systems (such as Cablevision of Huntington). The teams, of course, in granting exclusive sublicensing rights to Cablevision, gave up all rights themselves to deal independently with third-party cable system operators seeking to cablecast the teams' games.

Since the inception of "SportsChannel" in 1979, all of the contracts have provided that Cablevision be solely responsible for the production **[**14]** and origination of the sporting events carried on "SportsChannel" and the costs thereof. For the home games of two of the teams -- the Nets and the Islanders -- Cablevision has generally leased production facilities from an independent sports-programming producer. For the home games of the Mets and Yankees, **[*490]** Cablevision has leased the production facilities of two local broadcast stations which have separate agreements with those teams for the broadcasting of a certain number of the teams' games. [5] **[**15]** The

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[4] "Overbuild" refers to a situation in which a second cable television operator wires the same streets and competes head-to-head for subscribers with the operator which first served the area.

Mets and Yankees agreements have provided that the teams would use their best efforts to make the broadcasters' facilities available for Cablevision's use. For those away games of the teams cablecast by Cablevision on "SportsChannel," the agreements generally provided that the teams would procure a "split feed" [6] for Cablevision, at the latter's cost, from the producer at the away arena.

The contracts entered into prior to 1982 generally required Cablevision to make fixed payments to the teams, either on a per-season or a per-game basis, which did not depend on the number of Cablevision's sublicensees or ultimate viewers. Since 1982, the contracts between Cablevision and the Islanders, Mets, and Yankees all provide for payment by Cablevision based on a percentage of revenues derived from "SportsChannel." Thus, under the latter agreements those teams' licensing income is presumably related to the number of "SportsChannel" subscribers since sublicensing revenues are based, at least in part, on the number of subscribers that purchase "SportsChannel" from the sublicensee.

[16]** 2. *The Individual Agreements*

The Islanders. In 1975 the Islanders and Cablevision entered into their first agreement granting Cablevision [7] **[**17]** exclusive cablecast rights to Islanders games for five hockey seasons (1975-76 to 1979-80). The agreement also designated the Islanders as Cablevision's agent for the sale of cable television rights to the Islanders games to cable systems not owned by Cablevision, but all such sales were subject to Cablevision's approval. This agency provision led to a dispute between the parties, Cablevision brought suit, discussed *infra*, and in 1978 the agreement was judicially voided. As part of a settlement of the suit a new agreement was entered into that year granting Cablevision an exclusive license to produce and distribute Islanders games for cable television transmission for five hockey seasons (1978-79 to 1982-83). In 1982 the Islanders and Cablevision entered into a new agreement, presently in effect, granting Cablevision exclusive production and distribution rights for thirty seasons. [8]

The Nets. Until 1967 the Nets and Islanders were commonly owned and shared a home arena on Long Island, New York. Thus, in 1975 the Nets first entered into an agreement with Cablevision identical to the 1975 Islanders agreement, and it met the same fate in 1978 as a result of the same litigation. In August, 1978, Cablevision and the Nets (now owned by defendant Meadowlands Basketball Associates and located in New Jersey) entered into a new agreement which differed, however, from the 1978 Islanders agreements in several **[*491]** **[**18]** important respects. The outstanding variation was that the Nets retained production rights and responsibilities and only granted Cablevision the right to distribute Nets games in areas where Cablevision owned a cable television system franchise. In other words, under the 1978 agreement the Nets produced the games and distributed them directly to cable system operators. The Nets became disenchanted with this arrangement by early 1979 and later that year entered into a new agreement with Cablevision amending their 1979 agreement for the 1979-80 through 1983-84

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[5] The Mets and Yankees have agreements with WOR TV and WPIX TV respectively, granting those stations rights to broadcast some of those teams' games. Those games are also available to HTVC subscribers as part of the basic service. The teams' agreements with Cablevision grant rights to those games not broadcast by WOR or WPIX.

[6] Typically, the production facilities necessary to provide video feed of games at most stadiums are controlled by a local broadcaster with rights to the local team's games. A visiting broadcaster or cablecaster, with rights to the visiting team's games, generally obtains a "split" of the video feed from the local broadcaster and pays him an amount reflecting a fair share of his production and origination costs.

[7] This initial agreement was between the Islanders and Long Island Cable Communications Development Company ("LICCDC"), a predecessor of SportsChannel.

[8] *See* Appendix to Defendants' Cross-Motion for Summary Judgment ("Def. App.") Exh. Y (Nets/Islanders Agreement with LICCDC of 1975); Appendix of Exhibits to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment ("Pl. App.") Exh. 4 (Nets/Islanders Agreement with HEP of 1976); *Long Island Cable Communications Co. v. Nassau Sports*, No. 13533/76 (N.Y. Sup. Ct. 1977) ("*LICCDC*"); Pl. App. Exh. 5 (*LICCDC* trial transcript); Def. App. Exh. U (*LICCDC* decision); Pl. App. Exh. 13 (Islanders/Cablevision Agreements of 1978 and 1982).

basketball seasons. The new agreement, which permitted Cablevision to offer Nets games as part of "SportsChannel," granted Cablevision exclusive production and distribution rights throughout the Nets' home territory rather than only in those areas where Cablevision had its own franchise. The record does not reveal any more recent agreements between Cablevision and the Nets. [9]

[19]** *The Mets*. The Mets first contracted with Cablevision in 1979, granting it exclusive rights to produce and distribute cablecasts of Mets games for the 1979 and 1980 baseball seasons as part of "SportsChannel." Pursuant to an option provision, Cablevision renewed the agreement for the 1981 season. After the 1979 season the Mets were acquired by its present owner, defendant Doubleday Sports, Inc., and in 1980 the Mets entered into an agency agreement with the Islanders appointing the latter as the Mets' exclusive agent for the sale of rights to cablecast Mets games. Pursuant to this agreement the Islanders negotiated with Cablevision on behalf of the Mets and Islanders beginning in 1980, culminating in the 1982 Islanders agreement mentioned above, and an agreement simultaneously entered into between the Mets and Cablevision which virtually duplicated the thirty-year 1982 Islanders agreement. The 1982 Mets agreement remains in effect. [10]

[20]** *The Yankees*. The Yankees and Cablevision entered into their first agreement in April, 1979, granting Cablevision exclusive rights to produce and distribute Yankees games as part of "SportsChannel" for the 1979 and 1980 baseball seasons. In March, 1981, an almost identical agreement was reached with Cablevision covering the 1981 season only. In May, 1982, the Yankees and Cablevision entered into a fifteen-year (1982 to 1996 seasons) agreement, currently in effect, once again granting Cablevision exclusive production and distribution rights. [11]

C. *Plaintiffs' Efforts to Obtain Sports Programming from the Teams and Cablevision*

An important issue raised by defendants' motion involves the extent to which plaintiffs sought sports programming rights -- and the nature of the rights sought -- which they claim in this lawsuit were unlawfully withheld in furtherance of anticompetitive conspiracies.

Plaintiffs' efforts to obtain **[**21]** rights to cablecast the teams' games fall into three categories. The plaintiffs' first efforts began in September, 1975, when Nishimura wrote to Roy Boe, then principal owner of the Islanders and Nets, proposing the carriage of his teams' games as part of a sports programming package to be offered to HTVC subscribers as a separate, premium cable television service. Approximately one month later, however, those teams entered into their first contracts with Cablevision for the 1975-76 through 1979-80 seasons. As noted above, these contracts designated the Islanders and the Nets as agents for the sale of cable exhibition rights for their games to third-party operators, subject to Cablevision's prior approval. Pursuant to their agency power the **[*492]** teams negotiated with several cable system operators, including Nishimura, resulting in a series of offers by Nishimura and three other operators, all of which were rejected by Cablevision. Nevertheless, the Nets and Islanders entered into agreements with all four operators in September, 1976. The agreements with plaintiff HEP (which would "resell" the programming to HTVC) purported to grant it exclusive rights to cablecast in Huntington **[**22]** all of the teams' home games for the 1976-77 through 1979-80 seasons. [12]

Cablevision promptly brought suit in the state court to void the four sets of agreements and ultimately prevailed when the court ruled that Cablevision had not unreasonably rejected the operators' offers and thus those teams had breached their 1975 agreement with Cablevision by entering into the 1976 contracts without Cablevision's prior approval. In June, 1978, the court issued a final judgment awarding Cablevision over $4 million in damages against

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[9] *See* Pl. App. Exh. 12 (Nets/Cablevision Agreements of August, 1978 and August, 1979).

[10] *See* Pl App. Exh. 11 (Mets/Cablevision Agreements of 1979 and 1982); Appendix of Exhibits to Memorandum Supporting Plaintiffs' Motion for Additional Discovery Exh. A (Nassau Sports/Mets Agency Agreement of 1980).

[11] *See* Pl. App. Exh. 10 (Yankees/Cablevision Agreements of 1979, 1981 and 1982).

[12] *See* Pl. App. Exh. 2 (Nets/Islanders Agreement with LICCDC of 1975); Pl. App. Exh. 4 (Nets/Islanders Agreement with HEP of 1976). At this time HTVC was the only cable system operating in Huntington.

those teams and terminating the 1976 agreement. The teams filed a notice of appeal, but later withdrew their appeal simultaneously with the execution of the 1978 agreements with Cablevision as part of an overall settlement. As a result of this litigation the 1976 agreement between the two **[**23]** teams and HEP was never implemented.

The second effort by the plaintiffs to obtain sports programming occurred in September, 1979, when Seth Morrison, HTVC's program director, wrote to the principal owners of the Yankees and Mets [13] requesting an opportunity to discuss the availability of their 1980 home games for cablecasting by HTVC. The letters indicated that HTVC had been unable to cablecast the games because of the teams' exclusive contracts with Cablevision. According to Morrison, he followed up the letter with telephone calls to representatives of both teams and further explained that HTVC was interested in obtaining necessary production rights or, alternatively, rights to a "split feed" produced by another. The teams declined to consider HTVC's proposal, citing their exclusive contracts with Cablevision. [14]

Plaintiffs' third effort to **[**24]** secure programming rights occurred in early 1982, which was after Cablevision of Huntington commenced operating with a cable television "menu" that included "SportsChannel." At this time plaintiffs were solely interested in acquiring "SportsChannel" for HTVC in Huntington from Cablevision and made no attempt to purchase any rights directly from the teams. Rather, plaintiffs adopted a strategy of direct negotiation with Cablevision and informal contacts with the teams hoping to enlist their support in pressuring Cablevision to sell "SportsChannel" to plaintiffs. This strategy failed. After months of inconsequential communications with Cablevision, in June, 1982, Nishimura made demand upon Cablevision for it to make available "SportsChannel" to HTVC in Huntington on a comparable basis with other licensees. In a series of letter exchanges, copies of which Nishimura sent to the teams, Cablevision cited HTVC's signal-theft security problems [15] as its reason for not entertaining plaintiffs' request for "SportsChannel." Nishimura labelled this concern baseless and a "red herring" and pressed his demand for "SportsChannel" to no avail. Throughout this period Nishimura contacted, either personally **[**25]** or through others, various representatives of the Yankees, Mets, and Islanders seeking their assistance in acquiring "SportsChannel" for HTVC in Huntington. Citing their teams' exclusive contracts with Cablevision, the **[*493]** teams stated that plaintiffs would have to deal with Cablevision in order to acquire any cablecasting rights to the teams' games. [16] Plaintiffs then commenced the instant suit in January, 1983.

[26]** Defendants' motion essentially seeks dismissal of all claims alleging conspiracies involving the teams to deny plaintiffs access to sports programming, fundamentally on the grounds that plaintiffs never sought the same rights granted to the Cablevision defendants, that plaintiffs lack standing to sue the teams, and that plaintiffs' injuries were not caused by the teams' actions. On the other hand, plaintiffs' position is that they did seek rights "akin to" those granted to Cablevision, that adequate demand was made, and that the alleged injury was caused by the teams' actions.

Specifically, defendants request dismissal of (i) Counts V through IX (which principally allege horizontal conspiracies among the teams) in their entirety, and (ii) Counts I through IV and XII insofar as they challenge the legality of the exclusive contracts or claims that the teams conspired with Cablevision to deny plaintiffs production rights or "SportsChannel" programming. Should defendants prevail, the teams no longer will be parties to this litigation and plaintiffs' antitrust claims against Cablevision involving sports programming will be considerably narrowed.

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[13] The record contains a copy of Morrison's letter to the Yankees.

[14] *See* Affidavit of Seth Morrison ("Morrison Aff."), dated May 14, 1984, Paragraphs 5-6.

[15] Signal-theft security problems concern the ability of subscribers to receive cable programming without authorization and without paying.

[16] *See* Pl. App. Exh. 7 (Plaintiffs' Answers to Defendants' Interrogatories Set Forth in Pretrial Order No. 1, Paragraph 8); Morrison Aff.; Affidavit of W. Gerard Asher, dated June 13, 1984; Affidavit of James Y. Nishimura dated June 14, 1984; Deposition of James Y. Nishimura at 502-05, 517-18; Deposition of John O. Pickett at 240-44; Def. App. Exh. J & K (Letters between HTVC and Cablevision); Deposition of Eugene J. McHale, dated September 27, 1983 at 113-14; Affidavit of Stuart B. Freeman, dated January 12, 1984.

IV. *Discussion*

HN1[] A party is entitled **[**27]** to summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, . . . show that there is no genuine issue as to any material fact and that [it is] entitled to a judgment as a matter of law." *Fed.R.Civ.P. 56(c)*. Also, "it is well established that 'the burden [is] on the moving party to demonstrate the absence of any material factual issue genuinely in dispute . . . .'" *Hayden Publishing Co., Inc. v. Cox Broadcasting Corp., 730 F.2d 64, 68 (2d Cir. 1984)* (quoting *Heyman v. Commerce & Industry Insurance Co., 524 F.2d 1317, 1320 (2d Cir. 1975))*; *see* *Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)*. In determining whether a genuine issue of material fact exists, the non-moving party must be given the benefit of all reasonable doubts. *Reading Industries, Inc. v. Kennecott Copper Corp., 631 F.2d 10, 13 n.6 (2d Cir. 1980)*, *cert. denied*, *452 U.S. 916, 69 L. Ed. 2d 420, 101 S. Ct. 3051 (1981)*. The function of the district court on a motion for summary judgment is not to resolve conflicting claims, but to "determine whether there are issues of fact to be tried. **[**28]** . . . Stated another way, the key is issue-finding, not issue-resolution." *United States v. One Tintoretto Painting, 691 F.2d 603, 606 (2d Cir. 1982)*.

It follows that ***HN2***[] in complex antitrust litigation, summary proceedings are disfavored and sparingly utilized when, as is often the case, resolution turns on issues of motive and intent. *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*; *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 555 (2d Cir. 1977)*; *see generally* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2732.1 (1983). That is not to say that summary judgment is never appropriate in antitrust litigation, particularly where motive and intent are not involved, *see* *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289-90, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)*, *reh'g denied*, *393 U.S. 901, 21 L. Ed. 2d 188, 89 S. Ct. 63 (1968)*; *Reading Industries, Inc. v. Kennecott Copper Corp., 631 F.2d at 13 n.6*, but it appears clear that motive and intent are not involved where standing is at issue, **[*494]** *Billy Baxter, Inc.* ***[**29]*** *v. Coca-Cola Co., 431 F.2d 183, 189 (2d Cir. 1970)*, *cert. denied*, *401 U.S. 923, 27 L. Ed. 2d 826, 91 S. Ct. 877 (1971)*, and that "standing is a question of law for the court to determine." *John Lenore & Co. v. Olympia Brewing Co., 550 F.2d 495, 498 (9th Cir. 1977)*. *Cf.* *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)* (complaint dismissed for failure sufficiently to allege antitrust injury).

To have standing to sue there must be an injury resulting from the violation of the statute. Consequently, ***HN3***[] standing is an important limitation on the right to maintain a private damage action under § 4 of the Clayton Act, *15 U.S.C. § 15*. The statute provides:

> . . . any person who shall be *injured* in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . (Emphasis added.)

Although the language may be read to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation, the courts have been "virtually unanimous in concluding that Congress did not intend antitrust laws **[**30]** to provide a remedy in damages for all injuries that might conceivably be traced to" such a violation. *Hawaii v. Standard Oil Company of California, 405 U.S. 251, 263 n.14, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972)*; *see* *Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. at 534*; *Blue Shield of Virginia v. McCready, 457 U.S. 465, 476-77, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*. The courts have instead looked to common law principles which limit the availability of damage recoveries. As the Supreme Court has recently noted, "there is a similarity between the struggle of common-law judges to articulate a precise definition of the concept of 'proximate cause', and the struggle of federal judges to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages." *Associated General Contractors, 459 U.S. at 535-36*. *See* *Crimpers Promotions, Inc. v. Home Box Office, Inc., 724 F.2d 290, 295 (2d Cir. 1983)*, *cert. denied*, *467 U.S. 1252, 52 USLW 3906, 82 L. Ed. 2d 841, 104 S. Ct. 3536 (1984)*. The plaintiffs must demonstrate "a causal connection between an antitrust violation **[**31]** and an injury sufficient for the trier of fact to establish that the violation was a 'material cause' of or a 'substantial factor' in the occurrence of damage." *Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d at 187*; 2 P. Areeda & D. Turner, ***Antitrust Law***, § 334 at 163 (there must be "a significant causal connection between the defendant's violation and the plaintiff's injury"). If the plaintiffs, at this stage of the litigation, cannot demonstrate a sufficient link between their injury and the defendants' alleged conduct, standing will be denied. As to plaintiffs' claims made under the New York State antitrust laws, *N.Y.Gen.Bus.Law § 340* (McKinney's 1968), the New York State courts have adopted the same standing constraints as imposed by the federal courts under § 4 of the Clayton Act. *Neeld v. National Hockey League, 439 F. Supp. 446, 454-55 (W.D.N.Y. 1977)*; *Lerner Stores Corp. v. Parklane Hosiery Co., 86 Misc. 2d 215, 218, 381 N.Y.S.2d 968* (Sup. Ct.), *aff'd on other grounds*, *54 A.D.2d 1072, 388 N.Y.S.2d 760* (4th Dep't 1976).

A. *Plaintiffs' Standing*

With this principle in mind the court considers the issues presented by this motion. The sole injury for which **[**32]** plaintiffs seek redress under § 4 of the Clayton Act is HTVC's loss, starting in December, 1981, of potential and existing cable television subscribers to its direct competitor Cablevision of Huntington. There appears to be little doubt that the direct cause of this injury is Cablevision's refusal, and not the teams' refusal, to grant plaintiffs the right to carry the defendant teams' games on "SportsChannel" while granting such a right to plaintiffs' competitor. The actions of the teams, in granting Cablevision the exclusive right to produce and distribute **[*495]** their games and thereby making the games available to plaintiffs only through Cablevision, are at most an indirect cause of the injury. That is to say, plaintiffs' loss of subscribers can only be traced to the teams through Cablevision's independent exercise of the exclusive rights granted it by the teams.

To illustrate, if plaintiffs' immediate competitor, Cablevision of Huntington, did not offer its subscribers "SportsChannel", plaintiffs, under their own theory, would suffer no competitive injury upon which to base a claim, regardless of their inability to acquire cablecasting rights. Similarly, if the teams granted **[**33]** the same exclusive production and distribution rights to Cablevision but Cablevision did not have a cable system franchise in Huntington, HTVC would suffer no competitive loss due to the teams' actions if Cablevision refused to grant it a "SportsChannel" sublicense. In other words, only when Cablevision is competing with HTVC and exercises its rights of refusal does the alleged loss result to HTVC.

The unmistakable fact is that the various contracts between the teams and Cablevision expressly give the latter sole discretion to sublicense or not to sublicense the teams' games to third-party cable system operators. The contracts unambiguously demonstrate that the teams contractually relinquished to Cablevision all control to distribute their games. *See* *Reading Industries, Inc. v. Kennecott Copper Corp., 631 F.2d at 13 n.6* (summary judgment appropriate where the issue of causal relationship between alleged violation and injury turned on documentary evidence).

In addition to its indirectness, the chain of causation between plaintiffs' harm and the teams' alleged wrongdoing otherwise contains no precisely defined links which are sufficient to support standing. *Associated General* **[**34]** *Contractors, 459 U.S. at 540*. As the Court of Appeals for the Second Circuit stated:

> ***HN4***[] . . . there are inherent limitations in the substantive protection afforded by the antitrust laws: they exclude claims based on conjectural theories of injury and attenuated economic causality that would mire the courts in intricate efforts to recreate the possible permutations in the causes and effects of [defendant's action]. *Cf.* *Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573, 583-85 (3d Cir. 1979)*.

Reading Industries, Inc. v. Kennecott Copper Corp., 631 F.2d at 14. For instance, to the extent that plaintiffs claim that in the absence of the exclusive contracts with Cablevision [17] the plaintiffs could have purchased cablecasting rights directly from the teams, the requisite causal relationship nevertheless rests on speculation that (a) the teams would have produced the programming of the games themselves for distribution, (b) plaintiffs would have reached a

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[17] In reference to the exclusivity clauses in the teams' contracts, *see* *United States v. Jerrold Electronics Corp., 187 F. Supp. 545*, (E.D.Pa. 1960), *aff'd*, ***365 U.S. 567, 5 L. Ed. 2d 806, 81 S. Ct. 755 (1961)***(per curiam), where the record showed that one product was necessarily tied to another as a single package without violation of the antitrust laws. This principle was affirmed in *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 1565, 80 L. Ed. 2d 2 (1984)*.

licensing agreement with the teams not only individually but collectively as a package, and (c) Huntington subscribers would then have chosen to subscribe to plaintiffs' cable service. It is **[**35]** appropriate to cite again *Reading Industries, Inc. v. Kennett Copper Corp., 631 F.2d at 13-14*, where the court said, "to find antitrust damages in this case would engage the court in hopeless speculation concerning the relative effect of an alleged conspiracy concerning the relative effect of an alleged conspiracy in the market for refined copper on the price of copper scrap, where countless other market variables could have intervened to affect those pricing decisions." Added to such variables is the undisputed fact that plaintiffs never were interested in acquiring or offered to acquire exclusive production and distribution rights on a metropolitan-wide basis, the product offered by the teams. At all **[*496]** times plaintiffs' interest was in acquiring rights to cablecast the teams' games on HTVC in Huntington only, an opportunity not offered by the teams but by a third party, Cablevision, in the form of "SportsChannel." The plaintiffs' claims that they could have purchased cablecasting rights from some other third-party "middleman" who *might* have contracted with the teams for production and distribution rights had not the teams granted those rights exclusively to Cablevision **[**36]** are even more speculative. By introducing this hypothetical middleman into this hypothetical scenario, the plaintiffs' link between the teams' alleged wrongdoing and the plaintiffs' injury is based on sheer speculation. [18]

[37]** To support their contention of standing, plaintiffs heavily rely upon *Blue Shield of Virginia v. McCready, supra*, and *Crimpers Promotions, Inc. v. Home Box Office, supra.* This reliance is misplaced. In *McCready* the plaintiff was a health subscriber who sought and was refused reimbursement for the costs of treatment by her psychologist. As a practice the defendant insurer reimbursed subscribers for the costs of psychotherapeutic services provided by psychiatrists but not by psychologists. The psychologists were the obvious target of the anticompetitive practice. McCready sued the insurer and a state-wide organization of psychiatrists, charging that the insurer's failure to reimburse was in furtherance of a conspiracy to restrain competition in the psychotherapy market. The standing analysis employed by the Court in *McCready* focused on two distinct types of limitation which the courts, "drawing on statutory policy," *457 U.S. at 473*, have used to restrict the availability of the § 4 remedy, one of which relates to duplicative recovery and the other to remoteness. Only the latter is relevant to this case.

That limitation ***HN6***[] relates to the court's denial of standing where **[**38]** a plaintiff's injury is too remote from an antitrust violation. *457 U.S. at 476-84*. In applying the "elusive" concept of remoteness, the Court wrote:

> we look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and, (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4.

457 U.S. at 478.

Concerning "remoteness" and causation, the Court asserted that plaintiff alleged a sufficient "physical and economic nexus" between the alleged violation and injury; denying reimbursement was the very means by which defendants sought to achieve the alleged illegal ends and McCready's injury was precisely the type of loss that the claimed violations would be likely to cause. *Id. at 479*. It concluded that McCready's alleged injury was of a type that Congress sought to redress in providing a § 4 remedy because it was "inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *Id. at 484*.

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[18] ***HN5***[] In passing upon constitutional standing issues, which the court recognizes are somewhat different from antitrust standing, the Supreme Court has also required a substantial causal nexus between injury and conduct. In *Allen v. Wright, 468 U.S. 737, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)*, it denied standing to parents of public school students who challenged the IRS's grant of tax exemptions to racially discriminatory schools, writing:

> The injury must be "fairly" traceable to the challenged action, and relief from the injury must be "likely" to follow from a favorable decision . . . Is the line of causation between illegal conduct and injury too attenuated? Is the prospect of obtaining relief from the injury as a result of a favorable ruling too speculative?

In **[**39]** *McCready* there was no question whether the defendants' alleged conduct had *in fact* caused the plaintiff's alleged injury. The denial of reimbursement was both the means by which defendants sought to achieve the alleged illegal ends and the very injury for which plaintiff **[*497]** sought redress. Here, the alleged wrongdoing by the teams -- granting exclusive rights to Cablevision -- did not, as previously discussed, cause plaintiffs to lose subscribers to Cablevision of Huntington. Such action is not inextricably intertwined with the alleged injury sustained by the plaintiffs.

Crimpers is equally unavailing to plaintiffs' position. The plaintiff in that case organized a cable television trade show to facilitate contacts between producers of cable television programming and local cable television systems. The complaint alleged that defendants, two companies, Home Box Office, Inc. and Showtime Entertainment Corporation, allegedly dominant in the business of purchasing and assembling programming from producers and selling it to the cable systems, conspired to cause a boycott of plaintiff's trade show. Applying *McCready* standing analysis to those alleged facts, Judge **[**40]** Friendly, writing for the Second Circuit, held that the plaintiff, although not a direct competitor of the defendants, had standing under § 4 to assert its antitrust claims.

Crimpers is distinguishable from the present case on the same ground as *McCready*. The trade show allegedly was a failure due to the defendants' actions, which were anticompetitive, so that the plaintiff's injury in *Crimpers* had the same direct causal nexus with the alleged antitrust violation as was present in *McCready*. As the court stated in *Crimpers*, "the alleged violations were defendants' conspiring to interpose barriers against direct dealings between the producers and the stations and attempting to monopolize the business of furnishing programs. Crimpers got in the way and defendants allegedly made it suffer for trying to do so." *724 F.2d at 294*.

B. *Cablevision's Refusal to Sublicense "SportsChannel" to HTVC and the Teams' Liability*

The only other respect in which the teams are accused of violating the antitrust laws is their alleged complicity in Cablevision's refusal in 1982 to grant a "SportsChannel" license to HTVC. The allegation reads that the teams "refused to enable" plaintiffs **[**41]** to receive "SportsChannel" from Cablevision. The short answer to this claim is simply that the teams had no legal right to affect Cablevision's sublicensing decision one way or the other. Cablevision did not need the teams' consent "to effectuate [its] determination not to deal" with HTVC. *Reisner v. General Motors Corp., 671 F.2d 91, 99* (2d Cir.), *cert. denied*, *459 U.S. 858, 74 L. Ed. 2d 112, 103 S. Ct. 130 (1982)*.

The mere fact that plaintiffs allege a conspiracy, the specific intent of which was to harm them, does not save their complaint against the teams. As the Court stated in *Associated General Contractors, 459 U.S. at 537*:

> ***HN7***[] . . . an allegation of improper motive, although it may support a plaintiff's damages claims under § 4, is not a panacea that will enable any complaint to withstand a motion to dismiss. Indeed, in *McCready*, we specifically held: "The availability of the § 4 remedy to some person who claims its benefits is not a question of the specific intent of the conspirators." *457 U.S., at 479*. [Footnotes omitted.]

Plaintiffs' standing in this case turns on the relationship between the teams' actions and plaintiffs' alleged injury, **[**42]** not on the particular motive plaintiffs attribute to the teams. To repeat, the plaintiffs have not established a nexus adequate to support standing. In addition, there is no evidence that the teams attempted to influence Cablevision to defeat plaintiffs' efforts in 1982 to obtain "SportsChannel." To the contrary, the evidence shows that it was the plaintiffs who actively solicited the teams' assistance in acquiring "SportsChannel" and that in response to the *plaintiffs*' solicitation various team officials made inquiry of Cablevision. Such conduct hardly raises an inference of causation or conspiracy.

Nor is it enough for plaintiffs to point to similar exclusivity agreements by the **[*498]** teams with Cablevision. Such evidence indicates "nothing more than parallel business behavior" which, "standing alone, is insufficient to give rise to an inference of an agreement among the defendants" nor to an inference of causative conduct by the defendants. *Windy City Circulating Co., Inc. v. Charles Levy Circulating Co., 550 F. Supp. 960, 965 (N.D.Ill. 1982)*.

C. *Failure to Demand Rights from the Teams*

Assuming, *arguendo*, that plaintiffs can establish a causal link between **[**43]** the teams' conduct and the alleged loss of subscribers, plaintiffs' claims against the teams based on the exclusive contracts with Cablevision must fail for an additional reason. The teams stand accused, essentially, of refusing to grant plaintiffs cablecast rights in furtherance of a conspiracy with Cablevision to monopolize cable television trade in Huntington. Paragraph 40 of the complaint alleges, as a predicate to all the sports claims, that "plaintiffs have . . . requested several defendant Teams to grant plaintiff cablecast rights *on the same basis* that Teams have granted such rights to [Cablevision]. Defendant Teams, without business justification and in furtherance of the conspirators' aims, have refused to deal with plaintiffs." (Emphasis added.) The record, however, clearly demonstrates that plaintiffs did not seek rights "on the same basis" that the teams granted Cablevision. In his affidavit in opposition to defendants' motion, plaintiff Nishimura acknowledges that plaintiffs were never interested in, much less sought, rights to produce and distribute the teams' games on an exclusive, metropolitan-wide basis. Yet that is exactly the basis upon which the teams granted **[**44]** rights to Cablevision. Plaintiffs were solely interested in obtaining rights to cablecast the teams' games over HTVC in Huntington. In reality, plaintiffs wished to purchase a product entirely different from the one the teams were offering. ***HN8***[] Absent a demand to purchase that which is the subject of an alleged refusal to deal, there can be no recovery under the antitrust laws. *Lawlor v. National Screen Service Corp., 270 F.2d 146, 154 (3d Cir. 1959)*, *cert. denied*, *362 U.S. 922, 4 L. Ed. 2d 742, 80 S. Ct. 676 (1960)*; *Webster Rosewood Corp. v. Schine Chain Theatres, Inc., 263 F.2d 533, 536* (2d Cir.), *cert. denied*, *360 U.S. 912, 3 L. Ed. 2d 1261, 79 S. Ct. 1296 (1959)*; *J.J. Theatres, Inc. v. Twentieth Century-Fox Film Corp., 212 F.2d 840, 845 (2d Cir. 1954)*; *Milwaukee Towne Corp. v. Loew's, Inc., 190 F.2d 561, 568 (7th Cir. 1951)*, *cert. denied*, *342 U.S. 909, 72 S. Ct. 302, 96 L. Ed. 680 (1952)*; *Gordon v. New York Stock Exchange, Inc., 366 F. Supp. 1261, 1263 (S.D.N.Y. 1973)*, *aff'd*, *498 F.2d 1303 (2d Cir. 1974)*, *aff'd*, *422 U.S. 659, 45 L. Ed. 2d 463, 95 S. Ct. 2598 (1975)*. *See* *Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 168, 32 L. Ed. 2d 627, **[**45]** 92 S. Ct. 1965 (1972)*.

There is another flaw in plaintiffs' demands. They were not only inadequate but were not timely. The record shows that at most plaintiffs' demands for cablecast rights from the teams consist of two letters and a few telephone calls from Seth Morrison, who then served as Program Director for HTVC in 1980. In his affidavit Morrison states that he knew at the time of his contacts that both teams had already granted exclusive rights to Cablevision. No demands which led to refusals were ever made upon the Nets and Islanders. In his deposition, Nishimura unequivocally states that he was seeking rights only "for defendant teams' programs carried on SportsChannel as SportsChannel provides to other cable companies. . . . The rights we were seeking prior to the commencement of the lawsuit was with SportsChannel." Depos. of James Y. Nishimura, at 502-05, 517-18. Other than in 1976 when the Islanders and Nets did grant cablecast rights to plaintiffs (although the contracts were never implemented due to litigation), there is no evidence that plaintiffs ever demanded cablecast rights from the teams at any of the numerous times when the teams were contractually free to consider **[**46]** offers from parties other than Cablevision. In his affidavit, however, filed after the motion for summary judgment was instituted, **[*499]** Nishimura states that he periodically attempted to attain rights to provide games of the individual teams but that from his experience with the teams and lack of information, he was "foreclosed" and "frozen out" from that possibility, and that it would have been futile to make further direct communications with the teams. [19] **[**47]** While this may be true, after the contracts were signed, there is no evidence that such was true before the contracts were executed. [20] In sum, the undisputed evidence demonstrates that plaintiffs failed to demand at any time the same rights which are the subject of the claimed refusal to deal by the teams and, therefore, the teams cannot be held liable under the antitrust laws.

D. *Plaintiffs' Requests for Additional Discovery*

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[19] To the extent that this ex post facto affidavit contradicts or is inconsistent with the deposition, the court believes it should not be given sufficient weight to raise an issue, particularly in view of the other evidence. *See* *Reisner v. General Motors Corp., 671 F.2d 91, 93 (2d Cir. 1982)*.

[20] It is recognized that demand is not necessary where it is futile, but such was not the case before the contracts were signed. *See Royster Drive-In* *Theatres v. American Broadcasting-Paramount Theatres, Inc., 268 F.2d 246, 251* (2d Cir.), *cert. denied*, ***361 U.S. 885, 4 L. Ed. 2d 121, 80 S. Ct. 156 (1959)***; *accord,* *Cleary v. National Distillers & Chemical Corp., 505 F.2d 695 (9th Cir. 1974)*.

Pursuant to *Rule 56(f) of the Federal Rules of Civil Procedure*, plaintiffs have submitted a dense, 50-page affidavit containing 46 separate discovery requests for additional documents and depositions which they believe must be granted in order to present material issues of fact essential to justify their opposition to defendants' motion. Many of the requests are specific, many are blunderbuss, and many seek discovery previously refused by the court. All of the requests share one element in common: immateriality to the dispositive issues in this case. Throughout this litigation plaintiffs' demand for discovery has been all-encompassing. The discovery **[**48]** to date has been far-reaching and voluminous, consisting of thousands of pages of documents and over two thousand transcript pages of depositions. The numerous contracts between the teams and Cablevision have been disclosed virtually in full text despite defendants' legitimate concerns over the dissemination of sensitive and confidential business information. They now seek additional evidence, such as depositions of the officers of Cablevision, drafts of the original contracts, preliminary negotiations with respect to the key provisions of the contracts, and evidence of conversations with representatives of the various teams before the execution of the contracts. None of the discovery sought, which in some instances is repetitious, cumulative and peripheral, is relevant as far as the teams are concerned. As stated by Mr. Justice Marshall in *First National Bank of Arizona v. Cities Service Co., 391 U.S. at 298*, in affirming a summary judgment:

> But in this case petitioner was attempting, in effect, to obtain discovery of peripheral aspects of Cities' alleged participation in the conspiracy, after having failed, despite already substantial discovery, to obtain any significant **[**49]** evidence of conspiracy for the period during which it was alleged to have directly injured him.

Plaintiffs are unable to show how any additional discovery could supply an inference of "conspiratorial" or causative conduct any stronger than that provided by the contracts themselves and the testimony in the affidavits and depositions already taken.

The court believes nothing new can be obtained by further discovery which will show causative conduct on the part of the teams, permitting recovery against them under § 4 of the Clayton Act.

E. *Nishimura's and CSC's Claims*

Defendants have also moved to dismiss all claims asserted by plaintiffs Nishimura and CSC on the ground that they are only suing in their capacities as, **[*500]** respectively, stockholder/employee and stockholder of the two remaining corporate plaintiffs, HTVC and HEP. It is well settled that ***HN9***[] a stockholder who suffers loss due to injury to his corporation may not recover damages under the antitrust laws because his "injury as a stockholder [is] indirect, remote and consequential." *Associated General Contractors, 459 U.S. at 533-34*; *Vincel v. White Motor Corp., 521 F.2d 1113, 1119 (2d Cir. 1975)*. **[**50]** Any injury to Nishimura as an employee of HTVC and HEP stands on the same footing. *Bichan v. Chemetron Corp., 681 F.2d 514 (7th Cir. 1982)*; *Saxe, Bacon & Bolan, P.C. v. Martindale-Hubbell, Inc., 521 F. Supp. 1046 (S.D.N.Y. 1981)*. The cases cited by plaintiffs, such as *Perkins v. Standard Oil Company of California, 395 U.S. 642, 649-50, 23 L. Ed. 2d 599, 89 S. Ct. 1871 (1969)*, are inapposite because here, unlike in *Perkins*, no injury other than that derived from stockholder or employee status is alleged. The defendants' motion must therefore be granted.

V. *Conclusion*

Plaintiffs have had extensive discovery for eighteen months and have failed to show that its injury, the alleged loss of existing and prospective subscribers in Huntington, was proximately caused by any violation of the antitrust laws by any of the defendant teams. No question of material fact on the issues of the propriety of the demand upon the teams, the causal link between the teams' actions and plaintiffs' injuries, plaintiffs' standing to sue the teams, or the teams' participation in a conspiracy appears from the depositions and affidavits to support the allegations in the pleadings, although **[**51]** participation in a conspiracy would be insufficient in the absence of a causal link.

For the reasons set forth, summary judgment should be granted (i) dismissing Counts V-IX of the complaint in their entirety; (ii) dismissing Counts I-IV and XII of the complaint insofar as they claim that the sports team defendants conspired with Cablevision to deny plaintiffs "SportsChannel" programming, that the teams unlawfully refused to grant television production rights to plaintiffs, or that the teams acted wrongfully in granting such rights to Cablevision; and (iii) dismissing all claims asserted by plaintiffs Communications Systems Corporation and James

Y. Nishimura. Because the sports teams are not defendants in any of plaintiffs' other claims, they should be dismissed from this action.

SO ORDERED.

Innovation Data Processing, Inc. v. International Business Machines Corp.

United States District Court for the District of New Jersey

October 25, 1984

Civil Action No. 83-1452

Reporter
603 F. Supp. 646 *; 1984 U.S. Dist. LEXIS 22472 **

INNOVATION DATA PROCESSING, INC., etc., Plaintiff, v. INTERNATIONAL BUSINESS MACHINES CORPORATION, etc., Defendant

Core Terms

tie-in, rule of reason, anti-competitive, tying arrangement

Counsel: **[**1]** Frederick L. Whitmer, Esq., Pitney, Hardin, Kipp & Szuch, Morristown, New York, for Plaintiff.

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Judges: Ackerman, District Judge.

Opinion by: ACKERMAN

Opinion

[*647] ACKERMAN, District Judge.

This is an antitrust action which was brought by the plaintiff Innovation Data Processing, Inc. against International Business Machines Corp. (IBM) seeking to enjoin IBM from marketing a new piece of computer software called Installation Productivity Option "J" (IPO-J).

As I pointed out in my previous decision, which was rendered on March 12, 1984, Innovation alleged that IPO"J" constituted a tie-in with an IBM software product known as Data Facilities Data Set Services (DFDSS). On the aforementioned date, I held that plaintiff had failed to demonstrate the existence of a per se unlawful tie-in arrangement, but found that the plaintiff was still entitled to proceed under its claim that defendant IBM's practices violated the general standards of the Sherman and Clayton Acts. *See Innovation Data Processing v. International Business* **[**2]** *Machines, 585 F. Supp. 1470 (D.N.J. 1984)*.

IBM now brings this motion for reconsideration of its motion for summary judgment upon the issue of whether Innovation may proceed under its alternative general standards claim. In the alternative IBM, has moved for certification of this issue to the Court of Appeals for the Third Circuit pursuant to *28 U.S.C. Section 1292(b)*.

Rule 12(I) of the Rules of the United States District Court for the District of New Jersey provides for reconsideration only when counsel has presented new factual matters or controlling decisions which the Court has overlooked.

IBM contends that under this Court's previous holding that IBM did not tie the DFDSS to the IPO"J" system, there is no anti-competitive conduct that remains to be tested under the "rule of reason" standard. In support of its motion, IBM cites a number of cases which support its contention that the failure to establish a tie-in must cause Innovation's claims to fail under a rule of reason theory. Without the key element of a tie-in, the extent of any effect on competition and the reasonableness of any restraint of trade are irrelevant. *See, Electroglas, Inc. v. Dynatex Corp., 497 F. Supp.* ***[**3]*** *97, 106 (N.D. Cal. 1980)*.

In a case decided by the United States Supreme Court only a few weeks after my previous decision, the Court dealt with the problem of tie-ins in connection with a contract that had been signed by a hospital in Louisiana with a group of anesthesiologists. I have read that decision and it is my determination that my denial of summary judgment as to plaintiff's "general standards" claim should be reconsidered. *See Jefferson Parish Hospital v. Hyde, 466 U.S. 2, 52 U.S.L.W. 4385, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)* which is to the best of my knowledge, the Court's most recent pronouncement of the state of tying arrangements in ***antitrust law***. I believe that the rationale employed by the Court requires that I reanalyze plaintiff's alternative theory.

A threshold question which must be resolved is whether by March 12 opinion held only that no *per se* tie-in had been established as a matter of law, or whether it held there was simply no tie-in. A finding of no *per se* tie-in is a conclusion of law predicated upon a finding that three distinct elements exist. The three distinct elements that must be found are:

1. the conduct in question must be a tie-in;

[4]** **[*648]** 2. the seller must have "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market of the tied product," and

3. a "not insubstantial" amount of interstate commerce must be affected.

See Northern Pacific Railway v. United States, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958), and *Ungar v. Dunkin' Donuts, 531 F.2d 1211, 1223-24 (3d Cir. 1976)*, *cert. denied 429 U.S. 823, 97 S. Ct. 74, 50 L. Ed. 2d 84 (1977)*.

As *Jefferson Hospital* pointed out, "A *per se* rule focuses on the probability of anti-competitive consequences," because "the character of the restraint produced by such an arrangement is considered a sufficient basis for presuming unreasonableness without the necessity of any analysis of the market context in which the arrangement may be found." *Jefferson Hospital 466 U.S. at 9*. "*Per se* condemnation - condemnation without inquiry into actual market conditions - is only appropriate if the existence of forcing is probable." *Id. at 15*.

Where a *per se* claim fails, plaintiff does not necessarily fail altogether in his claim. He simply loses the benefit of the presumption of **[**5]** harm provided by the *per se* rule and must show the actual effect of the alleged anti-competitive practice on the market. *See Fortner Enterprises v. U.S. Steel, (I), 394 U.S. 495, 500, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1968)*; and *Jefferson Hospital 52 U.S.L.W. at 4392, 466 U.S. 2*.

The standard guiding an inquiry into the purposes and effects of the practices involved in order to establish whether the standards of the Sherman Act have been violated, is known as the "rule of reason." *See U.S. Steel Corp. v. Fortner Enterprises, (II), 429 U.S. 610, 612*, Footnote 1, *51 L. Ed. 2d 80, 97 S. Ct. 861 (1977)*.

Crucial to whether a *per se* or "rule of reason" inquiry is made, however, is a preliminary showing of some practice or behavior by the defendant that could provide the basis for some anticompetitive effect. The practice alleged by the plaintiff here is that defendant tied the sale of one product to the sale of another. No other behavior is pleaded or can even be inferred from either the briefs or affidavits in this matter. Thus, before plaintiff may proceed on a *per se* analysis, or a "rule of reason" analysis, there must first be a finding that a tie-in is present. **[**6]** Thus, I now turn to my March 12 opinion to determine whether my finding that no *per se* illegal tie-in existed was predicated upon a finding that no tie-in existed in the first place.

In my analysis of the *per se* tie-in at issue, I proceeded under the three-prong analysis of *Northern Pacific Railway* described *supra*. (*See also* Innovation v. IBM, at 1475. The first element I examined was, of course, whether a tie-in existed. I found that, "IBM customers are for the purposes of the Sherman and Clayton Acts free to take either the DFDSS program or the IPO"J" by itself and that on this basis alone there is no illegal tying arrangement." *See* Innovation v. IBM at 1475.

The opinion went on, however, to describe three uncontradicted facts that confirmed this conclusion. "First, any IBM customer is free to license the DFDSS program at any time by itself. Second, any IBM customer can order IPO"J" in a segmented version which does not include the DFDSS program. And third, any IBM customer who orders the DFDSS program, whether by itself or together with either a segmented or integrated version of IPO"J", is free to cancel the license for the program at any time, paying **[**7]** the license fee only for the period of usage." *Id*.

On page 1476 I stated: "It is clear that IBM's actual conduct here cannot constitute an unlawful tying arrangement." At no point in my decision did I reach the issues raised by the second and third elements of a *per se* claim -- the economic power of the defendant and the amount of interstate commerce affected.

Thus, my finding of no *per se* tying claim was predicated on the first element **[*649]** of the analysis - the existence of a tie-in itself. The *Jefferson Hospital* opinion in its analysis of the relevant markets to be considered in the economic effects analysis of a tie-in assumes that a finding of a tie-in has already been made before any inquiry into the adverse economic effects can proceed. For example, on page 4389, *466 U.S. at 18* of that opinion the Court said: "any inquiry into the validity of a tying arrangement must focus on the market or markets in which the two products are sold . . ." and Justice O'Connor's concurrence stated: "the Court has never been willing to say of tying arrangements, as it has of price fixing, division of markets and other agreements subject to *per se* analysis, that they **[**8]** are always illegal, without proof of market power or anticompetitive effect." Although, as plaintiff points out, Justice O'Connor states in footnote 2, page 4394, *466 U.S. at 35*, that "arrangements largely indistinguishable from tie-ins are generally analyzed under the rule of reason," the assumption is that some practice has been found to exist that could allegedly be anticompetitive. As there has been no tie-in between IPO"J" and DFDSS, there is no practice to analyze even under a rule of reason.

The *Jefferson Hospital* rationale implicitly affirms the holding in *Electroglas, supra*, where the Court stated at page 106: "Plaintiffs correctly maintain that summary judgment against them on *per se* tying claims does not necessarily invalidate their tying claims under a rule of reason theory. . . . However, the failure to establish the existence of a tie-in must cause the tying claims to fail under either theory. Without this key element, the extent of any effect on competition and reasonableness of any restraint are irrelevant."

In finding the basis for plaintiff's claim under a rule of reason to be nonexistent, I am mindful of the Supreme Court's cautioning that summary judgment **[**9]** procedures should be used sparingly in complex antitrust litigation. I mentioned this on March 12 citing then, and now, to *Poller v. Columbia Broadcasting System, Incorporated, 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*. There are, however, circumstances which authorize summary disposition as where plaintiff fails in an antitrust action to show sufficient facts to raise genuine issues for trial. *See* *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1967)*, *see also* *Electroglas, supra.* For the aforementioned reasons, I accordingly grant defendant IBM's motion for summary judgment and deny plaintiff Innovation's claim under a "rule of reason" theory. Because of this finding there is no need to reach the § 1292 certification issue raised in defendant's motion.

In re Ray Dobbins Lincoln-Mercury, Inc.

United States District Court for the Western District of Virginia, Roanoke Division

October 25, 1984

Bankruptcy Nos. 7-81-00242, 7-81-00243, Adv. Nos. 7-82-0206, 7-82-0207, Misc. Nos. 83-M-10-R, 83-M-9-R

Reporter

604 F. Supp. 203 *; 1984 U.S. Dist. LEXIS 22491 **; 1986-2 Trade Cas. (CCH) P67,267

In re RAY DOBBINS LINCOLN-MERCURY, INC., Debtor; RAY DOBBINS LINCOLN-MERCURY, INC., Plaintiff, v. FORD MOTOR COMPANY, et al., Defendants; In re Rayfeal Condread DOBBINS, aka Ray C. Dobbins, and Mary Ellen Dobbins, aka Mary E. Dobbins, Debtors; Rayfeal Condread Dobbins and Mary Ellen Dobbins, Plaintiffs, v. FORD MOTOR COMPANY, et al., Defendants

Core Terms

conspiracy, wholly owned subsidiary, subsidiaries, alleged conspiracy, conspiring, Sherman Act, parent corporation, intra-enterprise, asserting, incapable

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Antitrust & Trade Law, Sherman Act**

A parent corporation and its wholly owned subsidiary, though separately incorporated, are incapable of conspiring in violation of *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*. The intra-enterprise conspiracy doctrine affords undue significance to the mere fact of separate incorporation while ignoring the common objectives of parent and subsidiary. It is the very nature of their relationship that a subsidiary acts for the benefit of a parent. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests. Rather, a parent's control over its subsidiary, whether or not actually manifested, ensures their unity. The mere coordinated activity of a parent and its wholly owned subsidiary is completely unilateral, never susceptible of a "conspiracy" label.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

A conspiracy between two subsidiaries in no way implicates the rejected intra-enterprise conspiracy doctrine, which applies only where a parent is an alleged co-conspirator.

Counsel: **[**1]** Jonathan M. Apgar, Salem, Virginia, Gordon H. Shapiro, Roanoke, Virginia, for Plaintiff.

James F. Douthat, Roanoke, Virginia, E. Milton Farley, III, Washington, District of Columbia, for Defendants.

Judges: Turk, Chief Judge.

Opinion by: TURK

Opinion

[*204] MEMORANDUM OPINION

TURK, Chief Judge.

On April 7, 1982, Plaintiffs Rayfeal Condread Dobbins and Mary Ellen Dobbins brought their action against Ford Motor Company (Ford Motor) and its wholly owned subsidiaries, Ford Motor Credit Company (Ford Credit) and Ford Leasing Development Company (Ford Leasing), for allegedly conspiring against Plaintiffs in violation of *Va.Code § 18.2-500*. (Dobbins Complaint, para. 17). The object of the alleged conspiracy was, Plaintiffs claim, to prevent them from subleasing the premises occupied by Ray Dobbins Lincoln-Mercury, Inc. By an Amended Complaint of January 31, 1983, Plaintiff Ray Dobbins Lincoln-Mercury, Inc. (the Dealership), sought from Ford Motor and Ford Credit damages resulting from an alleged further conspiracy against the Dealership.

The court's summary judgment order of August 16, 1984, operated as a dismissal of the case as to Ford Motor and disposed altogether of five of the six counts **[**2]** in the Amended Complaint. [1] Surviving that order are only those portions of the Dobbins' Complaint and Count VI of the Amended Complaint asserting the involvement of Ford Leasing and Ford Credit in conspiracies with Ford Motor against Plaintiffs. The two subsidiaries have now moved the court to dismiss these remaining causes of action for failure to state a claim upon which relief can be granted.

Defendants argue, and the court agrees in part, that the Supreme Court's recent decision in *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, is dispositive of the remaining claims. ***HN1***[] The Court held there that a parent corporation and its wholly owned subsidiary -- though separately incorporated -- are incapable of conspiring in violation of *§ 1* of the Sherman Act. **[**3]** *15 U.S.C. § 1*. The intra-enterprise conspiracy doctrine, the court reasoned, affords undue significance to the mere fact of separate incorporation while ignoring the common objectives of parent and subsidiary. *104 S. Ct. at 2743*. It is the very nature of their relationship that "the subsidiary acts for the benefit of the parent . . . . If a parent and a wholly owned subsidiary do 'agree' to a course of action, there is no sudden joining of economic resources that had previously served different interests." *Id. 104 S. Ct. at 2742*. Rather, the parent's control over its subsidiary, whether or not actually manifested, ensures their unity. *Id. 104 S. Ct. at 2742*. The mere coordinated activity of a parent and its wholly owned subsidiary is completely unilateral, never susceptible of the "conspiracy" label.

While admitting that Ford Credit and Ford Leasing are wholly owned subsidiaries of Ford Motor, (Dobbins Complaint, paras. 2 and 3), Plaintiffs contend that *Copperweld* is inapposite simply because it addressed specifically conspiracy under the **[*205]** Sherman Act; Plaintiffs in the instant case allege, on the other hand, violation of a state conspiracy statute. The court **[**4]** is unpersuaded by this superficial distinction. Contrary to Plaintiffs' assertions, *Copperweld* is not so discretely framed as to preclude its application in all but Sherman Act cases. The Supreme Court's guidance being uncontradicted by any authority regarding the particular Virginia statute, the *Copperweld* logic must control. Consequently, a parent corporation and its wholly owned subsidiary are equally incapable of conspiring under each of the two statutes.

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[1] In its order accompanying this opinion, the court denies the Dealership's motion for relief from the August 16 order. Grant of that motion would also have preserved Count IV of the Amended Complaint.

Defendants' reliance on *Copperweld* is ill-placed, however, as to any allegation of conspiracy between the two subsidiaries. ***HN2***[] Such a conspiracy in no way implicates the rejected intra-enterprise conspiracy doctrine, which applies only where the parent is an alleged co-conspirator. It is unclear from the Complaint whether the Dobbins allege a conspiracy not only between Ford Motor and each of its wholly owned subsidiaries, but also between the two subsidiaries, Ford Credit and Ford Leasing. To the extent that they allege the latter, *Copperweld* is of no effect.

Because *Copperweld* has made it impossible for Plaintiff Ray Dobbins Lincoln-Mercury, Inc., to prove the existence of a conspiracy between Ford Motor **[**5]** and its wholly owned subsidiary, Ford Credit, Count VI of the Amended Complaint -- now comprising all of the Dealership's claims -- is properly dismissed. This same reasoning supports dismissal of that portion of the Dobbins' claims alleging that Ford Credit and Ford Leasing conspired with their parent, Ford Motor. Insofar as the Dobbins allege a conspiracy between Ford Credit and Ford Leasing, *Copperweld* is inapplicable and the claim should not be dismissed.

The clerk is directed to send a certified copy of this Memorandum Opinion and Order to counsel of record.

End of Document

Tom Hudson & Associates, Inc. v. Chula Vista

United States Court of Appeals for the Ninth Circuit

May 15, 1984, Submitted ; October 25, 1984, Decided

No. 83-6467

Reporter

746 F.2d 1370 *; 1984 U.S. App. LEXIS 17376 **; 1984-2 Trade Cas. (CCH) P66,251

TOM HUDSON & ASSOCIATES, INC., and TOM HUDSON, Plaintiffs-Appellees, v. CITY OF CHULA VISTA, SCA SERVICES INC., and CHULA VISTA SANITARY SERVICE, INC., Defendants-Appellants

Prior History: [1]** Appeal from the United States District Court for the Southern District of California. Earl B. Gilliam, J., presiding

Core Terms

municipal, immunity, trash collection, franchise, articulated, antitrust, state policy, supervision, anti trust law, anticompetitive

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

HN1[] **Exemptions & Immunities, Parker State Action Doctrine**

Municipalities, simply by their status as such, do not share the state's antitrust immunity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Energy & Utilities Law > Antitrust Issues > Antitrust Immunity

Governments > Public Improvements > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN2[] **Exemptions & Immunities, Parker State Action Doctrine**

Municipal conduct is unprotected under the rule that states are immune from federal antitrust laws unless the city acts pursuant to a state policy to displace competition with regulation or monopoly public service.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN3[] Exemptions & Immunities, Parker State Action Doctrine

Cities and other local governmental entities are protected by the state's antitrust immunity so long as their conduct is authorized by a clearly articulated and affirmatively expressed state policy.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Local Governments > Claims By & Against

HN4[] Exemptions & Immunities, Parker State Action Doctrine

Though neutrality is not enough in determining municipal immunity from antitrust laws, something less than strict compulsion is necessary to extend immunity to local government. Rather, to determine that immunity applies, a court need only find that, from the authority given a governmental entity to operate in a particular given area, that the legislature contemplated the kind of action complained of.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Governments > Local Governments > Claims By & Against

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN5[] Parker State Action Doctrine, Local Governments & Private Parties

The requirement of "active state supervision" applies only to private persons seeking protection under the doctrine that federal antitrust laws do not apply to states. Municipalities, however, need make no showing of supervision by the state in suits challenging traditional municipal functions.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN6[] Exemptions & Immunities, Parker State Action Doctrine

To qualify for federal ***antitrust law*** immunity, a city need only show that it is acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, and that the legislature contemplated that that policy might be implemented by the kind of actions challenged as anticompetitive.

Governments > Local Governments > Duties & Powers

HN7[] Local Governments, Duties & Powers

See *Cal. Gov't Code § 66757*.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Governments > Local Governments > Duties & Powers

Governments > State & Territorial Governments > Legislatures

HN8[] **Exemptions & Immunities, Parker State Action Doctrine**

Federal antitrust laws do not require that state legislatures define the options available to municipalities with greater specificity than is displayed by *Cal. Gov't Code § 66757*.

Governments > Local Governments > Duties & Powers

HN9[] **Local Governments, Duties & Powers**

The California Legislature has affirmatively addressed the subject of local trash collection and has specifically authorized municipalities to grant exclusive trash collection franchises, without competitive bidding, pursuant to *Cal. Gov't Code § 66757*.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN10[] **Parker State Action Doctrine, Local Governments & Private Parties**

The actions of a private person are not exempt from federal antitrust laws under the doctrine of state immunity unless actively supervised by the state.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Energy & Utilities Law > Antitrust Issues > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > Utility Companies

HN11[] **Antitrust & Trade Law, Exemptions & Immunities**

For purposes of governmental antitrust immunity, a city need only show that it "pointedly reexamines" the proposals submitted by the private party.

Counsel: Robert C. Fellmeth, Hallen D. Rosner, San Diego, California, for Appellees.

For Greater Los Angeles Solid Wastes Management Asso: Timothy H. B. Yaryan, Esq., Sacramento, California, for Amicus Curiae.

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Thomas J. Harron, Esq., Chula Vista, California, Patrick Lynch, Esq., Thomas Gibbs, O'Melveny & Myers, Los Angeles, California, for Appellants.

Robert J. Logan, City Atty., San Jose, California, for Amicus: The City of San Jose.

Judges: Anderson, Skopil, and Poole, Circuit Judges.

Opinion by: POOLE

Opinion

[*1371] POOLE, Circuit Judge:

This case presents the issue whether California cities are exempt from federal antitrust scrutiny when granting exclusive trash collection franchises.

I.

Plaintiffs-appellees are two trash removal companies, Hudson & Associates and G. B. Services, and their individual owners. Defendants-appellants are the City of Chula Vista, California, and Chula Vista Sanitary **[**2]** Services (CVSS), a competing private trash collection firm, which since 1971 has held a contract with the city of Chula Vista to provide all commercial and residential trash collection services within the city limits. This exclusive trash-collection franchise is protected by city ordinance. Chula Vista Municipal Code § 8.24060.

Beginning in late 1981, plaintiffs wrote to officials of Chula Vista seeking to compete **[*1372]** for contracts to provide trash collection in that city. They received no answer.

Instead, in July, 1982, Chula Vista renewed its exclusive trash collection contract with CVSS for five years. The renewal was made without competitive bidding. In December, 1982, plaintiffs filed the present action, alleging that the exclusive franchise granted to CVSS violates both federal and state antitrust laws. On cross-motions for summary judgment and partial summary judgment, the district court held that the city's actions did not constitute protected state action under *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, and granted partial summary judgment to plaintiffs. Because the applicability of the state action exemption to **[**3]** the city is a separable and dispositive issue, this court granted permission for interlocutory appeal. *28 U.S.C. § 1292(b)*. We reverse.

II.

The effect of federal antitrust laws on local and municipal governments has been of growing concern in light of two relatively recent decisions of the U.S. Supreme Court. *Lafayette v. Louisiana Power & Light Company, 435 U.S. 389, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)*; *Community Communications Co., Inc. v. Boulder, 455 U.S. 40, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982)*.

In *Parker v. Brown, 317 U.S. 341, 352, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, the Court held that Congress did not intend federal antitrust laws to apply to the acts of States "as sovereigns." More than thirty years later, however, the *Lafayette* and *Boulder* decisions limited the *Parker* state-action doctrine and declared that ***HN1***[] municipalities, "simply by their status as such," do not share the State's antitrust immunity. In *Lafayette*, the Court held that a city could be sued for alleged antitrust violations committed by its wholly-owned municipal power company. The plurality of the **[**4]** Court in *Lafayette* stated that such ***HN2***[] municipal conduct is unprotected by *Parker v. Brown* unless the city acts "pursuant to [a] state policy to displace competition with regulation or monopoly public service." *435 U.S. at 413*. Adopting language from cases that had applied *Parker v. Brown* to actions of state agencies, *see* Bates v. State Bar of Arizona, 433 U.S. 350, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977), the plurality stated that **HN3**[] cities and other local governmental entities would be protected by the state's antitrust immunity so long as their conduct was authorized by a "clearly articulated and affirmatively expressed * * * state policy." 435 U.S. at 410.

In *Boulder*, a majority of the Court adopted the position of the *Lafayette* plurality: that the municipal acts are exempt from federal antitrust standards only when they are done pursuant to a "clearly articulated and affirmatively expressed" state policy. 455 U.S. at 51. The Court rejected the City's contention that, as a home rule city under the Colorado constitution with "full right of self-government in both local and municipal affairs," its own regulation **[**5]** of local cable television suppliers was the equivalent to that of the state. 455 U.S. at 53. Far from demonstrating a clearly articulated and affirmatively expressed state policy, the Court explained, the home rule provision showed only a "position * * * of mere *neutrality* respecting the municipal actions challenged as anticompetitive." 455 U.S. at 55. "Acceptance of such a proposition -- that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances -- would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." 455 U.S. at 56.

The foregoing cases, however, did not hold that the challenged municipal conduct need be inescapably mandated by the State. *See* Turf Paradise Inc. v. Arizona Downs, 670 F.2d 813, 823 n. 8 (9th Cir. 1982). **HN4**[] Though neutrality is not enough, something less than strict compulsion is necessary to extend immunity to local **[*1373]** government. Rather, to determine that *Parker v. Brown* immunity applies, a court need only find that, "from the authority given a governmental **[**6]** entity to operate in a particular given area, that the legislature contemplated the kind of action complained of." Lafayette, 435 U.S. at 415 (opinion of Brennan, J.). *See also* Boulder, 455 U.S. at 55.

Boulder explicitly left open the issue whether a municipality must also show that its actions were "actively supervised by the State," as had been suggested by the plurality opinion in *Lafayette.* Lafayette, 435 U.S. at 410; Boulder, 455 U.S. at 51, n. 14. Though the Supreme Court has not addressed this question, this court and several other circuits have held that **HN5**[] the requirement of "active state supervision" applies only to private persons seeking protection under the *Parker v. Brown* doctrine. *See, e.g.,* California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980). Municipalities, however, need make no showing of supervision by the State in suits challenging "traditional municipal functions." Golden State Transit Corp. v. City of Los Angeles, 726 F.2d 1430, 1434 (9th Cir. 1984); Town of Hallie v. City of Eau Claire, 700 F.2d 376, 383-84 (7th Cir. 1983) **[**7]** *cert. granted*, *467 U.S. 1240, 104 S. Ct. 3508, 82 L. Ed. 2d 818 (1984)*; Gold Cross Ambulance & Tran. v. City of Kansas City, 705 F.2d 1005, 1014 (8th Cir. 1983).

Thus, **HN6**[] to qualify for *Parker v. Brown* immunity, a city need only show that it is acting pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, and that the legislature contemplated that that policy might be implemented by the kind of actions challenged as anticompetitive. Golden State Transit Corp. v. City of Los Angeles, 726 F.2d 1430, 1433 (9th Cir. 1984) (Los Angeles taxicab regulation found to be supported by "clearly articulated and affirmatively expressed state policy").

III.

The present case poses no close questions of legislative intent. The State of California has plainly established a "clearly articulated and affirmatively expressed" policy that supports Chula Vista's grant of an exclusive trash hauling contract to CVSS. In particular, section 66757 of the California Government Code explicitly authorizes the very actions taken by Chula Vista. It states:

> **HN7**[] Notwithstanding any other provisions of law, **[**8]** each * * * city * * * may determine * * * (b) whether [solid waste handling] services are to be provided by means of non-exclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding, or, if in the opinion of its governing body, the public health, safety, and well-being so require, *by partially or wholly exclusive franchise, contract, license, permit, or otherwise either with or without competitive bidding*. (emphasis added).

The California Legislature unquestionably "contemplated" the measures adopted by Chula Vista.

Despite this statute's specificity, appellants seek to analogize it to the broad home rule provision at issue in *Boulder*. Appellees argue that § 66757 falls short of the standards required by *Lafayette* and *Boulder* because it fails to describe the particular regulatory procedure that municipalities must adopt if they choose to displace competition in the trash removal market. Because of this failure, appellees contend, § 66757 simply abdicates state policy-making responsibility to local governments in the manner forbidden by the *Boulder* decision.

We disagree with appellees' interpretation **[**9]** of *Boulder*. ***HN8***[] Federal antitrust laws do not require that state legislatures define the options available to municipalities with greater specificity than is displayed by § 66757. The Supreme Court's holding in *Boulder* is not so rigid. The "general grant of authority to enact ordinances" in *Boulder* was held insufficient to provide *Parker v. Brown* immunity because it did **[*1374]** not show "an affirmative addressing of the subject [of cable television regulation] by the State." *Boulder, 455 U.S. at 55*. By contrast, ***HN9***[] the California Legislature has affirmatively addressed the subject of local trash collection and has specifically authorized municipalities to grant exclusive trash collection franchises, without competitive bidding, as Chula Vista has done. The legislature undeniably contemplated that municipalities would grant such franchises, and it approved their doing so.

IV.

Appellees further argue that Chula Vista's supervision of CVSS's rates has been inadequate and that the city has, in effect, relegated uncontrolled monopoly power to CVSS, a private company. ***HN10***[] The actions of a private person are not exempt from federal antitrust laws under **[**10]** *Parker v. Brown* unless actively supervised by the State. *California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)*. Appellees claim that no such supervision of CVSS was provided. We disagree.

In *Midcal*, the Court held that a resale price maintenance scheme did not constitute protected state action where resale prices were filed with, but not reviewed by, a state agency. The Court stated:

> The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in "pointed reexamination" of the program.

445 U.S. at 105-106. *See also* *Cantor v. Detroit Edison Co. 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976)* (antitrust immunity not conferred on conduct simply because it was incorporated in tariffs filed with public utilities commission).

Here, by contrast, Chula Vista does not passively accept the rate proposals submitted by CVSS. All rate proposals are reviewed by the city finance department and must be approved by vote of **[**11]** the City Council. Unlike the situation in *Midcal*, the City of Chula Vista does review the reasonableness of CVSS's rates, and the rates in effect are directly attributable to action of the city, not mere "acquiesce[nce] in an anticompetitive policy adopted on a private party's initiative." *Benson v. Arizona State Bd. of Dental Examiners, 673 F.2d 272, 275 n. 5 (9th Cir. 1982)*. *See also* *Turf Paradise, Inc. v. Arizona Downs, 670 F.2d 813, 825 (9th Cir. 1982)* (selection of race dates by private contract is state action if subject to thorough investigation by State Racing Commission).

Appellee contends that the review conducted by the city is less intensive than required in a number of public utility ratemaking cases. *See, e.g.,* *Permian Basin Area Rate Cases, 390 U.S. 747, 20 L. Ed. 2d 312, 88 S. Ct. 1344 (1968)*; *Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 88 L. Ed. 333, 64 S. Ct. 281 (1944)*; *Driscoll v. Edison Light & Power Co., 307 U.S. 104, 83 L. Ed. 1134, 59 S. Ct. 715 (1939)*. We find this analogy to be unhelpful. The particular statutory schemes dealt with **[**12]** in those cases are, of course, not at issue here. Nor do we believe that the Sherman Act requires cities to treat all city contractors as public utilities. ***HN11***[] For purposes of *Parker v. Brown* antitrust immunity, the city need only show that it "pointedly reexamines" the proposals submitted by the private party. That requirement has been met here.

V.

The exclusive franchise system for trash collection and removal in this case was instituted in accordance with a clearly articulated and affirmatively expressed state policy, specifically authorizing the displacement of competition and contemplating the adoption of the conduct challenged here as anticompetitive. To the extent that monopoly powers have been granted to private persons, they are actively supervised by municipal officials. Chula Vista's trash collection franchise is immune from antitrust scrutiny under the doctrine of *Parker* ***[*1375]*** *v. Brown*, and the district court's order denying immunity is therefore REVERSED.

End of Document

Deak-Perera Hawaii, Inc. v. Department of Transp.

United States Court of Appeals for the Ninth Circuit

March 29, 1984, Argued and Submitted ; October 26, 1984

No. 83-1552

Reporter
745 F.2d 1281 *; 1984 U.S. App. LEXIS 17320 **; 1984-2 Trade Cas. (CCH) P66,250

DEAK-PERERA HAWAII, INC., Plaintiff-Appellant, v. DEPARTMENT OF TRANSPORTATION, STATE OF HAWAII, et al., Defendants-Appellees, and CITICORP (USA), INC., Intervenor-appellee.

Prior History: **[**1]** Appeal from the United States District Court for the District of Hawaii, Martin Pence, Senior District Judge, Presiding.

Core Terms

immunity, lease, anti trust law, sovereign, bidding, antitrust immunity, executive branch, state action, principles, state legislature, state government, private party, state agency, Sherman Act, monopoly, Airport, exempt

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > General Overview

HN1[] **Exemptions & Immunities, Parker State Action Doctrine**

Actions by the State acting as sovereign are immune from the federal antitrust laws.

Constitutional Law > State Constitutional Operation

Governments > Federal Government > Claims By & Against

Governments > State & Territorial Governments > General Overview

Governments > State & Territorial Governments > Legislatures

HN2[] **Constitutional Law, State Constitutional Operation**

The Hawaii Constitution creates the executive as a co-equal branch of the state government and provides for the establishment of departments under the supervision of the governor, *Haw. Const. art. V § 6*; the Department of Transportation is one such department. *Haw. Rev. Stat. § 26-19*.

Constitutional Law > State Constitutional Operation

HN3[] Constitutional Law, State Constitutional Operation

The Hawaii Constitution charges the governor with the faithful execution of the laws. Haw. Const. art. V § 5.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Administrative Law > Separation of Powers > Constitutional Controls > General Overview

HN4[] Separation of Powers, Legislative Controls

The Department of Transportation, as the governor's subordinate, fulfills its constitutional duty to execute Haw. Rev. Stat. § 261-4, which permits the Department of Transportation to establish and operate airports. Haw. Rev. Stat. §§ 261-4(a) and 261-7(a) provide the Department with implied authority to enter into the challenged exclusive lease.

Governments > Legislation > Effect & Operation > Operability

Public Contracts Law > Bids & Formation > Authority of Government Officers > General Overview

HN5[] Effect & Operation, Operability

Haw. Rev. Stat. §8102-2 exempts certain other businesses from bidding requirements for public concessions because of the danger that such a system of awarding all concessions or concession spaces by bid could result in a monopoly. Haw. Act of May 10, 1960, No. 14, § 1, 1960 Hawaii Sess. Laws 16.

Counsel: Robert F. Miller, Esq., Honolulu, Hawaii, for Appellant/Petitioner.

Gerald Y. Y. Chang, Esq., Honolulu, Hawaii, Robert A. Rowan, Esq., Susan O. Mollway, Esq., Cades, Schutte, Fleming & Wright, Honolulu, Hawaii, for Appellee/Respondent.

Judges: Goodwin and Kennedy, Circuit Judges, and Curtis, * District Judge.

Opinion by: GOODWIN

Opinion

[*1282] GOODWIN, Circuit Judge.

Deak-Perera lost its bid to retain the currency exchange concession at Honolulu International Airport when the Hawaii Department of Transportation awarded a five-year exclusive concession to Citicorp, the highest bidder. Alleging violation of federal and state antitrust laws and state bidding laws, Deak-Perera sued the state agency and two of its officials. We affirm the district court's finding that the defendants were entitled to state action immunity from federal antitrust laws. Deak-Perera Hawaii, Inc. v. Department of Transportation, 553 F. Supp. 976 (D. Haw. 1983). **[**2]**

* The Honorable Jesse W. Curtis, Senior United States District Judge for the Central District of California, sitting by designation.

I. *Antitrust immunity*

HN1[] Actions by "'the State acting as sovereign,'" *Hoover v. Ronwin, 466 U.S. 558, 104 S. Ct. 1989, 1998, 80 L. Ed. 2d 590 (1984)*, *quoting* *Bates v. State Bar of Arizona, 433 U.S. 350, 360, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977)*, are immune from the federal antitrust laws. If the State of Hawaii was acting in its sovereign capacity when it granted Citicorp the exclusive lease, it is immune from Deak-Perera's antitrust challenge.

The Department of Transportation, which granted the lease, is part of the executive branch of Hawaii state government. Although *Hoover v. Ronwin* declares that state legislatures and state supreme courts exercising legislative powers have antitrust immunity without further investigation, it expressly leaves open the circumstances under which the activities of a state executive branch are entitled to antitrust immunity. *104 S. Ct. at 1995 n.17*.

We hold that the Department's grant of the lease was an action of the State of Hawaii "acting as sovereign" and thus entitled to immunity from the **[**3]** antitrust laws. As the *Hoover* Court notes, the reasoning of *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*, lays the foundation of the doctrine of state-action antitrust immunity. *Parker* refused to construe the Sherman Act as prohibiting a raisin marketing program carried out by state officials pursuant to a statute enacted by the California legislature:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

317 U.S. at 350-351.

As *Hoover* puts it, the rationale of *Parker* rests on "principles of federalism and state sovereignty." *104 S. Ct. at 1995*. These principles entitle the executive branch of the State of Hawaii to state action immunity. ***HN2***[] The Hawaii Constitution **[**4]** creates the executive as a co-equal branch of the state government and provides for the establishment of departments under the supervision of the governor, *Haw. Const. Art. V § 6*; the Department of Transportation is one such department. *Haw. Rev. Stat. § 26-19*. ***HN3***[] The Hawaii Constitution charges the governor with "the faithful execution of the laws." *Haw. Const. Art. V § 5*. In granting Citicorp the challenged lease, ***HN4***[] the Department of Transportation, as the governor's subordinate, was fulfilling its constitutional duty to execute *Haw. Rev. Stat. § 261-4*, which permits the Department of Transportation to establish and operate airports. *Haw. Rev. Stat. §§ 261-4(a)* and *261-7(a)* provide the Department with implied authority to enter into the challenged exclusive lease. That the legislature contemplated an exclusive lease is emphasized by the noninclusion of foreign exchange concessions in *Haw. Rev. **[*1283]** Stat. § 102-2*. That ***HN5***[] statute exempts certain other businesses from bidding requirements for public concessions because of the "danger that such a system of awarding all concessions or concession spaces by bid could result in a monopoly." Act of May 10, 1960, No. 14, § 1, 1960 **[**5]** Hawaii Sess. Laws 16. Here, the required competitive bidding was invited and Citicorp won the competition and obtained a monopoly.

We see no reason why a state executive branch, when operating within its constitutional and statutory authority, should be deemed any less sovereign than a state legislature, or less entitled to deference under principles of federalism. In *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)*, the Supreme Court emphasized the importance of a "clearly articulated and affirmatively expressed" state policy, *id. at 410*, and specifically rejected the argument that "all governmental entities, whether state agencies or subdivisions of a State, are, simply by reason of their status as such, exempt from antitrust laws." *Id. at 408*. However, *Lafayette* involved a government delegation of authority to private parties. We note that this is not a case of private parties imposing competitive restraints in conjunction with state authorities. In such a case the inquiry would be different. *See* *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 63*

L. Ed. 2d 233, 100 S. Ct. 937 (1980); **[**6]** *Benson v. Arizona State Board of Dental Examiners, 673 F.2d 272, 274-76 (9th Cir. 1982)*. [1]

II. *Dismissal of state claim*

There is no federal jurisdiction over Deak-Perera's claim that the state and its officials violated state law. *Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 911, 79 L. Ed. 2d 67 (1984)*.

Conclusion

Because of our holding on state action immunity, we do not reach the state's constitutional defenses. The district court's grant of summary judgment for the Department is affirmed.

End of Document

[1] Part of the board of dental examiners involved in *Benson* was appointed by the governor on recommendation of the state dental association. ***Arizona Rev. Statutes § 32-1203***.

Ficker v. Chesapeake & Potomac Tel. Co.

United States District Court for the District of Maryland

October 29, 1984

Civil No. Y-83-4432

Reporter

596 F. Supp. 900 *; 1984 U.S. Dist. LEXIS 22376 **; 1985-1 Trade Cas. (CCH) P66,408

ROBIN K. A. FICKER v. CHESAPEAKE & POTOMAC TELEPHONE CO., et al.

Core Terms

advertising, defendants', monopoly, damages, anti trust law, allegations, legal services, anticompetitive, competitors, restrain, Airline, plaintiff's claim, Sherman Act, antitrust, consumer, publish, Clayton Act, directories, conspiracy

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN1[] **Antitrust & Trade Law, Sherman Act**

Section 1 of the Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States is declared to be illegal *15 U.S.C.S. § 1*. *Section 2* of the same act provides in part: every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states shall be deemed guilty of a misdemeanor. *15 U.S.C.S. § 2*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN2[] Motions to Dismiss, Failure to State Claim

For the purpose of a motion to dismiss, the plaintiff's complaint will be construed in a light most favorable to the plaintiff, and its allegations are, therefore, taken as true. A court may dismiss the complaint only if it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. However, the court is not bound to accept conclusory allegations concerning the legal effect of the events the plaintiff has set out if these allegations do not reasonably follow from his description of what happened. A pleader is not able to rely solely on averments that on their face comprehend activity clearly exempt from liability.

Antitrust & Trade Law > Sherman Act > 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

HN3[] Antitrust & Trade Law, Sherman Act

In considering antitrust claims, absent any anticompetitive purpose or design to create a monopoly, a business may unilaterally choose those with whom it will conduct business, as well as the terms and conditions of those business dealings. Federal antitrust laws were enacted to prevent anticompetitive conduct, rather than to enforce popular public utility notions of fair dealing. Even a recognized monopolist is not required to deal non-discriminately with would-be purchasers, whether they are in competition or not. Only refusals to deal as a part of a conspiracy to restrain trade or to maintain a monopoly violate the antitrust laws.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN4[] Clayton Act, Claims

Antitrust suits should be dismissed if the plaintiff cannot recover under any set of facts supporting the allegations in the complaint.

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

HN5[] **Clayton Act, Claims**

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. Even where an antitrust violation is established by the plaintiff or conceded by a defendant, it does not necessarily follow that any person harmed as a result of such conduct is a person injured by reason of the antitrust laws within the meaning of section 4 of the Clayton Act, *15 U.S.C.S. § 15*. Determining whether a person has standing requires an evaluation of the following factors: (1) the nature of the alleged injury; (2) whether the plaintiff is a consumer or competitor in the market where trade was allegedly restrained; (3) the tenuous and speculative character of the casual relationship between the plaintiff's alleged harm and the alleged restraint; (4) the potential for duplicative recovery or complex apportionment of damages; and (5) the existence of more direct victims of the alleged conspiracy.

Counsel: **[**1]** Robin K. A. Ficker, Pro Se.

J. William Sarver, Esquire, Baltimore, Maryland, John M. Goodman, Esquire, Washington, District of Columbia, and Julie M. Saulnier, Esquire, Washington, District of Columbia, for Defendants.

Judges: Young, United States District Judge.

Opinion by: YOUNG

Opinion

[*901] MEMORANDUM

YOUNG, United States District Judge

Robin K. A. Ficker, a Maryland attorney, filed this suit against Chesapeake and Potomac Telephone Company ("C&P") and the Reuben Donnelley Corporation ("Donnelley") pursuant to Section 4 of the Clayton Act seeking treble damages, *15 U.S.C. § 15*, and injunctive relief, *15 U.S.C. § 26*, for alleged violations of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. § 1*, *2*. [1] Defendants now seek dismissal of the plaintiff's complaint for failure to state a claim upon which relief may be granted under *Rule 12(b)(6) of the Federal Rules of Civil Procedure*. Plaintiff has failed to respond to the defendants' motion despite having been specifically invited to do so by this Court.

[2]** According to the facts alleged by the plaintiff, defendant C&P is a Maryland corporation engaged in the telecommunications business in Maryland and elsewhere. Defendant Donnelley is a Delaware corporation under contract with C&P to publish and distribute directories containing the names, addresses, and telephone numbers of C&P subscribers ("white pages"); these directories also contain classified advertisements for business subscribers of C&P ("yellow pages").

The complaint specifically alleges that both defendants have performed acts in Maryland in furtherance of an "unlawful attempt and conspiracy to monopolize, and an unlawful contract, combination, or conspiracy to restrain interstate commerce of the United States." Complaint para. 4. These claims are based upon the defendants' refusal

[1] ***HN1***[] *Section 1* of the Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States . . . is declared to be illegal . . .," *15 U.S.C. § 1*.

Section 2 of the same act states that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . .," *15 U.S.C. § 2*.

to print the plaintiff's advertisement containing price information for certain legal services offered by the plaintiff. The plaintiff contends that consumers of legal services are deprived of meaningful price comparisons for these services and are unable to locate legal services according to price because of the defendant's refusal to publish this information in the classified advertisements. **[**3]** Plaintiff thus concludes that this and other such omissions deny consumers the "benefit of full, free, and open competition in the provision of [legal] services, and [that] prices for such services will remain at artificial and non-competitive levels as a result." Complaint para. 15.

Finally, the plaintiff asserts that his law practice has been injured to the extent that he has lost fees from potential clients who would have used his services (because of their cost) were it not for defendants' actions which allegedly prevented them from doing so.

I.

HN2[] For the purpose of this motion to dismiss, the plaintiff's complaint will be construed in a light most favorable to the plaintiff, and its allegations are, therefore, taken as true. *See* Wright and Miller, 5 *Federal Practice and Procedure*: Civil § 1357 at 594 (1969) (citations omitted). This Court may dismiss the complaint only if it "appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 44-46, **[*902]** 78 S. Ct. 99, 101-102, 2 L. Ed. 2d. 80 (1957)*. However, the Court is not bound to accept conclusory allegations **[**4]** concerning the legal effect of the events the plaintiff has set out if these allegations do not reasonably follow from his description of what happened. Wright and Miller, *supra*, at 597. A pleader is not able to rely solely on "averments that on their face comprehend activity clearly exempt from liability." *City of Gainesville v. Florida Power and Light Co., 488 F. Supp. 1258, 1264 (D. Fla. 1980)*. It is apparent from the pleadings that the plaintiff has failed to allege any facts which, if true, would establish a violation under the Sherman Act and thereby entitle him to relief. Accordingly, defendants' motion to dismiss under *Rule 12(b)(6), Fed.R.Civ.P.*, will be granted as to both Counts I and II of the complaint.

II.

HN3[] In considering antitrust claims, both the Supreme Court, *see Lorain Journal Co. v. United States, 342 U.S. 143, 96 L. Ed. 162, 72 S. Ct. 181 (1951)*; *United States v. Colgate and Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*, and the Fourth Circuit, *see Virginia Academy of Clinical Psychologists v. Blue Shield, 624 F.2d 476, 483 (4th Cir. 1980)*, have recognized that absent any anticompetitive purpose or design to create a monopoly, "a business **[**5]** may unilaterally choose those with whom it will conduct business," as well as the terms and conditions of those business dealings. *Hester v. Martindale-Hubbell, Inc., 659 F.2d 433, 436 (4th Cir. 1981)*. Federal antitrust laws were enacted to prevent anticompetitive conduct, P. Areeda and D. Turner, III ***Antitrust Law***, para. 736(e) at 274 (1978); *see* Cong. Rec. 2457, 3151-53 (1890), rather than to enforce popular public utility notions of fair dealing. Areeda, *supra*, at 274. Even a recognized monopolist is not required to "deal non-discriminately [2] with would-be purchasers, whether they are in competition or not." *Id. at 271*. Only refusals to deal as a part of a conspiracy to restrain trade or to maintain a monopoly violate the antitrust laws. J. Von Kolinowski, *Antitrust Laws and Trade Regulations*, 2 § 6C.02[2] (1983).

Assuming arguendo **[**6]** that defendant Donnelley has a monopoly on yellow-page publishing in the area served by defendant C&P, the monopoly it enjoys is a natural incident of the monopoly status granted to C&P by Congress and the Federal Communications Commission, *see 47 U.S.C. § 151 et seq.*, because of its public utility character. *Best Advertising v. Illinois Bell Telephone Company and Reuben H. Donnelley Corporation, 229 F. Supp. 275* (S.D. Ill, 1964), *aff'd*, *339 F.2d 1009 (7th Cir. 1965)*. Although the advertising aspect of the business does not partake of this public utility character, the directories (of which the yellow page advertising is a part) are a normal and necessary part of C&P's effective operation as a public utility. *Best, 229 F. Supp. at 277*.

The plaintiff alleges that both defendants are attempting to monopolize all classified advertising in the area served by C&P; however, he has not alleged that either defendant has done anything other than refuse to publish his

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[2] By "non-discriminately," the Court excludes refusals to deal for such obvious economic reasons as poor credit and the like. Areeda, at 271, note 4.

advertisement *exactly* as he tendered it. Moreover, it is apparent from the face of the complaint that none of the parties is in competition with either of the other parties; thus, it is difficult, if not **[**7]** impossible, to envision any plausible scenario in which the defendants' refusal would tend to stifle competition or maintain any monopoly for the benefit of either defendant. [3] **[**8]** *See id*. Conceding the monopoly status of both defendants does **[*903]** not advance the plaintiff's argument that he has stated a claim upon which relief can be granted. Unlike the plaintiff in *Lorain Journal, supra*, [4] the plaintiff in the instant case does not allege, nor can he allege, that the defendants' conduct restrained trade in *their own* market for *their own* benefit. Absent this anticompetitive animus, plaintiff's claim must fail.

In *Official Airline Guides, Inc. v. FTC, 630 F.2d 920, 928 (2d Cir. 1980)*, the Second Circuit concurred with the contention of the FTC that Official Airline Guides had arbitrarily refused to publish commuter airline schedules to the detriment of competition among air carriers. Nonetheless, the court held that Official Airline Guides' refusal did not violate the Federal Trade Commission Act. [5] It determined that the cases relied upon by the FTC which required monopolists to deal with their competitors were inapplicable because Official Airline Guides did not compete with the airlines. *Official Airline Guides, 630 F.2d at 925-26*. The court also refused to apply the cases requiring monopolies to deal where their refusals furthered their own monopolies because Airline Guides' refusal did nothing to further its monopoly **[**9]** over the printing of airline schedules. *Id*. Similarly, the defendants in the instant case are not in competition with the plaintiff nor does the complaint allege any facts that would tend to support the plaintiff's conclusion that the defendants' conduct facilitated or enhanced any monopoly either defendant may enjoy.

Furthermore, the plaintiff has failed to allege any concerted activity on the part of the defendants that would give rise to an actionable claim under the Sherman Act. Plaintiff's reliance on *Hester v. Martindale-Hubbell, Inc., 659 F.2d 433 (4th Cir. 1981)*, in support of his contention that he has a claim cognizable under the Sherman Act is misplaced. In *Hester*, the defendants' complete refusal to publish *any* advertisement **[**10]** of the plaintiff was found to "[lie] well beyond the pale of even the most liberal extension of the concept of concerted activity." *Id. at 436*.

Like *Hester*, this "is not a case in which those at a lower level of competition have conspired to force a supplier at a higher level of competition to impose some restraint. Nor is it a case in which a supplier at a higher level of competition has coerced those at a lower level of competition to acquiesce in some anticompetitive endeavor." *Id*. (citations omitted). As the court observed in *Dollar-A-Day Rent a Car Systems, Inc. v. Mountain States Telephone Company, 22 Ariz. App. 270, 526 P.2d 1068 (1974)*, regulations restricting price advertising in the yellow pages of telephone directories are not anticompetitive and therefore do not run afoul of federal antitrust laws. Instead, they are "in [full] accord with the public purpose expressed by Congress." *Id. at 1073*, citing Federal Trade Commission Act, *15 U.S.C. § 41 et seq.* Thus, any restraint imposed by the advertising regulations of the defendants was not an "unreasonable restraint," *Best Advertising*, 339 F.2d at 1011, citing *Standard Oil Company of New* **[**11]** *Jersey v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1910)*, such as price fixing, elimination of competition or the creation of a monopoly, and, therefore, is not actionable under the federal antitrust laws. Furthermore, the plaintiff's claim here is even weaker than the one rejected by the Fourth Circuit in *Hester*. The plaintiff in *Hester* was completely denied the right to advertise in a medium in which his competitors advertised. [6] The pleadings in the

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[3] If anything, defendant's refusals to accept certain kinds of advertising would tend to create market opportunities for competing advertising firms thereby decreasing their control over the market. Both the complaint and the defendants' motion to dismiss note that C&P's reason for maintaining price restrictions is based on its concern that price quotations in it's classified adds will change within the useful life of the directories. Complaint para. 12; Defendants' Memorandum in Support of Their Motion to Dismiss at 2, n.2.

[4] In *Lorain Journal*, the Lorain Journal Co. enjoyed a substantial monopoly over local and national news and advertising in its Community and refused to accept advertisements from anyone who advertised over the *competing* radio station. *Lorain Journal, 342 U.S. at 148*.

[5] Although *Official Airline Guides, 630 F.2d at 920*, involved Section 5 of the Federal Trade Commission Act, *15 U.S.C. § 45*, the authorities relied upon the parties and the court included *Colgate, 250 U.S. at 300* and *Lorain Journal, 342 U.S. at 148*.

instant case **[*904]** clearly establish that the plaintiff received the same treatment as his competitors and was not prevented from advertising in the defendants' directory.

[12]** These cases make it abundantly clear that the defendants are under no obligation to accept the plaintiff's advertisement regardless of their monopoly position in the area served by C&P. *Lorain Journal, 342 U.S. at 155*; *Official Airline Guides, 630 F.2d at 928*. Moreover, plaintiff's complaint must fail because he has not alleged nor is he able to allege that he competes with either defendant, *Official Airline Guides, 630 F.2d at 925-26*; *Best, 229 F. Supp. at 277*, or that he has been discriminated against by the defendants in favor of his competitors.

III.

Additional grounds exist for dismissing the plaintiff's claims for damages under Section 4 of the Clayton Act, *15 U.S.C. § 15*. [7] Plaintiff does not allege facts which would confer standing upon him under the federal antitrust laws. [8] This court has held that ***HN4***[] antitrust suits should be dismissed if the plaintiff cannot recover under any set of facts supporting the allegations in the complaint. *Levey v. E. Stewart Mitchell, Inc., 585 F. Supp. 1030 (D. Md. 1984)*, appeal docketed, No. 84-1597 (4th Cir. June 7, 1984). The complaint is also devoid of any facts which support the allegation that the plaintiff has **[**13]** suffered the requisite antitrust injury.

The Supreme Court has made it increasingly clear that ***HN5***[] "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n.14, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972)*. Even where an antitrust violation is **[**14]** established by the plaintiff or conceded by a defendant, it does not necessarily follow that any person harmed as a result of such conduct is a person injured by reason of the antitrust laws within the meaning of Section 4 of the Clayton Act. *See* *Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723, 51 U.S.L.W. 4139, 4142 (1983)*. Determining whether a person has standing under Section 4 requires an evaluation of the following factors:

> (1) the nature of the alleged injury;
>
> (2) whether the plaintiff is a consumer or competitor in the market where trade was allegedly restrained; [9]

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[6] In *Hester*, the court in its *dicta* concluded that the "restricted access to advertising" was a restraint of trade but not actionable unless accompanied by "concerted activity." *Hester, 659 F.2d at 436*. However, in the present case, defendants have not "restricted access to advertising" either individually or in concert; they have merely established rules for advertising content and have applied them in an even-handed, nondiscriminatory way. Without such "restricted access to advertising" in furtherance of some anticompetitive purpose, *Hester* does not save the plaintiff's claims from being dismissed for failure to state a claim upon which relief may be granted.

[7] Section 4 of the Clayton Act provides that:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . And shall recover thrice fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

[8] The requirement of "antitrust standing" is different and more restrictive than standing as a constitutional doctrine. While almost any harm will satisfy the standing requirement in the constitutional context, much more is required to acquire standing to pursue a damage action under Section 4 of the Clayton Act.

[9] This frequently dispositive inquiry, *see* *Associated General Contractors, 51 U.S.L.W. at 4144*, has been referred to as the "target area" test. It has also been described as requiring a plaintiff to show that he is "within the area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Id. at 4144, n.33*, citing *Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 546-547 (5th Cir. 1980)*; *Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 17-18 (1st Cir. 1979)*; *Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292-1295 (2d Cir. 1971)*. The Second Circuit has also stated that for a plaintiff to be within the target area, he must be:

> a person against whom the conspiracy was aimed, such as a competitor of the persons sued. Accordingly, we have drawn a line excluding those who have suffered economic damage by virtue of their relationship with "targets" . . .

[*905] (3) the tenuous and speculative character of the casual relationship between the plaintiff's alleged harm and the alleged restraint;

(4) the potential for duplicative recovery or complex apportionment of damages; and

(5) the existence of more direct victims of the alleged conspiracy.

See *Associated General Contractors, 51 U.S.L.W. at 4146*.

[15]** A review of the plaintiff's allegations in light of these cases reveals that both counts of the complaint should be dismissed with regard to damages for lack of standing. Count I is easily disposed of because the plaintiff is not a competitor of either defendant and the defendants are not competitors of each other. Nor is the plaintiff a consumer in the market in which the alleged restrain of commerce occurred. In sum, the plaintiff does not allege any facts in Count I which would place him within the target area of the alleged restrain of trade, *Associated General Contractors, 51 U.S.L.W. at 4144, n.33, 4146-47*. Count I simply fails to disclose any facts which identify any justiciable interest the plaintiff has with regard to damages in the competition affected by the restrain. *Plumbers and Steamfitters Local 598 v. Morris, 511 F. Supp. 1298, 1306 (D. Wash. 1981)*.

The allegations in Count II also fail to establish plaintiff's standing to pursue damages under Section 4 even though the plaintiff is a consumer in the advertising market (the market presumably affected by anticompetitive conduct in furtherance of defendants' monopoly). He does not allege that he has been charged **[**16]** noncompetitive prices for his advertisements; therefore, the only market in which he conceivably could have suffered harm as a result of the defendants' conduct is the legal services market, a market in which he is not a consumer and in which neither defendant competes. Hence, Count II also fails to allege any facts which place the plaintiff within the target area of the alleged violation of *Section 2* of the Sherman Act. *See* *Associated General Contractors, 51 U.S.L.W. at 4144, n.33, 4146*.

In addition, plaintiff's alleged injury is too indirect and the damages too highly speculative for the plaintiff to recover under Section 4. Plaintiff has not established a "significant causal connection between the defendants' violation and [his] injury," Areeda, II *Antitrust Laws* para. 334a, at 163, or that his injury was "inextricably related to, and caused by, the alleged anticompetitive conduct." *Bichan v. Chemetron Corp., 681 F.2d 514 (7th Cir. 1982)*, *cert. denied*, *460 U.S. 1016, 103 S. Ct. 1261, 75 L. Ed. 2d 487 (1983)*. In *Associated General Contractors, supra*, the Court dismissed a union's complaint against a multi-employer association which allegedly had coerced third **[**17]** parties in to dealing with nonunion firms. The coercive acts were alleged to have adversely affected the trade of certain unionized firms to the detriment of the business activities of the union and its members. The Supreme Court denied the union relief pursuant to Section 4 "partly because [the injury was] indirect, and partly because the alleged effects on the union may have been produced by independent factors . . ." thereby making the union's damage claim too highly speculative. *Associated General Contractors, 51 U.S.L.W. at 4146*. [10]

Calderone, 454 F.2d at 1294.

Another Court of Appeals has asked whether the alleged injury is "arguably within the zone of interests protected by the antitrust laws." *Malamud v. Sinclair Oil, 521 F.2d 1142, 1151-52 (6th Cir. 1975)*.

[10] The Court also pointed out that any attempt to determine the amount of such speculative damages and apportion them among possible conflicting and duplicative claims would embroil the court in complex and potentially unmanageable proceedings. Such indirect causation and speculative harm has caused the dismissal of other actions under Section 4. *See* *Eastern Auto Distributors v. Peugeot Motors of America, 573 F. Supp. 943 (E.D. Va. 1983)* (dismissing a defendant supplier's counterclaim for lost sales based on the plaintiff distributor's alleged tying arrangement which forced its dealers to sell both Peugeot and Renault automobiles).

[18]** **[*906]** Here, as in *Associated General Contractors*, the indirectness of the alleged harm and the presence of independent factors are fatal to the plaintiff's claim for damages. *Compare* *Associated General Contractors, 51 U.S.L.W. at 4146* (presence of independent factors possibly accounting for harm made action for damages inappropriate) *with* *Blue Shield of Virginia v. McCready, 457 U.S. 465 n.11, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)* (plaintiff suffered directly from the alleged conspiracy and also could "ascertain [her damages] to the penny" thereby making antitrust damages appropriate). Customers ability to obtain low priced legal services from attorneys other than the plaintiff make it impossible for the plaintiff to establish the number of potential customers who would have turned to him for legal services (and the resulting fees he would have earned) were it not for the defendants' refusal to publish the price information in his advertisement. In fact, it is entirely possible that the plaintiff may have done less business if price information for legal was published in the defendants' yellow pages. Consequently, plaintiff's claims for damages pursuant to Section **[**19]** 4 of the Clayton Act are too speculative and potentially duplicative for this case to proceed beyond the present motion to dismiss.

Finally, this Court need not decide whether the injury plaintiff alleges was proximately caused by defendants' conduct for the purpose of determining whether there is standing to sue for injunctive relief under Section 16 of the Clayton Act, *15 U.S.C. § 26*, because, as determined above, the conduct alleged in the complaint fails to support an actionable claim for violation of either *Section 1* or *2* of the Sherman Act. [11] Accordingly, plaintiff's claim for injunctive relief must also fail.

[20]** After careful consideration of the pleadings in this case, defendants' motion to dismiss for failure to state a claim, pursuant to *Rule 12(b)(6), Fed.R.Civ.P.*, will be granted and plaintiff's complaint, accordingly, dismissed.

[*none] [EDITOR'S NOTE: The following court-provided text does not appear at this cite in 596 F. Supp.]

ORDER

In accordance with the statements in the Memorandum attached hereto, it is this 29th day of October, 1984, by the United States District Court for the District of Maryland, ORDERED:

1. That defendants' motions to dismiss BE, and the same ARE, hereby GRANTED; and

2. That a copy of this Memorandum and Order be mailed to the plaintiff and counsel for the defendants.

End of Document

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[11] This Court recognizes that the standing requirements for injunctive relief under Section 16 of the Clayton Act, *15 U.S.C. § 26* are broader than those of Section 4. *State of Hawaii v. Standard Oil Co., 431 F.2d 1282, 1284-85 (9th Cir. 1970)*, *aff'd*, *405 U.S. 251, 261, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972)*. Broader standing under Section 16 is justified because of the difference between the remedies available under each section. In contrast to Section 4, Section 16 does not involve punitive and potentially disastrous judgments for treble damages and attorney's fees; neither is there the threat of duplicative recoveries. *In re Multidistrict Vehicle Air Pollution, 481 F.2d 122, 130* (9th Cir.), *cert. denied*, ***414 U.S. 1045, 94 S. Ct. 551, 38 L. Ed. 2d 336 (1973)***.

Thus, the target area approach is irrelevant to the question of standing under Section 16. *Parks v. Watson, 716 F.2d 646, 662 (9th Cir. 1983)*, citing ***City of Rohnert Park v. Harris, 601 F.2d 1040, 1044 (9th Cir. 1979)***, *cert. denied*, ***445 U.S. 961, 100 S. Ct. 1647, 64 L. Ed. 2d 236 (1980)***; *In re Multidistrict Vehicle Air Pollution, 481 F.2d at 130-31*. All that is required for standing under Section 16 is that the plaintiff show a threatened loss or injury cognizable in equity proximately resulting from the alleged antitrust violation. *See* *Parks, 716 F.2d at 662*.

Rothery Storage & Van Co. v. Atlas Van Lines, Inc.

United States District Court for the District of Columbia

October 30, 1984

Civil Action No. 83-0450

Reporter

597 F. Supp. 217 *; 1984 U.S. Dist. LEXIS 22341 **; 1984-2 Trade Cas. (CCH) P66,258

ROTHERY STORAGE & VAN CO., et al., Plaintiffs, v. ATLAS VAN LINES, INC., Defendant

Subsequent History: [1]** Revised Memorandum, November 9, 1984.

Core Terms

carrier-agents, van, shipments, Plaintiffs', carrier, deregulation, independent authority, conspiracy, lines, interstate, board of directors, anti trust law, summary judgment, pooling agreement, Sherman Act, announced, rule of reason, non-carrier, undisputed, immunity, new policy, infrastructure, ownership, entities, terminated, non-Atlas, network, separate company, per se rule, anticompetitive

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Transportation Law > Commercial Vehicles > Rates & Tariffs

Civil Procedure > ... > Summary Judgment > Opposing Materials > Memoranda in Opposition

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Clayton Act > Jurisdiction

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Business & Corporate Law > Agency Relationships > General Overview

Communications Law > Regulators > US Federal Communications Commission > Jurisdiction

Business & Corporate Compliance > ... > Sales of Goods > Title, Creditors & Good Faith Purchasers > General Overview

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Charters

Transportation Law > Carrier Duties & Liabilities > General Overview

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Rates & Tariffs

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > US Interstate Commerce Commission

HN1[] Commercial Drivers & Vehicles, Rates & Tariffs

49 U.S.C.S. § 10934(d) states that the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C.S. § 12), do not apply to discussions or agreements between a motor common carrier providing transportation of household goods subject to the jurisdiction of the Interstate Commerce Commission (commission) under subchapter II of chapter 105 of this title and its agents (whether or not an agent is also a carrier) related solely to (1) rates for the transportation of household goods under the authority of the principal carrier, (2) accessorial, terminal, storage, or other charges for services incidental to the transportation of household goods transported under the authority of the principal carrier, (3) allowances relating to transportation of household goods under the authority of the principal carrier, and (4) ownership of a motor common carrier providing transportation of household goods subject to the jurisdiction of the commission under subchapter II of chapter 105 of this title by an agent or membership on the board of directors of any such motor common carrier by an agent.49 U.S.C.S. § 10934(d) (1982).

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Charters

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Authority to Act > Contracts & Conveyances > Formation & Negotiation

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Pooling Agreements

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Duty to Provide Service

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Pooling Arrangements

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > Restraints of Trade

HN2[] Air & Space Transportation, Charters

Federal law gives special immunity from the antitrust laws to carrier-agent relationships, but only if 1) the van line and its carrier-agents enter into a "pooling agreement" that spells out the division of business, sharing of facilities, and other terms according to which the van line will allow its "agents" to compete with it, and 2) the pooling agreement meets Interstate Commerce Commission approval. Significantly, a pooling agreement may be terminable unilaterally by either a national van line or its carrier-agents, and the exercise of this option eliminates the automatic antitrust immunity that a carrier-agent relationship otherwise enjoys.

Business & Corporate Law > ... > Authority to Act > Apparent Authority > General Overview

Transportation Law > Carrier Duties & Liabilities > Damages

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > Agency Relationships > Authority to Act > General Overview

Business & Corporate Law > ... > Authority to Act > Actual Authority > General Overview

HN3[] **Authority to Act, Apparent Authority**

National van lines are expressly liable for actions committed by an agent when the agent is operating within the actual or apparent authority of its principal van line. *49 U.S.C.S. § 10934(a)*

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN4[] **Summary Judgment, Entitlement as Matter of Law**

Under *Fed. R. Civ. P. 56(c)*, a motion for summary judgment may be granted only 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. Undisputed facts and inferences to be drawn from those facts must be viewed in the light most favorable to the party opposing the motion. To support summary judgment, the record must demonstrate that the opponent would not be entitled to prevail under any circumstances. Courts have been cautioned to be especially careful about premature termination of a cause of action filed under the federal antitrust laws. Nonetheless, summary judgment may well be appropriate even in an antitrust action where a court has permitted extensive discovery and the requirements of *Rule 56(c)* have been met.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN5[] Antitrust & Trade Law, Sherman Act

In order to prevail on a claim under *§ 1* of the Sherman Act, a plaintiff must show both 1) the existence of a contract, combination or conspiracy and 2) an unreasonable restraint of trade under either the per se rule or the rule of reason, as appropriate. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

HN6[] Antitrust & Trade Law, Sherman Act

The actions of a corporation's board of directors do not constitute a conspiracy within the meaning of *§ 1* of the Sherman Act. A corporation, which can only function pursuant to the group decisions of the members of its board of directors, cannot in this fashion be found to have conspired with itself. An exception to this rule may exist, however, where individual members of the board of directors possess an independent personal stake in a particular action of the board, that is, where they act on their own behalf.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Charters

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Transportation Law > Carrier Duties & Liabilities > General Overview

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Duty to Provide Service

HN7[] Regulated Industries, Transportation

49 U.S.C.S. § 10934(d)(4) provides, in part, that the antitrust laws do not apply to discussions or agreements between a motor common carrier and its agents (whether or not an agent is also a carrier) related solely to ownership of a motor common carrier by an agent or membership on the board of directors of any such motor common carrier by an agent.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Business & Corporate Law > ... > Authority to Act > Contracts & Conveyances > Liability of Principals

Antitrust & Trade Law > Regulated Industries > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > Common Carriers

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Agency Relationships > General Overview

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Duty to Provide Service

HN8[] **Antitrust & Trade Law, Exemptions & Immunities**

49 U.S.C.S. § 10934(d) expressly allows agents and carrier-agents of a van line to serve on the van line's board of directors, participate in its deliberations and decisions, and exercise responsibility for the affairs of the principal free of the risk of antitrust liability for doing so, despite their obvious status as independent entities with at least these basic independent interests. The statute, moreover, specifically immunizes discussions and agreements regarding the ownership of motor common carriers by a van line's agents. It is intended to immunize carriers and their agents from the antitrust laws with respect to certain dealings between them.

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

Business & Corporate Law > Agency Relationships > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Duty to Provide Service

HN9[] **Regulated Industries, Transportation**

Congress appears to have expressly exempted the participation of agents and carrier-agents in the membership, deliberations, or agreements of a van-line's board of directors from the application of the antitrust laws where the subject matter of the discussions and agreements relate to the van line's policy with respect to the ownership of independent interstate authority by the van line's agents, including policies requiring change because of the business consequences of deregulation.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

The antitrust laws look to substance, not to form.

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

A finding of conspiracy under the ***antitrust law*** cannot be sustained on the basis of evidence merely "consistent" with illegal coordination between a manufacturer and its independent distributors. Rather, a plaintiff must proffer specific evidence "inconsistent" with the defense of unilaterality.

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

Business & Corporate Law > ... > Directors & Officers > Management Duties & Liabilities > General Overview

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Duty to Provide Service

Antitrust & Trade Law > Sherman Act > General Overview

Evidence > Inferences & Presumptions > General Overview

HN12[] **Communications, Sherman Act**

The mere showing of a "personal benefit" traceable to an agent on a board of directors should not suffice to trigger the "independent stake" exception under *49 U.S.C.S. § 10934*, assuming one exists, unless plaintiffs also proffer evidence showing that the personal benefit in question was inconsistent with or divergent from the board's own competitive interests. There is a longstanding presumption that the members of a corporation's board of directors are incapable of conspiring with themselves under the Sherman Act in that there is no other way that a corporation can advance its competitive interests.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN13[] **Antitrust & Trade Law, Sherman Act**

A manufacturer generally has a right to deal, or refuse to deal, with whomever it likes under the antitrust laws, as long as it does so independently.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

Antitrust & Trade Law > Clayton Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

HN14[] **Antitrust & Trade Law, Sherman Act**

A manufacturer, under the antitrust laws, 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.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Evidence > Inferences & Presumptions > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] **Practices Governed by Per Se Rule, Boycotts**

Boycotts and price-fixing schemes, when proven, have often been accorded per se treatment under the antitrust laws. Nonetheless, a per se rule is a judicial shortcut; it represents the considered judgment of courts, after considerable experience with a particular type of restraint, that the rule of reason, the normal mode of analysis, can be dispensed with. There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. A court will not indulge in this conclusive presumption lightly. Invocation of a per se rule always risks sweeping reasonable, pro-competitive activity within a general condemnation, and a court will run this risk only when it can say, on the strength of unambiguous experience, that the challenged action is a naked restraint of trade with no purpose except stifling of competition.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN16[] **Antitrust & Trade Law, Sherman Act**

Per se rules of illegality under the antitrust laws are appropriate only when they relate to conduct that is manifestly anticompetitive.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN17[] **Antitrust & Trade Law, Sherman Act**

"Considerable" and "unambiguous" experience with a practice is a necessary prerequisite for application of per se treatment under the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN18[] **Antitrust & Trade Law, Sherman Act**

Under the rule of reason, a restraint must be evaluated to determine whether it is significantly anticompetitive in purpose or effect. In making this evaluation, a court generally will be required to analyze the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the anticompetitive evils of the challenged practice must be carefully balanced against its pro-competitive virtues to ascertain whether the former outweighs the latter. A restraint is unreasonable if it has the net effect of substantially impeding competition.

Business & Corporate Law > Agency Relationships > Termination > Accomplishment of Purpose

Business & Corporate Law > Agency Relationships > General Overview

HN19[] **Termination, Accomplishment of Purpose**

Classic agency law gives a principal the prerogative of withdrawing permission for an agent to do an act if convenient to protect the principal's interests.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN20[] **Antitrust & Trade Law, Sherman Act**

One of the basic tenets of the federal antitrust laws is that they are intended to protect competition, not competitors.

Counsel: C. Jack Pearce, Washington, District of Columbia, Robert J. Gallagher, Keith I. Clearwaters, Washington, District of Columbia, Timothy J. Shearer, Washington, District of Columbia, for Plaintiffs.

James vanR. Springer, R. Bruce Holcomb, Washington, District of Columbia, for Defendant.

Judges: Louis F. Oberdorfer, District Judge.

Opinion by: OBERDORFER

Opinion

[*219] MEMORANDUM

This is a private antitrust action brought pursuant to *Section 1* of the Sherman Act, *15 U.S.C. § 1 (1982)*, against Atlas Van Lines, Inc. ("Atlas"), a nationwide van line company. [1] Plaintiffs are ten present and former agents of

[1] In their complaint, filed February 17, 1983, plaintiffs also named the Interstate Commerce Commission ("ICC") as a party-defendant. Plaintiffs requested -- as a predicate to certain further relief against the ICC -- that the Court compel the ICC to reach a decision on a related matter pending before the agency. In light of intervening developments and upon motion by the ICC, the

Atlas. They challenge an Atlas policy -- made effective in August, 1983 -- under which Atlas announced that it would terminate its agency relationship with any agent that maintained independent operations in the interstate moving business unless the agent transferred its independent authority to do so to a separate and distinct (albeit affiliated) company. The case is presently before the Court both on defendant's motion for summary judgment and on plaintiffs' motion for partial summary judgment as to liability. After careful consideration **[**2]** of undisputed facts developed after extensive discovery and set out pursuant to *Fed. R. Civ. P. 56* and Local Rule 1-9(h), as well as the arguments advanced by the parties in their memoranda and at oral argument, the Court concludes that, for the reasons set forth below, plaintiffs' motion for partial summary judgment as to lability must be denied, and defendant's motion for summary judgment must be granted.

I.

This lawsuit involves, in essence, the legality of Atlas's response to the **[**3]** regulatory and commercial changes resulting from the deregulation of the household goods moving industry in 1980. A brief overview of Atlas's methods of operation and of the recent changes in the industry is necessary to an understanding of the nature of the claims at issue.

Defendant Atlas Van Lines holds authority from the Interstate Commerce Commission ("ICC") to transport goods from state to state on a nationwide basis. Statement of Material Undisputed Facts in Support of Plaintiffs' Motion for Partial Summary **[*220]** Judgment As To Liability para. II-A (hereinafter "PSF" ["Plaintiffs' Statement of Facts"]); Defendant's Response to Plaintiffs' Statement of Material Undisputed Facts para. II-A (hereinafter "DRPF" ["Defendant's Response to Plaintiffs' Facts"]); " Defendant's Statement of Material Facts As To Which There Is No Genuine Issue para. 1 (hereinafter "DSF" ["Defendant's Statement of Facts "]); Plaintiffs' Statement of Genuine Issues para. 1 (hereinafter "PSGI"). [2] **[**6]** As has been typical of the operation of other national van lines, Atlas exercises this authority primarily through a group of "agent" moving companies around the country. These "agent" companies are **[**4]** independent entities that have entered into standardized "Agency Agreements" with Atlas to carry out interstate shipments under Atlas's authority, PSF paras. II-C, V-P, DRSF paras. II-C, V-P, Plaintiffs' Appendix I (hereinafter "Plaintiffs' App."), and that agree -- in making Atlas shipments -- to abide by the operating procedures, painting and maintenance standards, and uniform rates, *inter alia*, provided for by the Agency Agreement. *See* PSF paras. V-O - V-X; DRPF paras. V-O - V-X; DSF paras. 2-13; PSGI para. 2-13. In addition, representatives of some of Atlas's agent companies sit on the Atlas board of directors, PSF para. II-K, V-A; DRPF paras. II-K, V-A -- a practice that has been typical in the industry during many years of ICC oversight, *see* S. Rep. No. 497, 96th Cong., 1st Sess. 8 (1979); H. Rep. No. 1372, 96th Cong., 1st Sess. 10 (1979), and that won express legislative immunity from the federal antitrust laws -- as described below -- with the enactment of *49 U.S.C. § 10934(d)* in 1980. [3] Nonetheless, the agent companies **[*221]** in the field remain wholly independent from Atlas

Court on May 26, 1983 dismissed the action against the ICC as moot. *See* Order of May 26, 1983. The ICC is thus no longer a defendant in this suit.

[2] Plaintiffs' "Statement of Genuine Issues" purports to dispute a number of material facts asserted by defendant. Close comparison of plaintiffs' assertions discloses that while many of them challenge the implications or characterizations of defendant's statements, they do not effectively traverse them so as to put material facts into genuine dispute. For example, plaintiffs state that they cannot "accept[] as undisputed" the statement by defendant that "Atlas headquarters directs and coordinates [certain] agent activities." PSGI para. 4, at 10-11. Plaintiffs, thus, object that Atlas does not "direct" the performance of origin or destination services, *in any direct supervisory sense." Id*. (emphasis added). As suggested by the qualification at the end of the quotation, though, plaintiffs fail to dispute that Atlas does indeed have the authority to set the general terms according to which Atlas agents perform these functions for Atlas. And indeed, plaintiffs concede that "Atlas does coordinate the movement of trucks, to a substantial degree." *Id*. at 11. Throughout this memorandum, in citing to corresponding portions of plaintiffs' and defendant's factual pleadings, the Court relies on the assertions therein to the extent that they reveal areas of agreement as described above, while disregarding any specific facts as to which the parties have succeeded in raising a genuine issue.

[3] The validity of the Atlas policy at issue in this case involves consideration of two separate statutory immunity provisions: *49 U.S.C. §§ 11341-11342 (1982)*, and *49 U.S.C. § 10934(d) (1982)*. The first of these provisions, *49 U.S.C. §§ 11341-11342*, has relevance to the van line practice, described *infra* at slip op. pages 5-9, of allowing some agents (referred to as "carrier-agents") to possess and exercise their own independent interstate ICC authority in addition to acting as agents for the van line.

itself and interact with Atlas in accordance with standard contractual arrangements. **[**5]** PSF para. V-P, DRPF para. V-P.

[7]** It has also been common in the industry, in addition, for many agent companies to hold their own, separate interstate authority from the ICC. *E.g.*, PSF paras. I-E, I-G; DRPF paras. I-E, I-G; *see Practices of Motor Common Carriers of Household Goods (Agency Relationships)*, 115 M.C.C. 628, 629 (1972) (hereinafter referred to as "*Practices*"). Agent companies that hold such independent authority in their own right are termed "carrier-agents"; agents that hold no such independent authority are termed "non-carrier" agents. *Practices, supra*, at 629. While a non-carrier agent accepts shipments solely as an agent for the principal van line that it serves, a carrier-agent has more flexibility. It may, like a non-carrier agent, accept shipments for carriage on the account of its principal carrier. But a carrier-agent may also accept certain shipments for carriage on its own account -- rather than that of the principal carrier for which it serves as an agent -- when the distance of the shipment does not exceed the geographic range of its independent authority and when other factors render it profitable for the carrier-agent to do so. *E.g*. PSF paras. V-H - V-J; DRPF paras. **[**8]** V-H - V-J; *see Practices, supra*, at 629. A carrier-agent, in this fashion, simultaneously functions both as an agent of the principal van line that it serves, and, on certain shipments, as one of the van line's competitors, in that it may shift to its independent account certain shipments that might otherwise have been carried on the van line's account. *E.g*. PSF paras. V-G, V-I; DSF para. 22; PSGI para. 22; *see Practices, supra*, at 629. Some carrier-agents, moreover, enjoy the distinct benefit of using van line personnel, van line uniforms and equipment (with van line insignia), and van line origin and destination services even on shipments carried out on their own, independent authority, *e.g.*, DSF paras. 24-29; PSGI paras. 24-29; *see* Plaintiffs' App. G, and thus can avoid the costs of building the business infrastructure necessary to exercising their independent carrier authority effectively. *See* DSF para. 27; PSGI para. 27. Atlas carrier-agents, for example, enjoyed this latter benefit prior to the events at issue in this lawsuit. DSF paras. 24-29; PSGI paras. 24-29.

HN2[] Federal law has long given special immunity from the antitrust laws to carrier-agent relationships, **[**9]** but only if 1) the van line and its carrier-agents enter into a "pooling agreement" that spells out the division of business, sharing of facilities, and other terms according to which the van line will allow its "agents" to compete with it, and 2) the pooling agreement meets ICC approval. *See* *49 U.S.C. §§ 11341-11342 (1982)*; *Practices, supra*, at 633. Significantly, a pooling agreement may be terminable unilaterally by either the national van line or its carrier-agents, and the exercise of this option eliminates the automatic antitrust immunity that a carrier-agent relationship otherwise enjoys. *See* DSF para. 24; PSGI para. 24. Atlas entered into a pooling agreement in 1957, which set the terms according to which, thereafter, it allowed its agents to acquire and operate their own independent ICC

Coordination between a van line and its carrier-agents has, under *49 U.S.C. §§ 11341-11342*, long been immune from the federal antitrust laws provided that the van line and its carrier-agents enter into a "pooling agreement" meeting ICC approval. *See infra* at slip op. at page 7. There is no dispute in this case as to the immunity provided by this provision.

The second provision, *49 U.S.C. § 10934(d)*, was enacted in 1980 as part of Congress's deregulation of the household goods moving industry, *see* Pub. L. 96-454, § 5(a)(1), 94 Stat. 2013 (1980), and it is this provision that addresses, *inter alia*, the membership on a van line's board of directors of the van line's own agents. Plaintiffs' do not dispute that, under the statute, the fact of such membership is immune from antitrust challenge. *See* Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment at 18. Yet the further scope of this immunity provision is disputed, and is discussed in detail *infra* at slip op. pages 19-23, 27. ***HN1***[] The provision reads, in its entirety:

> The antitrust laws, as defined in the first section of the Clayton Act (*15 U.S.C. 12*), do not apply to discussions or agreements between a motor common carrier providing transportation of household goods subject to the jurisdiction of the [Interstate Commerce] Commission under subchapter II of chapter 105 of this title and its agents (whether or not an agent is also a carrier) related solely to (1) rates for the transportation of household goods under the authority of the principal carrier, (2) accessorial, terminal, storage, or other charges for services incidental to the transportation of household goods transported under the authority of the principal carrier, (3) allowances relating to transportation of household goods under the authority of the principal carrier, and (4) ownership of a motor common carrier providing transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title by an agent or membership on the board of directors of any such motor common carrier by an agent.

49 U.S.C. § 10934(d) (1982).

authority. DSF para. 24; PSGI para. 24. Other van lines, by contrast, have declined to enter into pooling agreements at all, and indeed have traditionally chosen to employ only non-carrier agents. *E.g.*, PSF para. III-I; DRSF para. III-I. Representatives of carrier-agents -- where the van line uses them -- may sit on a van line's board of directors just as do representatives **[**10]** of non-carrier agents, both pursuant to prior practice, *e.g.*, PSF para. V-A; DRPF para. V-A, and under the more recently enacted **[*222]** federal antitrust exemption contained in *49 U.S.C. § 10934(d) (1982)*. [4]

Finally, it is a central feature of the van line industry that agents within a van line's infrastructure often must agree to provide their services only to that particular van line and to other agent companies within the van line's network. *See, e.g.*, PSF para. V-Q; DRPF para. V-Q; Plaintiffs' App. G.As in many other industries, "exclusive dealing" is a common method of operation. *See* Plaintiffs' App. G, at 1-3. For van lines that have exclusive dealing arrangements and that utilize only non-carrier agents, thus, only shipments on the van line's own account are carried within the van line's infrastructure. For van lines that have exclusive dealing arrangements and that use carrier-agents as well as non-carrier agents, however, non-van line shipments originating **[**11]** from the carrier-agents' independent operations may be carried within the van line's infrastructure as well. The establishment of such arrangements for the benefit of a van line's carrier-agents is a matter of voluntary accommodation on the part of the van line -- though once established, it may be governed by the van line's ICC-certified pooling agreement. *See, e.g.*, DSF para. 24; PSGI para. 24; *see Practices, supra*, at 633. Nonetheless, almost no van line, apparently, allows the agents within its network regularly to handle the traffic of any company that is not also one of the van lines' agents. *E.g.*, DSF para. 22; PSGI para. 22; *see* Plaintiffs' App. G. [5]

[12]** Prior to the deregulation of the moving industry beginning around 1979, the extent to which agents could and did make use of independent ICC authority -- if their van lines allowed them to do so at all -- was limited. DSF para. 23; PSGI para. 23. First, then-existing ICC regulations made it very difficult for non-carrier agents to obtain, or for existing carrier-agents to augment, their own interstate authority. DSF para. 35; PSGI para. 35. Second, even for agents that did possess such authority, it was usually -- due to ICC regulations -- of limited geographic scope. DSF para. 35; PSGI para. 35. Most important, the ICC required that carrier-agents use the same rates for their "independent carrier" shipments as for their "agency" shipments -- that is, price competition between van lines and the independent operations of their carrier-agents was expressly barred. DSF para. 36; PSGI para. 36.

The advent of deregulation in the moving industry represented a dramatic change in these business circumstances. With deregulation, agents could obtain independent interstate authority or expand existing interstate authority quite easily. DSF para. 35; PSGI para. 35. By the same token, independent **[**13]** carriers and local moving companies wishing to offer interstate service could readily obtain their own interstate authority rather than associating with a national van line in order to do so. Also, the ICC no longer imposed narrow geographic limits on the scope of such new authority. Agents, as well as independent carriers, could obtain authority allowing them to carry goods on their own account not only locally, but regionally or even nationally as well. *See* DSF para. 35; PSGI para. 35. Moreover, and perhaps most significantly, the ICC abandoned the rule that carrier-agents were required to charge identical rates on their agency and non-agency shipments. DSF para. 36; PSGI para. 36.

Thus, as a result of deregulation, Atlas faced the prospect of potential Atlas shipments being shifted to independent carrier-agent accounts 1) by many more agents than before, 2) on long distance hauls as well as local hauls, and 3) with greater frequency due to newly authorized price competition from its carrier-agents in their **[*223]** independent capacities. *See* PSF paras. VI-V - VI-X; DRPF paras. VI-V - VI-X. Atlas carrier-agents, nevertheless, continued to reap a substantial benefit **[**14]** from the use of the Atlas infrastructure -- including Atlas-leased trucks, Atlas-

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[4] *See supra* note 3.

[5] Agent operations for handling government or military traffic or exercising freight forwarding authority as referred to at PSGI para. 22 constitute separate categories of business carried out under separate ICC authorities. *See Atlas Van Lines, Inc., et al. - Pooling Application*, ICC Docket No. MC-F-15004 at 1-5 (July 15, 1983) (Defendant's Evidentiary and Other Materials 17). While such shipments may also be carried within a van line's infrastructure, operations under these ancillary authorities are not affected by the Atlas policy being challenged in this suit and thus are not at issue.

trained personnel, Atlas uniforms, and the extremely valuable Atlas origin and destination network -- on their own, independent, non-Atlas hauls. *See* DSF paras. 24-29; PSGI paras. 24-29. After deregulation, moreover, this practice threatened to saddle Atlas with significant liability problems: as part of the deregulation of the industry, Congress made ***HN3***[] national van lines expressly liable for actions committed by an agent when the agent is operating "within the actual or *apparent* authority" of its principal van line. *49 U.S.C. § 10934(a) (1982)*. Thus, to the extent that the independent shipments of Atlas's carrier-agents were often carried out with many of the trappings of an official Atlas shipment, the new liability provision placed Atlas at an enhanced, statutory risk of being held legally responsible for those non-Atlas shipments. *See* DSF paras. 31-34; PSGI paras. 31-34.

Atlas initiated several policies in anticipation of and in response to the changes accompanying deregulation, though it aborted each of these initiatives in turn until it finally settled on the policy at issue in this suit. **[**15]** [6] **[**17]** On February 11, 1982, Atlas announced that it planned to exercise its right to cancel its pooling agreement, and that it would terminate its relationship with any agent company [7] that continued to operate an independent, interstate authority for its own account in addition to serving as an Atlas agent. PSF paras. VI-K - VI-P; DRPF paras. VI-K - VI-P. In effect, the policy meant that Atlas would thenceforth deal only with "non-carrier" agents. PSF para. VI-N; DRPF para. VI-N. Atlas indicated that its existing carrier-agents could retain their independent authority without being terminated as Atlas agents only if they transferred that authority to a separate corporation to be operated under a new and distinct name. PSF paras. VI-N - VI-P; DRPF paras. VI-N - VI-P; DSF paras. 52-53; PSGI paras. 52-53. Under the policy, the separate company could remain legally "affiliated" with the agency company -- that is, both companies could remain under common ownership. However, the separate company would be outside the Atlas network: it would generally not have access to Atlas origin and destination services provided by other Atlas agent companies around the country, PSF para. VI-M; DRPF para. **[**16]** VI-M, in that Atlas agent companies were contractually barred from providing such services for the shipments of non-Atlas companies to the extent that doing so would "infringe upon the exclusivity of representation which is a part of the agency agreement." PSF para. VI-N; DRPF para. VI-N.

[*224] Announcement of the new Atlas policy and its imminent implementation predictably triggered a challenge before the Interstate Commerce Commission. On August 16, 1982, in response to this challenge, the ICC *inter alia* affirmed Atlas's right to withdraw from its pooling agreement, holding that "nothing in [the] existing modified pooling agreement precludes withdrawal by any party from the agreement." *Atlas Van Lines, Inc - Pooling*, ICC Docket No. MC-F-14784, Finance Docket No. 29972 at 3 (August 16, 1982) (Appendix A to Second Amended Complaint). On February 17, 1983, moreover, the ICC announced that the new arrangement proposed by Atlas did not require a

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[6] *See infra* note 22. The successive initiatives were:

a) *January 27, 1979*. Atlas began to require that carrier-agents pay to Atlas one percent of their revenues from the use of their independent authorities, in compensation for the benefits they received from Atlas in aid of their independent operations. This requirement remained in effect until the last quarter of 1979. PSF paras. VI-A - VI-B; DRPF paras. VI-A - VI-B.

b) *January 27, 1979*. Atlas announced a policy -- effective immediately -- prohibiting an agent from acquiring any new interstate authority or applying to add to his present interstate authority. Atlas states that despite its threats, it never enforced this policy, and publicly abandoned the policy by November, 1980. PSF paras. VI-A, VI-C - VI-D; DRPF paras. VI-A, VI-C - VI-D; DSF para. 45; PSGI para. 45.

c) *November 1, 1980*. Atlas approved a tentative plan to purchase the independent authorities of its carrier-agents. The plan was soon abandoned without implementation. PSF paras. VI-F - VI-G; DRPF paras. VI-F - VI-G.

d) *March 20, 1981*. Atlas announced a plan that allowed agents freely to hold, increase, and use independent authority (without necessarily setting up a separate carrier company), but that banned any use of Atlas agents for origin and destination services in connection with shipments under such independent authority. The plan was implemented on May 1, 1981. After ICC objection that the plan required a new pooling agreement, the plan was abandoned on May 21, 1981. PSF paras. VI-H - VI-J; DRPF paras. VI-H - VI-J.

[7] Atlas's Agency Agreements state that they are terminable by either party upon thirty days notice "without cause." PSF para. V-Q; DRPF V-Q; Plaintiffs' App. I.

new pooling agreement: [8] the ICC held that because the independent authority to be retained by the agents would be transferred to an entirely separate competitive entity outside of the Atlas network, no "pooling" between competitive carriers would be taking place **[**18]** and thus no pooling agreement was necessary. *Atlas Van Lines, Inc. - Pooling*, ICC Docket No. MC-F-14784, Finance Docket No. 29972 at 8-11 (February 17, 1983) (Appendix B to Answer to Second Amended Complaint). [9]

Soon after Atlas announced its new policy, it contacted all of its agents by mail and asked them to respond by signing a form indicating whether or not they would comply with the new requirements for Atlas agency. PSF paras. VI-S, VI-U; DRPF paras. VI-S, VI-U. Most if not all of Atlas's agents eventually did respond, and the policy went **[**19]** into effect on August 18, 1983. At the time the policy was announced, Atlas had approximately 490 agents, 91 of whom were carrier-agents. Following implementation of the new policy, 48 of the carrier-agents shifted their independent authority to separate corporations, 20 gave up their authority entirely but remained as Atlas agents, 12 were terminated by Atlas for failure to comply with the policy, and 11 chose to leave Atlas either to operate on their own or to become carrier-agents for one of the other national carriers. DSF para. 82; PSGI para. 82. In February, 1984, Atlas imposed on its reconstituted agents an enhanced system of fines to enforce its prohibition against shipment of non-Atlas hauls on Atlas-leased trucks, given that under the new arrangement, as noted, the use of Atlas's service and equipment infrastructure was intended to become restricted to Atlas shipments alone. *See* PSF para. VI-AA; DRPF para. VI-AA; Plaintiffs' Motion to Further Supplement Summary Judgment Pleadings, Attachment A (February 24, 1984).

Plaintiffs argue that the institution of the new Atlas policy represents a "boycott" of those Atlas agent companies that failed to comply, and that the Atlas **[**20]** policy constitutes price-fixing because it is aimed at preventing price-cutting by carrier agents in their independent capacities. As such, plaintiffs argue that Atlas's policy should be treated as a *per se* violation of the antitrust laws, and that even if the policy does not merit *per se* treatment, it nevertheless should be condemned under the rule of reason. Defendant responds by arguing that undisputed facts establish that 1) the institution of the policy is statutorily immune from the antitrust laws under *49 U.S.C. 10934(d)*, 2) *per se* treatment, as urged by the plaintiffs, is inappropriate, and 3) no violation under the rule of reason can be shown.

II.

It is necessary at the outset to determine whether undisputed material facts make it possible to resolve this matter on the pending cross-motions for summary judgment. ***HN4***[] Under *Fed. R. Civ. P. 56(c)*, a motion for summary judgment may be granted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled **[*225]** to a judgment as a matter of law." It is well established that the undisputed facts and "inferences to be drawn" from those facts "must be viewed in the light most favorable **[**21]** to the party opposing the motion." *United States v. Diebold, Inc., 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962)* (per curiam). To support summary judgment, the record "must demonstrate that [the] opponent 'would not be entitled to [prevail] under any circumstances. '" *National Ass'n of Governmental Employees v. Campbell, 192 U.S. App. D.C. 369, 593 F.2d 1023, 1027 (D.C. Cir. 1978)* (quoting *Semaan v. Mumford, 118 U.S. App. D.C. 282, 335 F.2d 704, 705 n.2 (D.C. Cir. 1964))*.

Courts have been cautioned to be especially careful about premature termination of a cause of action filed under the federal antitrust laws. *Poller v. C.B.S., Inc., 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*. Nonetheless, summary judgment may well be appropriate even in an antitrust action where a court has permitted extensive discovery and the requirements of *Fed. R. Civ. P. 56(c)* have been met. *See First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289-90, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)*. In this case, both

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[8] *Compare supra* note 6, paragraph (d), where the ICC required a new pooling agreement.

[9] Plaintiffs sought to have this determination reviewed in the Court of Appeals for this Circuit, but the appeal was dismissed by agreement without the Court of Appeals having ever reached the merits. *See Rothery Storage & Van Co. v. Interstate Commerce Commission*, Agreement That Proceedings Be Dismissed (D.C. Cir. Nos. 83-1210, 83-1361) (filed February 6, 1984).

parties have moved for summary judgment, and their respective statements of undisputed material fact demonstrate that plaintiffs and **[**22]** defendant are in substantial agreement on the essential facts making up the core of this case. [10] On the basis of these facts, the Court concludes that the motions for summary judgment are ripe for disposition.

III.

HN5[] In order to prevail on a claim under Section 1 of the Sherman Act, a plaintiff must show both 1) the existence of a "contract, combination . . . or conspiracy," and 2) an unreasonable restraint of trade under either the *per se* rule or the rule of reason, as appropriate. Title *15 U.S.C. § 1 (1982)*; *see* ABA ***Antitrust Law*** *Developments* at 2 (2d ed. 1984). The undisputed facts demonstrate that plaintiffs in this action cannot meet either of these criteria.

A. Conspiracy.

Plaintiffs argue that a conspiracy to effectuate the Atlas policy in question existed 1) among the members of the Atlas board of directors, who voted to institute the policy, and 2) between Atlas and its agents in the field, who responded to Atlas's request for an indication of whether the agents **[**23]** would comply with Atlas's demands.

As to the alleged conspiracy among the members of the Atlas board of directors, it is firmly established that **HN6**[] the actions of a corporation's board of directors do not constitute a conspiracy within the meaning of Sherman Act § 1. *See* *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 104 S. Ct. 2731, 2741 n.15, 81 L. Ed. 2d 628 (1984)*; *Harvey v. Fearless Farris Wholesale, 589 F.2d 451, 455 n.7 (9th Cir. 1979)*. A corporation, which can only function pursuant to the group decisions of the members of its board of directors, cannot in this fashion be found to have conspired with itself. *See* *Nelson Radio & Supply, Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952)*, *cert. denied*, *345 U.S. 925, 97 L. Ed. 1356, 73 S. Ct. 783 (1953)*. An exception to this rule may exist, however, where individual members of the board of directors possess an independent personal stake in a particular action of the board, that is, where they act "on their own behalf." *Copperweld, supra*, at n.15; *accord* *Smith v. Northern Michigan Hospitals, Inc., 703 F.2d 942, 950 (6th Cir. 1983)*. Plaintiffs attempt to invoke this exception on the ground **[**24]** that Atlas's board of directors included the executives of some of Atlas's own agents and carrier-agents, which are separate corporate entities, independent from Atlas and from each other; plaintiffs argue that the new Atlas policies would necessarily affect both the Atlas and non-Atlas business potential of these separate companies in some fashion and thus give the agent companies on the board an **[*226]** independent stake in whether the policy was adopted.

In an effort to illustrate and substantiate this claim, plaintiffs allege more specifically that one non-carrier agent represented on the board received a 2% royalty from Atlas for every shipment carried on Atlas's account within a certain geographic area, and thus stood to benefit individually from the adoption of the new policy because the new policy would predictably cause tonnage previously carried on the independent accounts of Atlas's carrier-agents to be shifted to Atlas's own account. Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment, at 10-12. Plaintiffs also observe that at least one carrier-agent represented on the board subsequently sought to benefit from the policy by competing more **[**25]** vigorously for the business of an agent that was experiencing difficulty complying with the new Atlas policy. *Id*. at 8-10. Thus, plaintiffs argue that in voting for the Atlas policy at issue, the executives of Atlas's agents and carrier-agents who served on Atlas's board had a sufficiently independent stake to render their participation in the decision a conspiracy within the meaning of the Sherman Act.

There exist two, independently sufficient grounds for rejecting plaintiff's claim. The first is that even if the allegedly conflicting interests of some directors sufficed to trigger the "personal stake" exception, Congress has provided a special exemption from the antitrust laws that would preclude liability on account of the alleged agreement in question. Title **HN7**[] *49 U.S.C. § 10934* provides, in pertinent part, that

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[10] *See supra* note 2.

> d) The antitrust laws . . . do not apply to discussions or agreements between a motor common carrier . . . and its agents (whether or not an agent is also a carrier) related solely to . . . (4) *ownership of a motor common carrier . . . by an agent or membership on the board of directors of any such motor common carrier by an agent*.

(emphasis added). **[**26]** Defendant acknowledges that the agent companies represented on the board are separate entities from each other and from Atlas. Thus, the non-carrier and carrier-agents alike presumably possess at least some degree of interest in the success of their own companies, which on occasion may diverge from those of Atlas in general and other Atlas agents and carrier-agents individually. However, *49 U.S.C. 10934(d)* does not retain any "personal stake" exception. Rather ***HN8***[] it expressly allows agents and carrier-agents of a van line to serve on the van line's board of directors, participate in its deliberations and decisions, and exercise responsibility for the affairs of the principal free of the risk of antitrust lability for doing so, despite their obvious status as independent entities with at least these basic independent interests. *See infra* note 11. The statute, moreover, specifically immunizes "discussions and agreements" regarding the "ownership of motor common carriers" by a van line's agents. The legislative history of this provision clarifies that it was intended to "immunize carriers and their agents from the antitrust laws with respect to certain dealings between them." S. Rep. **[**27]** No. 497, 96th Cong., 1st Sess. 8 (1979). [11] Congress's aim, in particular, was to

> **[*227]** "assure[] that discussions between a principal carrier and its agents related solely to [*inter alia*] . . . pooling or divisions between the principal carrier and its agents . . . and ownership of a principal carrier by an agent . . . are not discussions that would be in violation of the antitrust laws."

S. Rep. No. 497, 96th Cong., 1st Sess. 17 (1979). Discussion, voting, and agreement within the board on a policy announcing the terms that are to govern such ownership as well as the policy's implementation -- as, it is undisputed, occurred in this case -- seem to fall squarely within the language and intent of this statutory exemption. The exemption provision, it must be noted, was enacted into law as an explicit component of Congress's deregulation package. Thus, Congress may fairly be understood as anticipating discussions and agreements after deregulation which addressed adjustments of the pre-existing relationships to the new business environment. The

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[11] The relevant Senate Report language reads in full:

> There is also a provision in the act that immunizes carriers and their agents from the antitrust laws with respect to certain dealings between them. *This section is needed in order to permit the continued relationships developed and approved over the years of certain van line companies*. In some cases, van line companies are composed and owned by agents who themselves are carriers within limited geographical areas. In some cases, the agents, as carriers themselves, have independent authority to operate in areas in which the principal carrier also may operate. Accordingly, in the absence of immunity, there could be some problems concerning immunity from the antitrust laws. The bill merely permits existing relationships to continue. . . .

S. Rep. 497, 96th Cong., 1st Sess. 8 (1979) (emphasis supplied).

Analogous language in the House Report on this legislation reads:

> New *section 10934* also contains a provision which immunizes from the antitrust laws certain discussions exercise [sic] agreements between carriers and their agents related to rates, charges, and allowances for transportation provided under the authority of the carriers. Further, such discussions and *agreements related to the ownership of a carrier by an agent or membership on the carrier's board of directors by an agent are immune*. The purpose of this provision is to allow the continuation of certain relationships between carriers and agents which have been established over the years. In some cases, the carriers are composed and owned by agents who themselves are carriers within limited geographical areas. In other cases, the agents, as carriers themselves, have independent authority to operate in areas in which the principal carrier operates. These relationships could be jeopardized in the absence of antitrust immunity. It is important to note that these exemptions are narrow ones. Specifically, the immunity provided by subsections (d) (1)-(3) applies only to discussions or agreements related to rates, charges, and allowances offered on traffic carried under the authority of the principal carrier. Similarly, subsection (d)(4) provides only a limited exemption. It does not exempt from the antitrust laws such things as anticompetitive mergers.

H. Rep. 1372, 96th Congress, 1st Sess. at 10 (1979) (emphasis added).

material discussions and agreements at issue in this case related solely to whether "pooling" between Atlas and **[**28]** its agents would continue after deregulation, and, if not, to how the ownership of a principal carrier by an agent could be accomplished. Thus, the claim that the actions of the Atlas board of directors in this matter constitute a conspiracy within the meaning of the Sherman Act must be rejected. ***HN9***[] Congress appears to have expressly exempted the participation of agents and carrier-agents in the membership, deliberations, or agreements of a van-line's board of directors from the application of the antitrust laws where, as here, the subject matter of the discussions and agreements relates to the van line's policy with respect to the ownership of independent interstate authority by the van line's agents, including policies requiring change because of the business consequences of deregulation.

[29]** Plaintiffs argue that the statutory immunity works only in one direction: i.e., that *§ 10934(d)* immunizes decisions *allowing* agents to acquire independent authority and *become* carrier-agents, but that it does not immunize a decision *abolishing* an existing carrier-agent arrangement. Statement of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment As To Liability at 12-14. The Court is well aware that Congress sought to ensure that carrier-agent arrangements would not be prohibited as a result of deregulation. However, Congress did not command that they be preserved, nor prohibit their abandonment. Under plaintiffs' view of *§ 10934(d)*, national van lines that prior to deregulation had permitted their agents to operate as carrier-agents would essentially be locked into that arrangement, while those that had not allowed their agents to obtain independent authority from the ICC would presumably be free to continue that policy. Yet there is nothing in the legislative history to support such an arbitrary result; indeed, the legislative history appears, if anything, to reaffirm the right of a van line to enforce traditional agency standards **[**30]** of loyalty and **[*228]** fiduciary duty upon its agents, as discussed below, and thus plaintiffs' argument must be rejected. *See infra* at slip op. pages 34-35 & note 17.

Alternatively, plaintiffs' effort to establish that the actions of the Atlas board of directors constituted a conspiracy within the meaning and scope of the Sherman Act must also fail in that -- even apart from the availability of statutory immunity -- plaintiffs do not proffer evidence or demonstrate a reasonable prospect that they could proffer or prove specific facts sufficient to invoke the "personal stake" exception.

HN10[] The antitrust laws look to substance, not to form. As noted, it may be inferred that each agent on the Atlas board of directors may well possess *some* independent interest in its own success apart from that of Atlas or its fellow agents, and that the benefits and detriments of the new policy may well accrue to each of them in a possibly distinct way. Yet other courts have observed that as long as employees or officers of a corporation have acted in accordance with their responsibility and authority to advance the interests of the corporation they serve -- and where plaintiffs have failed **[**31]** to proffer specific facts to the contrary -- no conspiracy within the meaning of the Sherman Act can be found. *See* *Green v. Associated Milk Producers, Inc., 692 F.2d 1153, 1156-57 (8th Cir. 1982)*; *Nelson Radio & Supply Co. v. Motorola, supra, at 914*. In the leading case supporting the existence of a "personal stake" exception, the personal interest in question was divergent from and possibly inconsistent with the corporate officer's responsibilities toward the corporation that the officer served. *See* *Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391, 399-400 (4th Cir. 1974)* (cited in *Copperweld, supra, at 2741 n.15*). In *Greenville*, the plaintiff alleged the existence of a conspiracy between a newspaper and the newspaper's own president to eliminate the plaintiff from the local newspaper advertising market. The Court held that a sufficient "personal stake" was alleged in that the president held a direct financial interest in yet another local newspaper that would benefit from the increased advertising that *it too* would gain as a result of the plaintiff's elimination. A newspaper president's interest in a completely unrelated paper is, on its face, **[**32]** wholly divergent from and possibly inconsistent with the president's presumed responsibilities toward the newspaper of which he is president. In the instant case, by contrast, the separate agent companies are part and parcel of Atlas's own network. Atlas's success is to a large extent dependent upon -- rather than divergent from or inconsistent with -- the success of its agent companies, either individually or as a group. And after voluminous discovery, plaintiffs have failed to proffer any facts showing that the agent and carrier-agent votes on the Atlas policy were grounded in interests that were inconsistent with or divergent from the overall best interests of Atlas itself. [12] The "personal **[*229]** benefits" alleged -- increased royalties due to increased Atlas traffic, and increased bases for competition with other Atlas agents -- are wholly consistent with the unitary interests of Atlas and its agents to build a strong Atlas system. A stockholder/director of a company, for example, does not hold an impermissible personal benefit or act "on his own behalf" simply because his effort to advance the interests of the corporation would increase the value of his stock interest and **[**33]** the dividends paid to him. Here, similarly, careful evaluation of the facts proffered by plaintiff shows only that any advantage to the stockholder/director/agent was merely incidental to the advantage to the corporation, rather that inconsistent with or divergent from Atlas interests or with the Atlas agent/directors' responsibilities toward Atlas. *See also Card v. National Life Insurance, 603 F.2d 828, 834 (10th Cir. 1979)*. After considerable discovery, plaintiffs have not shown any reasonable possibility of proving otherwise. Plaintiffs, therefore, have failed to demonstrate any likelihood of proving the existence of a conspiracy within the Atlas board of directors or between the board and Atlas itself, for this reason as well as for the statutory immunity ground noted previously.

[34]** As to the alleged conspiracy between Atlas and its agents in the field, plaintiffs rely heavily on the fact that, soon after announcing its new policy, Atlas requested that its agents respond by indicating whether they would comply with the policy's terms. Plaintiffs contend that this communication represents negotiation or agreement, and as such satisfies the "conspiracy" requirement of their Sherman Act *§ 1* claim.

Again, there are two reasons for rejecting plaintiffs' claim. First, even if Atlas's communication with its agents did constitute an "agreement," such activity appears also to be immunized from the antitrust laws under *49 U.S.C. § 10934(d)*. As noted, that provision expressly immunizes "discussions and agreements" between a van line and its agents relating to "ownership of a carrier by an agent." Atlas's effort to determine the intentions of its agent." Atlas's effort to determine the intentions of its agents in response to the announcement of its change in policy regarding the ownership of independent carrier authority by its agents falls squarely within the language and intent of the statutory exemption. *See supra* pages slip op. at 19-23.

Alternatively, even apart **[**35]** from the availability of such statutory immunity, plaintiffs have not proffered facts sufficient to establish a vertical conspiracy. Plaintiffs have not demonstrated, nor does it appear that they can demonstrate, that Atlas's actions amounted to anything other than the unilateral announcement of a policy change and its subsequent implementation. The Supreme Court, in its last term, reaffirmed that ***HN13***[] "[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." *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775*

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[12] The insistence on such a showing is further supported by principles recently set forth by the Supreme Court's decisions in *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*, and *Copperweld, supra.* In *Monsanto*, the Court indicated that ***HN11***[] a finding of conspiracy could not be sustained on the basis of evidence merely "consistent" with illegal coordination between a manufacturer and its independent distributors. Rather, a plaintiff must proffer specific evidence "inconsistent" with the defense of unilaterality. *Monsanto, supra, at 1473*. An analogous distinction provided the basis of the decision in *Copperweld*, where the Court rejected the proposition that a corporation can conspire with its separately incorporated but wholly owned subsidiary. *Copperweld, supra, at 2742-45*. The Court observed that "Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition," *id. at 2741*, or, in other words, that the challenged behavior was, by itself, just as "consistent" with the "effort to compete," legitimately, as it was with the "effort to stifle competition." The Court thus seems to suggest that in such circumstances, the antitrust laws can only be triggered by proffering evidence of behavior "inconsistent" with otherwise legitimate purposes.

In the instant case, thus, ***HN12***[] the mere showing of a "personal benefit" traceable to an agent on the Atlas board of directors should not suffice to trigger the "independent stake" exception -- assuming one exists -- unless plaintiffs also proffer evidence showing that the personal benefit in question was inconsistent with or divergent from Atlas's own competitive interests. There is a longstanding presumption that the members of a corporation's board of directors are incapable of conspiring with themselves under the Sherman Act in that there is no other way that a corporation can advance its competitive interests, *see Nelson Radio, supra*, and, thus, the Court is reluctant to find that the plaintiffs have demonstrated the existence of "the plurality of actors imperative for a *§ 1* conspiracy," *Copperweld, supra, at 2741*, without a proffer of evidence suggesting that the personal benefits derived from the board's actions were inconsistent with or divergent from the interests of Atlas itself.

(1984). The same principle applies in a case such as this one. [13] As the analysis in **[*230]** *Spray-Rite* makes clear, plaintiffs here can only succeed in showing a conspiracy by offering specific, direct evidence inconsistent with the defense of unilaterally and indicating that Atlas and its agents had a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Id. at 1473*. While plaintiffs demonstrate that Atlas kept in regular touch with its agents -- informing them of the substance of the policy and seeking to **[**36]** elicit responses -- such actions are wholly consistent with good management and planning. *Cf. id. at 1470*. Despite extensive discovery, on the other hand, plaintiffs offer no evidence inconsistent with the proposition that the policy announcement and implementation was a unilateral act on Atlas's behalf.

Plaintiffs, thus, have failed to demonstrate that the actions of the agents on Atlas's board of directors or in the field can in any way **[**37]** be deemed to constitute a conspiracy within the meaning or scope of *Section 1* of the Sherman Act.

B. Unreasonable Restraint of Trade.

Even if plaintiffs were able to satisfy the "conspiracy" requirement necessary to establish a Sherman Act *§ 1* violation, plaintiffs would still have to establish that Atlas's policy constituted an "unreasonable restraint of trade." Plaintiffs stress that the immunity granted by Congress with the enactment of *49 U.S.C. § 10934 (d)* was meant to be a "limited" one and was not intended to protect "such things as anticompetitive mergers," H. Rep. 1372, 96th Cong., 1st Sess. 10 (1979). Plaintiffs argue that the competitive restraint imposed by the Atlas policy must therefore be evaluated in any event to determine whether it might fall outside of the immunity provision's intended scope.

Assuming, *arguendo*, that a conspiracy has been demonstrated and that no statutory immunity applies, the Court would next have to determine whether to apply "per se" treatment to the evaluation of the practice in question, as urged by plaintiffs, or whether to apply the "Rule of Reason," as urged by defendant.

1) *Per se treatment*.

Plaintiffs contend, as indicated **[**38]** above, that the institution of the new Atlas policy represents a "boycott" of those Atlas agents who refused to comply with the policy, and that it also represents a "price-fixing" scheme, in that it is allegedly aimed at preventing price-cutting by carrier-agents in their independent capacities. [14]

HN15[] Boycotts and price-fixing schemes, when proven, have often been accorded *per se* treatment. [15] Nonetheless, the Court of Appeals of this Circuit has warned that

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[13] In *Spray-Rite, supra*, the Supreme Court confirmed the vitality of *United States v. Colgate & Co., 250 U.S. 300, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*. As the Court explained:

> Under *Colgate*, ***HN14***[] 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.

Spray-Rite, supra, at 1469. The *Colgate/Spray-Rite* doctrine applies to non-price terms of dealing -- such as those in this case -- as well.

[14] Plaintiffs theorize that the new policy tended to cause either of two outcomes: 1) agents abandoned or failed to seek independent authority under which they might have charged lower prices for moving services comparable to those that they were providing as Atlas agents, or 2) agents transferred their independent authority to separate corporations, and the additional cost of doing so dampened their ability to charge lower rates on the independent shipments.

[15] As noted, it is typical in the moving industry for the agents of a van line to enter into exclusive dealing agreements with the van line; i.e., they agree not to provide van line services to any company that is not also an agent of the van line that they serve. Plaintiffs argue that this practice should in this case be treated as an antitrust violation because it is an integral part of Atlas's alleged boycott and price maintenance schemes. Though exclusive dealing arrangements are traditionally treated under the Rule of Reason, plaintiffs contend that here they should be treated as part of Atlas's other *per se* violations.

> A *per se* rule is a judicial shortcut; it represents the considered judgment of **[**39]** courts, after considerable experience with a particular type of restraint, that the rule of reason -- the normal mode of analysis -- can be dispensed with. As the Supreme Court explained in *Northern Pacific Railway Co. v. United States*, "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the **[*231]** precise harm they have caused or the business excuse for their use." A court will not indulge in this conclusive presumption lightly. Invocation of a *per se* rule always risks sweeping reasonable, pro-competitive activity within a general condemnation, and a court will run this risk only when it can say, on the strength of unambiguous experience, that the challenged action is a "naked restraint[] of trade with no purpose except stifling of competition."
>
> The Supreme Court emphasized the "demanding standards" of *Northern Pacific Railway* last term in *Continental T.V., Inc. v. GTE Sylvania Inc*. Reiterating that **HN16**[] "*per se* rules of illegality are appropriate only when they relate to conduct that **[**40]** is manifestly anticompetitive," the Court overruled *Arnold, Schwinn & Co*., which had held certain vertical restraints illegal *per se*. The *Continental* Court noted that the vertical restrictions in question possessed "redeeming virtues" in their stimulation of inter-brand competition; that the restrictions were "widely used in our free market economy"; and that there existed "substantial scholarly and judicial authority supporting their economic utility." For these reasons, the Court held that the restraints at issue were to be analyzed not under a *per se* rule, but under the rule of reason.

Smith v. Pro-Football, 193 U.S. App. D.C. 19, 593 F.2d 1173, 1181 (D.C. Cir. 1978) (footnotes omitted).

[41]** In *Smith v. Pro-Football*, the Court of Appeals refused to apply the *per se* rule in its evaluation of the NFL player draft. In this case, the Court similarly declines to apply the *per se* rule in evaluating Atlas's response to the changes accompanying deregulation of the household goods moving industry. Deregulation abruptly re-organized the rules at the foundation of the moving industry. Analysts are still examining the impact of these changes. *See* Plaintiffs' App. P, Q. No court has apparently yet closely analyzed the unique nature of the business relationship between van lines and their carrier-agents, at least as the relationship affects the carrier-agents' exercise of their independent authority. [16] **HN17**[] "Considerable" and "unambiguous" experience with the practice at issue is a necessary prerequisite for application of *per se* treatment, and the Court finds that -- given the unusual nature of the van line/carrier-agent relationship, and given the general confusion following deregulation -- such experience is simply absent in the present case. Moreover, the Atlas policy allows agents the option of retaining their independent authority in separate companies, or becoming **[**42]** carrier-agents of a different van line, and thus the Court is reluctant to term the policy as "pernicious." Also, it simply cannot be accepted that the new Atlas policy has "no purpose except the stifling of competition" or that it is without "any redeeming virtue." Plaintiffs cannot reasonably dispute that Atlas was fully within its rights when it terminated its pooling agreement, or that Atlas's new policy will enhance inter-carrier competition among the national van lines, as explained below. Finally, it is worth noting that the new Atlas policy represents nothing more than the adoption of a method of operation -- exclusive agency -- that is "widely used" not only in the van line industry, but throughout commerce. In sum, the Court finds that the "demanding standards" for application of *per se* treatment have simply not been met. Rather, "the courts have had too little experience with this type of restraint, and know too little of the 'economic and business stuff' from which it issues, confidently to declare it illegal without undertaking **[*232]** the analysis enjoined by the rule of reason." Id. at 1182 (footnote omitted).

[43]** 2) *Rule of Reason*.

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[16] *Cf.* North American Van Lines, Inc. v. I.C.C., 666 F.2d 1087, 1094-96 (7th Cir. 1981) (van line challenge against ICC regulations implemented after deregulation) ("There was no evidence before us regarding the customary arrangements . . . between national carriers and their agents."); *Clemmer v. North American Van Lines, Inc*., 1969 Trade Cases para. 72,936, at 87609 (E.D. Pa. 1969) (van line's allocation of exclusive territories between agents deemed not in violation of the antitrust laws) (policy in question did not affect carrier-agents' independent shipments).

Plaintiffs argue that the initiation of Atlas's new policy can be condemned even under the rule of reason. Guidance may once again be taken from the opinion of the Court of Appeals of this Circuit in *Smith v. Pro Football, supra*, where the Court of Appeals stated that:

> ***HN18***[] Under the rule of reason, a restraint must be evaluated to determine whether it is significantly anticompetitive in purpose or effect. In making this evaluation, a court generally will be required to analyze "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the "anticompetitive evils" of the challenged practice must be carefully balanced against its "procompetitive virtues" to ascertain whether the former outweigh the latter. A restraint is unreasonable if it has the "net effect" of substantially impeding competition.

Id. at 1183.

This memorandum has already described the "facts peculiar to" the van line and moving industry, and the recent legislative and regulatory changes leading to the new Atlas **[**44]** policy. Prior to deregulation, Atlas had given its carrier-agent companies permission to use the Atlas infrastructure to compete with Atlas itself, for their own accounts, within the boundaries set by federal regulations and ICC oversight. ***HN19***[] Classic agency law, however, gives a principal the prerogative of withdrawing such permission if convenient to protect the principal's interests. *See* *Restatement of Agency, Second §§ 1 (1)*, *14N*, *393-394*. Nothing in the legislative history of Congress's deregulation of the household moving goods industry suggests that when Congress removed the regulatory restrictions on carrier-agent independent operations, it added a restriction barring van lines from exercising this prerogative. Indeed, the legislative history of the measure shows just the opposite: that Congress had no intention of disturbing the ability of a van line to reach agreements enforcing "the fiduciary duty of loyalty of an agent not to compete with its principal concerning the subject matter of the agency." S. Rep. 497, 96th Cong., 1st Sess. 8. [17] **[**46]** Congress may well have speculated that by widening the regulatory boundaries on carrier-agent independent operations, it would have triggered **[**45]** more independent operation of that sort. However, when it lifted those restrictions, it did so -- consistent with the free market philosophy supporting deregulation in general -- to create an *option*, not a *mandate*. [18] **[*233]** Congress, thus, left each individual van line free to fashion

[17] The Senate Report discussion of this matter reads in full:

> During the course of its deliberations, the Committee considered a proposal to include within the immunity section language that would grant immunity to agreements concerning exclusive agency representation, or the fiduciary duty of loyalty of an agent not to compete with the principal concerning the subject matter of the agency. The Committee determined that this type of relationship is not a violation of the antitrust laws and is standard agency law as expressed in *section 393 of the Restatement* of the Law of Agencies section. The Committee felt that inclusion of such language could imply that such relationships are a violation of the antitrust laws in the absence of immunity. Thus, the Committee determined not to include such language in the bill.

S. Rep. 497, 96th Cong., 1st Sess. 8 (1979). Neither party makes any issue of the portion of this passage explaining that "the Committee determined not to include" language in the bill that might have immunized exclusive agency or fiduciary duty agreements directly. Thus, it is not necessary to resolve any questions that might arise from the fact that such language was consciously excluded. However, the Court is inclined to agree with the observation of the Senate Committee that "this type of relationship is not a violation of the antitrust laws," *id. Cf.* *Delta Data Systems Corp. v. Webster, 744 F.2d 197*, slip op. at 8-9 (D.C.Cir. Sept. 21, 1984) (valid to consider GAO report as persuasive even if not binding).

[18] The House Report on the legislation states, under the heading "Section 2. Declaration of Policy," that:

> Section 2 sets forth congressional policy with respect to the household goods moving industry. The emphasis in the policy statement is threefold -- *the reduction of unnecessary regulation*, the strengthening of consumer remedies and protections, *and the establishment of maximum carrier flexibility* in pricing their services and meeting the needs of their shippers.

H. Rep. 1372, 96th Cong., 1st Sess. 5 (1979) (emphasis added). *See also* S. Rep. 497, 96th Cong., 1st Sess. 8 (1979) ("The bill merely *permits* existing [carrier-agent] relationships to continue." (emphasis added)).

its own response to deregulation -- or, in Atlas's case, to the prospect of widescale price competition from its own agents using the van line's own infrastructure. Atlas's choice was to protect against the further diversion of its own business infrastructure in this fashion, and instead to strengthen its competitive position by returning to a traditional agency arrangement whereby its agent companies serve Atlas alone. As such, the new Atlas policy plainly had a legitimate business purpose, and is consistent with policies chosen by Congress with respect to the choice between regulation and competition in this industry.

In an effort to identify the "anticompetitive evil" of the challenged practice, plaintiffs stress that, upon the implementation of the new Atlas policy and the resultant withdrawal of access to Atlas services and equipment for use on independent shipments, several carrier-agents ceased their independent operations entirely. Others adapted by shifting their independent authorities to separate **[**47]** corporations or abandoning Atlas to become carrier-agents for some other major van line, and plaintiffs adduce facts showing that these latter groups of agents incurred significant expense in doing so.

HN20[] One of the basic tenets of the federal antitrust laws, however, is that they are intended to protect *competition*, not *competitors. Copperweld, supra, at 2740 n.14*. The Court must look not to whether individual agents incurred losses as a result of the new policy, but rather to the extent to which the Atlas policy somehow impeded the opportunity of Atlas agents to utilize their independent authority in the market for moving services. On this score, it is necessary to reiterate that the new Atlas policy does not absolutely bar an Atlas agent from exercising independent interstate authority. The agent company itself must serve Atlas alone, but agents *may* exercise independent authority if that authority is placed in an affiliated but commercially separate company. Because the separate company must develop its own service and equipment infrastructure, the true effect of the Atlas policy is, in essence, only to prevent agents who do exercise independent authority from appropriating **[**48]** to themselves any aspect of the Atlas network for the support services and overhead equipment necessary to operate that interstate authority beyond any great distance. The new arrangement essentially terminates a subsidy previously available to an Atlas carrier-agent at the expense of Atlas. At the same time, agents who wish to continue to operate as "carrier-agents" are not barred from seeking to join one of the other van lines that do subsidize carrier-agents in this way. Thus, the only enduring anticompetitive harm demonstrated by the plaintiff is the loss of the opportunity to continue to operate in a traditional carrier-agent relationship with Atlas itself.

In reaching this conclusion, the Court has not overlooked the fact that Atlas has also required its carrier-agents to refrain from transferring their established names as Atlas agents to the corresponding non-Atlas affiliate companies created as a result of the carrier-agents' compliance with the Atlas policy. In any given case, this requirement bars the new, non-Atlas entity from access to the goodwill -- as it is represented in the carrier-agent's established name -- that has been built up as a result of the carrier-agent's **[**49]** *Atlas* relationship. At the same time, though, it also deprives the independent entity of any goodwill that might have been fairly allocable to *it* due to the carrier-agent's own independent operations. *See* DSF para. 58; PSG1 para. 58. The **[*234]** reasonableness of this feature of the Atlas policy may be viewed differently by different courts. It passes muster here because plaintiffs have not proffered evidence that would indicate the relative burden that Atlas would have borne had it permitted its carrier-agents to transfer their established names to the new, non-Atlas entities, if the agents had so wished, as opposed to requiring its carrier-agents to give the new entities different names instead. [19] Indeed, even if there were such evidence, it would necessarily be speculative. And in addition, each carrier-agent, as noted, had the clear option of operating completely independently, or of seeking to associate with another van line that would permit carrier-agent or independent operations under that name.

[50]** In judging the reasonableness of the Atlas policy, it should be noted that plaintiffs appear to have conceded that a van line is fully entitled to abandon its agency network altogether, or choose to operate exclusively with agents that have no independent interstate authority at all -- i.e., no independent interstate authority either within

[19] It is worth noting, in this regard, that one other major van line has determined to accept the costs of permitting its carrier-agents to shift their established names to such newly created separate entities. *See* DSF para. 79. Counsel for the defendant may themselves yet decide, out of an abundance of caution and in anticipation of a possible appeal, to recommend to Atlas the adoption of this more conservative approach.

the agency company or within a separate, affiliated company. *See* Transcript of Hearing, August 6, 1984, at 19 - 23. At least one major van line other than Atlas does indeed operate in such a manner. [20] The arrangement now being enforced by Atlas, however, is one that is *less* extreme. Agents are expressly *permitted* to continue to operate their own, independent authority as long as it is located within an "affiliated" but separately incorporated company. The Court of Appeals for this Circuit faced an analogous situation in *United States v. Studiengesellschaft Kohle, 216 U.S. App. D.C. 303, 670 F.2d 1122 (D.C. Cir. 1981)*. That case involved the holder of a process patent who had granted licenses to several manufacturers, allowing all of them to use the process to produce products for their own use but allowing only one of them to **[**51]** sell the resultant product in the open market. The plaintiff manufacturers challenged this "restraint." The Court of Appeals however, noted that the patent-holder was legally entitled to grant an exclusive manufacturing and sales license to a *single* licensee if he so desired, and that therefore, the patent-holder could not be deemed to have acted "unreasonably" under the antitrust laws for having taken the less extreme step of licensing additional manufacturers subject to the condition that the resultant product be restricted to their own use. *Id. at 1128* - 31, 1135. Similarly, if Atlas would be entitled to choose to continue doing business only with agents that possess no interstate authority whatsoever, then Atlas would presumably be entitled -- without being found to have acted unreasonably -- to take the less extreme step represented by the Atlas policy in question. [21] *See also Red Diamond Supply, Inc. v. Liquid Carbonic* ***[*235]*** *Corp., 637 F.2d 1001, 1006-07* (5th Cir.), *cert. denied*, *454 U.S. 827, 102 S. Ct. 119, 70 L. Ed. 2d 102 (1981)*. Rather than choosing to do business only with agents who have no independent authority whatsoever, Atlas *allows* its **[**52]** agents to possess independent authority as long as they place it in a separate company and look elsewhere than to Atlas for the support and overhead services necessary to utilize that authority. It is difficult to regard this tempered action as "unreasonable" within the meaning of the Sherman Act, or to see what other proof plaintiffs could muster to change this conclusion.

[53]** Finally, to the extent that Atlas's policy has any legally cognizable anticompetitive effect, there stands balanced against it the plain and significant procompetitive impact on competition among the national van lines. Plaintiffs do not dispute in any material way that enforcing traditional agent loyalty upon Atlas agents will strengthen Atlas's competitive position vis-a-vis the other national van lines, particularly those that already require their agents to work with them alone. Plaintiffs concede that carrier-agency reduced the amount of traffic carried on Atlas's account, PSGI para. 22, and cannot plausibly argue that carrier-agency did not or would not expose Atlas to increased liability -- at least to some extent -- for shipments carried out under Atlas's actual or *apparent* authority. *See* PSGI paras. 31-34. Atlas's new policy eliminated these competitive vulnerabilities, and thus, as shown above, had a legitimate business purpose with a plain procompetitive effect. Therefore, considering the nature and overall competitive effect of the announcement and implementation of the new Atlas policy, the Court finds from undisputed facts that plaintiffs are unable to show **[**54]** that Atlas's actions violated the rule of reason. [22]

IV.

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[20] Plaintiffs themselves report that "Allied Van Lines, the largest van line, allows no firm affiliated with it to have or to use authority to conduct interstate operations competitive with its own. This arrangement was approved and immunized from the antitrust laws by the Interstate Commerce Commission in 1946, following an antitrust action suit brought by the Justice Department. *Evanston Fireproof Warehouse, et al., - Control - Allied Van Lines*, 46 M.C.C. 557 (1946)." PSF para. III-I.

[21] The court does not itself face the question, nor intimate any ruling, on whether indeed it would be valid under the antitrust laws for a van line to take the more extreme step of banning its agents even from having separate affiliates exercise independent carrier authority. Suffice it to note that plaintiffs, having *conceded* that a van line is entitled to take such extreme action, *see* Transcript of Hearing, August 6, 1984, at 19-23, are in no position to argue that Atlas's less extreme action is unreasonable. Given that Atlas bars only the exercise of independent authority by the agency companies themselves, the policy goes no farther than is necessary to enforce traditional agency standards upon the agent companies alone. The discussion above demonstrates the reasonableness of a policy that is limited in this fashion.

[22] To the extent that plaintiffs' claims also challenge Atlas's earlier, aborted efforts to cope with the advent of deregulation, *see supra* note 6, the Court similarly finds that no violation of the rule of reason can be demonstrated. Even apart from whether the "conspiracy" requirement can be met as to these earlier Atlas actions, the Court finds that their short duration, the prerogative of Atlas to impose traditional agency standards upon its agents, and the procompetitive aim of the actions establish that they cannot be deemed "unreasonable" under the Sherman Act.

For the foregoing reasons, the Court concludes as a matter of law from undisputed material facts that defendant's actions in requiring its agents to refrain from independent carrier operations, except through separate corporate affiliates, does not violate *Section 1* of the Sherman Act. Accordingly, an accompanying order will deny plaintiff's motion for partial summary judgment as to **[**55]** liability, and will grant defendant's motion for summary judgment.

ORDER

For reasons set forth in any accompanying Memorandum, it is this 30th day of October, 1984, hereby

ORDERED, ADJUDGED and DECREED: that plaintiffs' motion for summary judgment should be, and hereby is, DENIED; and it is further

ORDERED, ADJUDGED and DECREED: that defendant's motion for summary judgment should be, and hereby is, GRANTED; and it is further

ORDERED: that this action should be, and hereby is, DISMISSED.

Hydro Air of Connecticut, Inc. v. Versa Techs., Inc.

United States District Court for the District of Connecticut

October 31, 1984

Civ. No. N-81-145 (WWE)

Reporter

599 F. Supp. 1119 *; 1984 U.S. Dist. LEXIS 22293 **; 1985-1 Trade Cas. (CCH) P66,564

HYDRO AIR OF CONNECTICUT, INC., Plaintiff, v. VERSA TECHNOLOGIES, INC. and Power Draulics-Nielsen, Inc., Defendants

Disposition: [1]** DENIED.

Core Terms

products, summary judgment, antitrust, unfair, franchisor, Franchise, summary judgment motion, good faith, distributor, intrabrand, terminated, cylinders, business relationship, plaintiff's claim, marketing plan, trade name, prescribed, argues, sales, material fact, Sherman Act, counterclaim, Practices, trademark, counts

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

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

HN1[] **Summary Judgment, Motions for Summary Judgment**

In order to prevail on a motion for summary judgment, the movant must show that there is no genuine issue of material fact and that judgment should be entered as a matter of law. Therefore, the court is permitted pursuant to *Fed. R. Civ. P. 56(c)* to ascertain those material facts which are not substantially controverted and to determine those questions of law dependent upon uncontroverted facts.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Business & Corporate Compliance > ... > Distributorships & Franchises > Termination > Antitrust Issues

HN2[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

The mere substitution of sales agents does not violate ***antitrust law***, but where a refusal to deal is not unilateral but is prompted by an understanding with other parties, there may be an antitrust violation.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

HN3[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A vertical restraint involves a combination of persons at different levels of the market structure, such as one between manufacturers and distributors. Vertical restrictions are not per se violations of the Sherman Act, when the alleged agreement is an exclusive distributorship.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Pretrial Motions & Procedures > Suppression of Evidence

HN4[] Monopolies & Monopolization, Conspiracy to Monopolize

Suppression of intrabrand competition is lawful only if intrabrand competition acts as a check on the exploitation of intrabrand market power.

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > Claims

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > State Regulation

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Antitrust & Trade Law > ... > Trade Practices & Unfair Competition > State Regulation > General Overview

HN5[] State Regulation, Claims

The Connecticut Unfair Trade Practices Act (CUTPA), *Conn. Gen. Stat. § 42-110b*, provides that no person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Under CUTPA the plaintiff must establish either unfair methods of competition or unfair or deceptive acts or practices which have a potential effect on the general consuming public. A business person can maintain a CUTPA cause of action without showing consumer injury.

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Governments > Courts > Common Law

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN6[] **Consumer Protection, Deceptive & Unfair Trade Practices**

Connecticut courts have adopted the Federal Trade Commission's "cigarette rule" in determining whether a given practice is unfair. (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is within at least the penumbra of some common law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers, competitors, or other businessmen.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > Good Cause

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > General Overview

Business & Corporate Law > Distributorships & Franchises > Termination > Notice Requirements

HN7[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

If a business relationship constitutes a franchise within the meaning of the Connecticut Franchise Act, Conn. Gen. Stat. §§ 42-1333 --42-133h, it may not be terminated except upon good cause and upon 60 days written notice.

Business & Corporate Compliance > ... > Trademark Law > Conveyances > Franchises

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Franchise Agreements

Trademark Law > Special Marks > Service Marks > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Elements

Trademark Law > Conveyances > General Overview

Trademark Law > ... > Particular Subject Matter > Names > General Overview

HN8[] Conveyances, Franchises

Conn. Gen. Stat. § 42-133e(b) defines a franchise as an agreement or arrangement in which (1) a franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor and (2) the operation of the franchisee's business pursuant to such a plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Business & Corporate Law > Distributorships & Franchises > Franchise Relationships > Elements

Energy & Utilities Law > Oil & Petroleum Products > Gasoline Fuels > Gasoline Dealers & Distributors

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

Governments > Courts > Special Judges

HN9[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Relevant factors in determining whether a franchise exists include whether the franchisor set the hours of operation, number of employees, and placement of advertising signs. In addition, it is relevant whether the franchisor hired the employees, provided the management training or offered financial support.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Commercial Law (UCC) > ... > Application & Construction > Contract Provisions > Implied Covenant of Good Faith

Labor & Employment Law > Employment Relationships > At Will Employment > General Overview

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN10[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

Conn. Gen. Stat. § 42a-1-203 provides that every contract or duty within this title imposes an obligation of good faith in its performance or indorsement.

Counsel: Donald Lunt, Fay & Lunt, Wallingford, Connecticut, for Plaintiff.

Shaun S. Sullivan, Wiggin & Dana, Mark R. Kravitz, New Haven, Connecticut, Scott W. Hansen, Reinhart, Boerner, Van Deuren, Norris & Rieselbach, Milwaukee, Wisconsin, for Versa Technologies.

John Callagy, New York New York, Taggart D. Adams, Kelley, Drye & Warren, Stamford, Connecticut, Paul Barenholtz, Kelley, Drye & Warren, New York New York, for Power Draulics-Nielsen.

Judges: Eginton, District Judge.

Opinion by: EGINTON

Opinion

[*1121] RULING ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

EGINTON, District Judge.

Plaintiff is engaged in the business of selling hydraulic and pneumatic systems and components in the New England states. It alleges that the defendant Versa Technologies, Inc., through its Milwaukee Cylinder division (hereinafter "Milwaukee"), unlawfully terminated plaintiff as an authorized distributor/representative of Milwaukee products. Both defendants have filed motions for summary judgment dismissing plaintiff's claim. Defendant Power Draulics-Nielsen, Inc. (hereinafter "PDN") has also moved for summary judgment on its counterclaim.

Summary judgment should not be improvidently granted, **[**2]** especially in an antitrust case. Reversal of an imprudent grant of summary judgment in defendants' favor would delay the start of plaintiff's trial. Nevertheless, legal issues which may be resolved short of trial should be decided. ***HN1***[] In order to prevail on a motion for summary judgment, the movant must show that there is no genuine issue of material fact and that judgment should be entered as a matter of law. *Robertson v. Seidman & Seidman, 609 F.2d 583, 591 (2d Cir.1979)*. Therefore, the court is permitted pursuant to *Fed.R.Civ.P. 56(d)* to ascertain those material facts which are not substantially controverted and to determine those questions of law dependent upon uncontroverted facts.

In August 1972, plaintiff was authorized to act as Milwaukee's exclusive sales agent in southern Connecticut. Occasionally plaintiff purchased Milwaukee products from Milwaukee Cylinder as a distributor for resale. It is alleged that in 1979 Milwaukee authorized plaintiff to sell Milwaukee products throughout the entire state of Connecticut, thereby allowing plaintiff to **[*1122]** compete with another distributor/representative, Fluid Kenetics. It is undisputed that on December 3, 1980, Milwaukee **[**3]** notified plaintiff that it would be terminated effective January 3, 1981. Apparently Fluid Kenetics was terminated also by Milwaukee. In their place, Milwaukee appointed defendant PDN as its exclusive distributor/representative in New England. For a period of time, plaintiff was able to place orders for Milwaukee products through a Milwaukee dealer in New York, but incurred a substantial reduction in profits.

Plaintiff claims the defendants violated Section 1 of the Sherman Act, sections 35-26, 35-27, and 35-28 of the Connecticut Anti-Trust Act, and the Connecticut Unfair Trade Practices Act. In addition, it is alleged that Milwaukee violated the Connecticut Franchise Act and the covenants of good faith and fair dealing. PDN is alleged to have intentionally and improperly interfered with plaintiff's business relations.

By counterclaim, PDN argues that plaintiff instituted its action for the purpose of harassment, in the absence of a colorable claim, with malice and without probable cause. Summary judgment is requested for the defendants on both the complaint and the counterclaim. For the reasons set forth below, the Motions for Summary Judgment are denied.

FEDERAL ANTITRUST

[4]** In count I of its complaint, plaintiff claims that the defendants entered into a conspiracy in violation of Section 1 of the Sherman Act to terminate plaintiff as Milwaukee's representative/distributor and to appoint PDN as Milwaukee's representative for New England. Defendants have moved for summary judgment on the basis that ***HN2***[] the mere substitution of sales agents does not violate ***antitrust law***. *Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283 (6th Cir.1963)*. This is a correct assessment of the law, but plaintiff is alleging more than mere substitution. Where a refusal to deal is not unilateral but is prompted by an understanding with other parties, there may be an antitrust violation. *Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168 (3rd Cir.1979)*. Plaintiff is alleging ***HN3***[] a vertical restraint, i.e., a combination of persons at different levels of the market structure, such as one between manufacturers and distributors. *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131* (2d Cir.), *cert.*

denied 439 U.S. 946, 99 S. Ct. 340, 58 L. Ed. 2d 338, *rehearing denied 439 U.S. 1104, 99 S. Ct. 883, 59 L. Ed. 2d 65 (1978)*. Vertical restrictions are not *per se* **[**5]** violations of the Sherman Act, when the alleged agreement is an exclusive distributorship. *Id*. Plaintiff was Milwaukee's sole representative in southern Connecticut. *See* Exhibit B to the complaint.

The "rule of reason" test must, therefore, be applied. The alleged agreement between Milwaukee and PDN is violative of section 1 of the Sherman Act only if it is anticompetitive in purpose or effect. *Oreck Corp., 579 F.2d at 126*.

Plaintiff claims that it has been deprived of the Milwaukee product line, which it cannot effectively replace. *See* Gaudet Affidavit of Aug. 24, 1984, at 4. It is contended that because 40% of plaintiff's customers in the Connecticut area were purchasing Milwaukee products and these customers accounted for 80% of plaintiff's total sales, plaintiff lost sales not only of Milwaukee cylinders, but also of other products as well. Complaint, para. 37; Gaudet Affidavit of Aug. 24, 1984 at 4.

Plaintiff argues that one of the purposes of the conspiracy was to damage the ability of the plaintiff and of Fluid Kenetics to compete with PDN in the sale of other products. There is evidence that the competitors' cylinders were not met with the same level of acceptance **[**6]** from plaintiff's customers. Gaudet Affidavit of Aug. 24, 1984 at 4. In fact, plaintiff argues that because Milwaukee cylinders were the "Cadillac" of cylinders, there is no real competition at all. The facts are disputed on this issue. Milwaukee claims that there is not much difference between its cylinders and those of its competitor, Wabco. As evidence, it offered the deposition of **[*1123]** plaintiff's sales manager. Deposition of Pueschel, Sept. 30, 1981 at 33-34. Although the availability and price of Milwaukee products have not been affected, the market for other products may have been adversely impacted. *Westman Commission Co. v. Hobart Corp., 461 F. Supp. 627 (D.Colo.1978)*. Hence, there is a genuine dispute as to material facts and summary judgment may not be granted as to this issue.

In addition, plaintiff argues that Milwaukee terminated two dealers, both of whom were directly competing in the sale of Milwaukee products in northern Connecticut, and replaced them with one dealer, thereby eliminating intrabrand competition. There was apparently no written agreement authorizing plaintiff to sell Milwaukee products in northern Connecticut. However, plaintiff claims that **[**7]** an agreement was made. Complaint para. 23. Milwaukee has offered no evidence to dispute this. ***HN4***[] Suppression of intrabrand competition is lawful only if intrabrand competition acts as a check on the exploitation of intrabrand market power. *Alladin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1116 (5th Cir.1979)*. Because there is a dispute as to whether there is any real intrabrand competition, summary judgment is inappropriate at this time.

CONNECTICUT ANTI-TRUST ACT

The Connecticut Anti-Trust Act, Conn.Gen.Stat. §§ 35-24-35-44, incorporates various provisions of the federal anti-trust laws, especially § 1 of the Sherman Act. *Elida, Inc. v. Harmor Realty Corp., 177 Conn. 218, 226, 413 A.2d 1226 (1979)*. For the reasons stated in the previous section, summary judgment is denied as to count II of the complaint.

THE CONNECTICUT UNFAIR TRADE PRACTICES ACT

Defendants Milwaukee and PDN have moved for summary judgment also as to count III of the complaint. ***HN5***[] *Conn.Gen.Stat. § 42-110b*, the Connecticut Unfair Trade Practices Act (CUTPA), provides that "no person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or **[**8]** commerce." *McLaughlin Ford, Inc. v. Ford Motor Co., 192 Conn. 558, 473 A.2d 1185 (1984)* sets forth the required elements of proof under the Act. The plaintiff must establish either unfair methods of competition or unfair or deceptive acts or practices which have a potential effect on the general consuming public. A business person can maintain a CUTPA cause of action without showing consumer injury.

As noted in the *McLaughlin* opinion, ***HN6***[] Connecticut courts have adopted the Federal Trade Commission's "cigarette rule" as furnishing appropriate criteria by which to determine whether a given practice is unfair.

> (1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise -- whether, in other words, it is within at least the penumbra of some common law, statutory or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers (competitors or other businessmen). *192 Conn. at 568, 473 A.2d 1185*.

Based upon the preceding sections of this opinion, the **[**9]** court finds that there is a material issue of fact as to whether the defendants' alleged conduct offended a public policy.

The defendants argue that CUTPA is inapplicable because there is no potential effect on the consuming public. Conn. Public Act 84-468 recently amended CUTPA so as to not require proof of public interest or public injury. However, the act takes effect from its passage. A statute affecting substantive rights is intended to apply prospectively only. *Nagle v. Wood, 178 Conn. 180, 187, 423 A.2d 875 (1979)*. Thus, plaintiff must establish a potential **[*1124]** effect on the public. As previously discussed in the antitrust section of this opinion, there is a genuine issue of material fact concerning the effect of the defendants' alleged conduct on intrabrand and intrabrand competition.

THE CONNECTICUT FRANCHISE ACT

In count IV of its complaint, plaintiff alleges that Milwaukee's termination of its agreement with plaintiff was a violation of the Connecticut Franchise Act, *Conn. Gen.Stat. §§ 42-133e -- 42-133h*. ***HN7***[] If a business relationship constitutes a franchise within the meaning of the Act, it may not be terminated except upon good cause and upon sixty days **[**10]** written notice. Defendants maintain that the Act is not applicable, because the relationship between plaintiff and Milwaukee was not than of a franchise.

HN8[] *Conn.Gen.Stat. § 42-133e(b)* provides the definition of a franchise.

> "Franchise" means an oral or written agreement or arrangement in which (1) a franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor . . . and (2) the operation of the franchisee's business pursuant to such a plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate . . . .

Milwaukee contends that it did not prescribe, in substantial part, a marketing plan for the plaintiff and that plaintiff's business was not substantially associated with its trade name.

The first question is whether plaintiff was granted the right to engage in offering, selling or distributing Milwaukee products under a marketing plan or system prescribed in substantial part by Milwaukee. It is undisputed **[**11]** that there was an agreement between plaintiff and Milwaukee whereby plaintiff was granted the right to act as Milwaukee's representative for the sale of Milwaukee products. In *Consumers Petroleum of Connecticut, Inc. v. Duhan, 38 Conn.Supp. 495, 452 A.2d 123 (1982)*, Judge Daly, writing for an appellate session of the superior court, set forth a number of ***HN9***[] relevant factors for this determination. They include whether the franchisor set the hours of operation, number of employees, and placement of advertising signs. In addition, it is relevant whether the franchisor hired the employees, provided the management training or offered financial support.

In a recent unreported decision of the United States District Court for the District of Connecticut, Judge Brieant, sitting as a visiting judge, recognized that many of these factors are relevant only to retail sales businesses. *Grand Light and Supply Co., Inc. v. Honeywell, Inc*., Civ. Action No. N-78-342 (TFGD), slip op. at 23 (D.Conn. July 13, 1984). Because the defendant therein was obliged to hold management conferences, sales meetings and training seminars and to provide promotional assistance, the court concluded that the defendant **[**12]** prescribed the material elements of plaintiff's marketing plan for the sale of defendant's products.

The case at bar is remarkably similar. Milwaukee offered training seminars, provided promotional and sales materials, established requirements concerning credit ratings, and set sales goals and forecasts. Milwaukee has not disputed these facts in its affidavits or depositions. The court, therefore, finds that Milwaukee did prescribe at least some elements of a market plan with respect to plaintiff's sale of Milwaukee products. It is for the trier of fact to determine whether it was prescribed in substantial part by Milwaukee.

The second issue is whether the operation of plaintiff's business pursuant to such a plan was substantially associated with Milwaukee's tradename. Milwaukee contends that the holding in *Muha v. United Oil Co., 180 Conn. 720, 433 A.2d 1009 (1980)* prohibits a finding of substantial association. In *Muha*, the parties' agreements did not require the plaintiffs to sell only the defendant's products, and the **[*1125]** plaintiffs, in fact, derived most of their profits from other sales and services. Justice Healey stated that the plaintiff's activities were **[**13]** not substantially related with the defendant's trademark. *Id. at 726, 433 A.2d 1009*. However, it is recognized that this is mere dicta. The actual holding of the court was that there was no franchise because the defendant had no trademark or trade name of its own.

The *Grand Light* case considered the same unique issue presented herein: does the Connecticut Franchise Act apply to an authorized sales representative/distributor whose gross revenue from the sales of the alleged franchisor's products account for only 2% of its total income. *Grand Light*, slip op. at 16. Judge Brieant concluded that it did. He based his decision upon the absence of any Connecticut law otherwise and the plain meaning of the statute. *Conn.Gen.Stat. § 42-133e(b)* requires that the "operation of the franchisee's business *pursuant to such (marketing) plan or system*" be "substantially associated" with the franchisor's trademark or trade name (emphasis added). Although it is admittedly a difficult question, this court agrees with Judge Brieant's conclusion.

Because this is a diversity jurisdiction action with respect to count IV of the complaint, this court must apply the substantive law of the **[**14]** state of Connecticut under *Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938)*. Mere obiter should be entitled to little weight. *Nolan v. Transocean Airlines, 290 F.2d 904* (2d Cir.), *cert. denied 368 U.S. 901, 82 S. Ct. 177, 7 L. Ed. 2d 96 (1961)*. Moreover, the statute requires that the business activities *relating to the market plan* be substantially associated with the franchisor's trademark or trade name. It does not require the plaintiff's entire business to be so associated. Indeed, the court can find no reason to exclude from the operation of the statute a business that acts as a franchisee for several franchisors.

Defendant Milwaukee has not disputed plaintiff's association with Milwaukee's trade name. Whether or not it is sufficient to constitute substantial association is a question for the trier of fact to determine. Summary judgment is, therefore, denied as to count IV.

COVENANT OF GOOD FAITH

In counts V and VI of the complaint, plaintiff contends that defendant Milwaukee breached the covenants of good faith and fair dealing implied in the parties' contractual relationship and imposed by *Conn.Gen.Stat. § 42a-1-203*. Milwaukee **[**15]** has moved for summary judgment against the plaintiff as to these counts on the ground that neither a common law nor a U.C.C. good faith duty can override contract terms. In support thereof, Milwaukee has cited two cases which hold that a good faith obligation cannot be implied if it would be inconsistent with the express terms of the contract. *See Cardinal Stone Co., Inc. v. Rival Manufacturing Co., 669 F.2d 395 (6th Cir.1982)*; *Corenswet v. Amana Refrigeration, Inc., 594 F.2d 129* (5th Cir.), *cert. denied 444 U.S. 938, 100 S. Ct. 288, 62 L. Ed. 2d 198 (1979)*.

In *Corenswet*, the Court of Appeals for the Fifth Circuit recognized that courts have begun to read a good faith limitation into contracts. It declined to impose this limitation in *Corenswet* because there was no existing backdrop of Iowa state law supporting it. *594 F.2d at 137*. *Cardinal Stone* expressly relies upon the *Corenswet* decision. *669 F.2d at 396*.

HN10[] *Conn.Gen.Stat. § 42a-1-203* provides that "every contract or duty within this title imposes an obligation of good faith in its performance or indorsement." As a commercial agreement, the Hydro Air/Milwaukee contract is clearly governed by this provision. **[**16]** A Connecticut trial court has applied the identical provision contained in the *Restatement (Second) of Contracts § 231* to an at-will employment contract. *Magnan v. Anaconda Industries, Inc., 37 Conn.Supp. 38, 429 A.2d 492, 494 (1980)*. There is, therefore, an existing body of Connecticut law supporting plaintiff's contention. Milwaukee's motion for **[*1126]** summary judgment is denied as to these counts.

WRONGFUL INTERFERENCE WITH BUSINESS RELATIONS

By counts VII and VIII of its amended complaint, plaintiff claims that defendant PDN intentionally and improperly interfered with plaintiff's business relationship with Milwaukee. PDN argues that summary judgment is appropriate because plaintiff has failed to allege independent tortious activity.

PDN relies upon the case *Blake v. Levy, 191 Conn. 257, 464 A.2d 52 (1983)* for its contention that plaintiff must prove fraud, misrepresentation or intimidation. However, the *Blake* opinion goes on to state that "in an action for intentional interference with business relations, we think the better reasoned approach requires the plaintiff to plead and prove at least some improper motive or improper means." *Id. at 262, 464* ***[**17]*** *A.2d 52*. Plaintiff has alleged that such conduct was intentional and improper. Amended Complaint, para. 43. An affidavit submitted by the plaintiff raises an inference that PDN's actions were motivated by a desire to increase its business at the expense of plaintiff. Affidavit of Gaudet, August 24, 1984, para. 6.

PDN argues that its conduct was not improper. However, in view of this court's determinations on the issues of the antitrust and unfair trade practice allegations, there are sufficient issues of disputed material facts to make summary judgment inappropriate on the counts of wrongful interference with business relations.

Defendant PDN's counterclaim is based upon plaintiff's alleged failure to establish a colorable claim. In view of this court's determination on the motions for summary judgment as to plaintiff's complaint, PDN's motion for summary judgment on the counterclaim is DENIED. Accordingly, all motions for summary judgment are DENIED.

SO ORDERED.

End of Document

Marrese v. Interqual, Inc.

United States Court of Appeals for the Seventh Circuit

March 29, 1984, Argued ; November 6, 1984, Decided

No. 83-1581

Reporter
748 F.2d 373 *; 1984 U.S. App. LEXIS 16953 **; 1984-2 Trade Cas. (CCH) P66,271

R. ANTHONY MARRESE, M.D., and BONE & JOINT SURGEONS, INC., Plaintiffs-Appellants, v. INTERQUAL, INC., et al., Defendants-Appellees

Prior History: **[**1]** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 82 C 4296 -- George N. Leighton, Judge.

Core Terms

medical staff, interstate commerce, Sherman Act, recommendation, peer review process, patients, peer review committee, plaintiffs', defendants', supervised, clinical privileges, out-of-state, revoked, practitioner, Licensing, staff privileges, antitrust, healthcare provider, exempt, first amended complaint, anti trust law, allegations, articulated, regulation, revocation, records, surgeon, staff, hospital board, peer review

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Monopolies & Monopolization, Attempts to Monopolize**

The Sherman Act prohibits every contract, combination or conspiracy, in restraint of trade or commerce among the several States, 15 U.S.C.S. § 1, and also prohibits monopolizing any part of the trade or commerce among the several States. 15 U.S.C.S. § 2.

Antitrust & Trade Law > Sherman Act > Jurisdiction

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Sherman Act, Jurisdiction**

It is axiomatic that in pleading a cause of action under the Sherman Act, 15 U.S.C.S. §§ 1, 2, the plaintiff must adequately allege the jurisdictional requirement of interstate commerce. Thus, the plaintiff's complaint must allege sufficient facts to establish that the defendant's alleged illegal conduct is "in interstate commerce" or has a "substantial and adverse effect" upon interstate commerce.

Civil Procedure > Appeals > Standards of Review > General Overview

HN3[] **Appeals, Standards of Review**

In reviewing the dismissal of a complaint, the factual allegations of the complaint are taken as true.

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Transportation Law > ... > Federal Powers > Powers of Congress > Substantial Relations

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN4[] **Antitrust Actions, Facilities**

Medical practice per se and without more is a local activity. To bring it within reach of the Federal antitrust laws a substantial and adverse effect upon interstate commerce is requisite.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Antitrust & Trade Law, Sherman Act**

As long as the restraint in question substantially and adversely affects interstate commerce, the interstate commerce nexus required for Sherman Act, 15 U.S.C.S. § 1, coverage is established.

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

The defendant's activities must be shown as a matter of practical economics to have a not insubstantial effect on the interstate commerce involved.

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Antitrust & Trade Law, Sherman Act**

Though each case involves a unique set of facts, if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] Antitrust & Trade Law, Sherman Act

An effect can be substantial under the Sherman Act, 15 U.S.C.S. § 1 even if its impact on interstate commerce falls far short of causing enterprises to fold or affecting market price.

Antitrust & Trade Law > Sherman Act > General Overview

HN9[] Antitrust & Trade Law, Sherman Act

If the allegations of the plaintiff's complaint fairly claim that the alleged conspiracy, to the extent it is successful, will place unreasonable burdens on the free and uninterrupted flow of interstate commerce, that is sufficient, at the pleading stage of a proceeding, to establish a substantial effect upon interstate commerce under the Sherman Act, 15 U.S.C.S § 1.

Business & Corporate Law > Foreign Corporations > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Transportation Law > ... > Federal Powers > Powers of Congress > Substantial Relations

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] Business & Corporate Law, Foreign Corporations

Under the "substantial effect" test, it is unnecessary for an antitrust plaintiff to allege the defendant had the purposeful goal of affecting interstate commerce or that the conspiracy threatens the demise of out-of-state businesses or that the conspiracy affects market prices.

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

HN11[] Sherman Act, Claims

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. This rule applies with no less force to a Sherman Act, 15 U.S.C.S. § 1 claim, where one of the requisites of a cause of action is the existence of a demonstrable nexus between the defendants' activity and interstate commerce.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

HN12[] Antitrust & Trade Law, Sherman Act

Jurisdiction is not defeated by plaintiff's failure to quantify the adverse impact of defendant's conduct.

Antitrust & Trade Law > Sherman Act > Remedies > Injunctions

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

HN13[] **Remedies, Injunctions**

Even where there is an inability to prove that concerted activity has resulted in legally cognizable damages, jurisdiction need not be impaired, though such a failure may confine the available remedies to injunctive relief.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Organizations

HN14[] **Antitrust & Trade Law, Exemptions & Immunities**

The second threshold issue is whether the defendants' conduct is clearly articulated and affirmatively expressed as state policy and actively supervised by the State so as to be exempt from the Federal antitrust laws under the doctrine of state action.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] **Antitrust & Trade Law, Exemptions & Immunities**

The state action doctrine provides an exemption from the Federal antitrust laws and, if applicable, allows for dismissal of the complaint.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

HN16[] **Reviewability of Lower Court Decisions, Preservation for Review**

The general rule is that a federal appellate court does not consider an issue not passed upon below.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Preservation for Review

Healthcare Law > Business Administration & Organization > Peer Review > General Overview

HN17[] **Reviewability of Lower Court Decisions, Preservation for Review**

The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Business Administration & Organization > Peer Review > Organizations

HN18[] **Antitrust & Trade Law, Exemptions & Immunities**

The state action doctrine exempts conduct that is clearly articulated and affirmatively expressed as state policy and actively supervised by the State from the Federal antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > State & Territorial Governments > Legislatures

HN19[] **Antitrust & Trade Law, Sherman Act**

When a state legislature adopts legislation, its actions constitute those of the State and ipso facto are exempt from the operation of the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

HN20[] **Antitrust & Trade Law, Sherman Act**

The United States Supreme Court decisions establish two standards for antitrust immunity. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy' second, the policy must be actively supervised by the State itself.

Antitrust & Trade Law > Sherman Act > General Overview

HN21[] **Antitrust & Trade Law, Sherman Act**

To satisfy the clearly articulated and affirmatively expressed state policy element of the state action doctrine, the state legislature must authorize the challenged activity and the legislature must intend to displace the Federal antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

HN22[] **Antitrust & Trade Law, Sherman Act**

The state legislature's intent to displace the federal antitrust laws exists if the challenged restraint is a necessary consequence of engaging in the authorized activity.

Antitrust & Trade Law > Sherman Act > General Overview

HN23[] **Antitrust & Trade Law, Sherman Act**

As a matter of judicial economy, the Federal courts must not be further burdened by complex antitrust litigation when the alleged illegal conduct is mandated and supervised by the state and, furthermore, the plaintiff is afforded the due process safeguards of hearings and state court review.

Antitrust & Trade Law > Sherman Act > General Overview

HN24[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act, *15 U.S.C.S. § 1* gives no hint that it was intended to restrain official action directed by a state.

Antitrust & Trade Law > Sherman Act > General Overview

HN25[] **Antitrust & Trade Law, Sherman Act**

There is nothing in the language of the Sherman Act *15 U.S.C.S. § 1* or in its history which suggests that its purpose was to restrain a state or its nonsovereign representatives from activities directed by its legislature.

Counsel: John J. Casey, Landesman & Schwartz, Chicago, Illinois, for Plaintiff.

George W. Spellmire, Hinshaw, Culbertson, Moelmann, Hoban & Fuller, W. Washington, Chicago, Illinois, Alfred C. Tisdahl, Jr., French, Rogers, Kezelis, & Kominiarek, P.C., N. Dearborn, Chicago, Illinois, for Defendant.

Judges: Bauer, Coffey, Circuit Judges, and Fairchild, Senior Circuit Judge.

Opinion by: COFFEY

Opinion

[*374] COFFEY, Circuit Judge.

Plaintiffs-Appellants, R. Anthony Marrese, M.D., and Bone & Joint Surgeons, Inc., appeal the judgment of the United States District Court for the Northern District of Illinois dismissing the plaintiffs' claims under the Sherman Act *§§ 1*, *2*, *15 U.S.C. §§ 1*, *2*, for lack of subject matter jurisdiction. We conclude that the defendants' conduct in reviewing Dr. Marrese's surgical procedures and recommending that his clinical privileges at Deaconess Hospital, in Evansville, Indiana, be revoked, is exempt from the Federal antitrust laws under the doctrine of "state action," and thus we affirm **[**2]** the dismissal of the plaintiffs' claims under the Sherman Act *§§ 1*, *2*.

I

The record reveals that Dr. R. Anthony Marrese, is a Board certified orthopedic surgeon who specializes in the treatment of spinal disorders. Dr. Marrese is the sole shareholder of Bone & Joint Surgeons, Inc., an Indiana corporation with its principal office in Evansville, Indiana. He is licensed to practice medicine in the states of Illinois and Indiana and, at the commencement of this lawsuit, had clinical privileges to practice at Deaconess Hospital, **[*375]** a non-profit corporation located in Evansville, Indiana. [1]

[3]** In February 1978, a Special Ad Hoc Committee ("SAHC") comprised of selected members of the medical staff at Deaconess Hospital conducted an audit of the surgical "back" procedures performed at Deaconess. [2] The results of that audit raised questions concerning the "appropriateness of the surgeries performed by Dr. Marrese." Accordingly, the SAHC recommended to the medical staff at Deaconess that all of Dr. Marrese's lumbar laminectomy and spinal fusion cases be monitored, and that any case without a positive radiological finding be subjected to a mandatory second opinion. In August 1980, the SAHC retained Interqual, Inc., an independent, nonaffiliated company engaged in the business of performing medical audits, to conduct a further audit of Dr. Marrese's lumbar and cervical surgical procedures. Based upon the findings of the Interqual audit, the SAHC recommended to the Medical Staff Executive Council at Deaconess that Dr. Marrese's clinical privileges be revoked. On April 28, 1982, the Medical Staff Executive Council adopted the recommendation of the SAHC but stayed implementation of Dr. Marrese's clinical privilege revocation, pending a hearing as required by the hospital's Fair **[**4]** Hearing Plan.

The Fair Hearing Plan at Deaconess was adopted by the medical staff in June 1979 "to provide every practitioner with one evidentiary hearing and with one appellate hearing in the event that any action is taken [including revocation of clinical privileges] by the Medical Staff Executive Council . . . or the Board of Directors of the Hospital." The medical staff's authority to review professional practices within its hospital is provided for in the State of Indiana statutory code:

> "The governing board of the hospital shall be the supreme authority in the hospital
> * * *
>
> The medical staff of a hospital shall be an organized group which shall be responsible to the governing board . . . and shall have the responsibility of reviewing the professional **[**5]** practices in the hospital for the purpose of reducing morbidity and mortality, and for the improvement of the care of patients in the hospital. *This review shall include, but shall not be limited to, the quality and necessity of the care provided patients*. . . ."

Ind. Code § 16-10-1-6.5 (1982) (emphasis added). The Indiana statutory scheme for quality control of the medical profession further provides that the personnel of:

> "a committee having the responsibility of evaluation of qualifications of professional health care providers, or of patient care rendered by professional health care providers, or of the merits of a complaint against a professional health care provider that includes a determination or recommendation concerning the complaint
> * * *
> shall be immune from any civil action arising from any determination made in good faith in regard to evaluation of patient care. . . ." [3]

---

[1] At oral argument the plaintiffs' counsel informed this court that Dr. Marrese "is no longer practicing in Evansville," but counsel failed to provide this court with any information concerning Dr. Marrese's status at Deaconess Hospital, much less his underlying reason for no longer practicing in Evansville, Indiana. It is clear from the plaintiffs' first amended complaint that Dr. Marrese's clinical privileges at Deaconess had not been revoked prior to the filing of this lawsuit in July 1982.

[2] According to the plaintiffs' first amended complaint, the "back" procedures audited by the SAHC included, *inter alia*, fifty lumbar laminectomies and forty spinal fusions performed by orthopedic surgeons on the staff at Deaconess Hospital.

[3] The Indiana legislature defines good faith as "an act taken without malice after a reasonable effort to obtain the facts of the matter and in the reasonable belief that the action taken is warranted by the facts known." Ind. Code § 34-4-12.6-1(f) (1982).

[*376] Ind. Code §§ 34-4-12.6-1(c), 34-4-12.6-3 (c) (1982). [4] The procedure to be followed in reviewing professional practices within a hospital is set forth in Ind. Code § 34-4-12.6-2(b):

> "Any professional health care provider under investigation **[**6]** shall be permitted at any time to see any records accumulated by a peer review committee pertaining to his personal practice and shall be offered the opportunity to appear before the peer review committee with adequate representation to hear all charges and findings concerning his practice and to offer rebuttal information, which shall be a part of the record before any disclosure of the charges and findings hereunder."

[7]** The Fair Hearing Plan adopted by the medical staff at Deaconess affords any practitioner adversely affected by a recommendation or action of the Medical Staff Executive Council or the Board of Directors, the right to an evidentiary hearing. [5] **[**8]** The hearing is conducted before an evidentiary hearing committee, comprised of five members of the senior or active medical staff. [6] The practitioner may request to be represented by an attorney and/or may be accompanied by a member of the medical staff, and shall also be allowed to:

> "(a) call and examine witnesses
> (b) introduce exhibits
> (c) cross-examine any witness on any matter relevant to the issues
> (d) question the qualifications of any witness
> (e) rebut any evidence
> (f) request that the record of the hearing be made by use of a court reporter or an electronic recording unit."

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[4] Effective April 1983, the Indiana legislature amended Ind. Code § 16-10-1-6.5 to provide in pertinent part:

> "The governing board and its employees, agents, consultants, and attorneys have absolute immunity from civil liability for communications, discussions, actions taken, and reports made concerning disciplinary action or investigation taken or contemplated, if such reports or actions are made in good faith and without malice."

Ind. Code Ann. § 16-10-1-6.5(b) (Burns Supp. 1983).

[5] According to the Fair Hearing Plan at Deaconess, a practitioner is entitled to an evidentiary hearing for the following recommendations or actions:

> "(a) Denial of initial staff appointment
>
> (b) Denial of reappointment
>
> (c) Suspension of staff membership
>
> (d) Revocation of staff membership
>
> (e) Denial of requested advancement in staff category
>
> (f) A change in staff category not acceptable to the practitioner
>
> (g) Limitation of the right to admit patients
>
> (h) Denial of requested department/service/section affiliation
>
> (i) Denial of requested clinical privileges
>
> (j) Reduction of clinical privileges
>
> (k) Suspension of clinical privileges
>
> (l) Revocation of clinical privileges
>
> (m) Terms of probation
>
> (n) Individual requirement of consultation

[6] The five hearing committee members are appointed by the president of the medical staff when the hearing is occasioned by an adverse recommendation of the Medical Staff Executive Council. On the other hand, when the hearing is occasioned by an adverse recommendation of the governing hospital board, the board president appoints the five members of the hearing committee.

At a hearing to review the revocation of a practitioner's clinical privileges, "the body whose adverse recommendation or action occasioned the hearing shall have the initial obligation to present evidence" in support of its recommendation. According to the Fair Hearing Plan at Deaconess, the burden then shifts to the practitioner to show "by a preponderance of the evidence that the grounds [for revocation] lack any substantial basis or that such basis or the conclusions drawn therefrom are either arbitrary, unreasonable, or capricious." Following this hearing, the committee compiles its findings and submits them along with a recommendation to either the Medical Staff Executive Council or the Board of Directors, depending **[**9]** upon which body initiated the adverse recommendation or action. After reviewing the committee's findings and recommendation, the council or hospital board affirms, modifies, or reverses the recommendation. If the decision is adverse to the practitioner, he has a **[*377]** right of review before the joint conference committee of the hospital. The Fair Hearing Plan at Deaconess provides that "the practitioner seeking the review may submit a written statement detailing the findings of fact, conclusions and procedural matters with which he disagrees, and his reasons for disagreement." Following submission of the practitioner's statement, the joint conference committee conducts a review hearing and based upon its findings, recommends to the hospital board that the adverse decision be affirmed, modified, or reversed. The board issues a final written decision and if the practitioner's hospital staff privileges are, in fact, revoked, he is entitled to appeal that decision through the Indiana state court system and challenge the "good faith" of the hospital staff members in reaching their conclusion. *See, e.g.,* *Kiracofe v. Reid Memorial Hosp., 461 N.E.2d 1134, 1139-41 (1984)*; **[**10]** *Yarnell v. Sisters of St. Francis Hlth. Serv., 446 N.E.2d 359, 361-63 (1983)*. [7]

In July 1982, before the Board of Directors at Deaconess had issued their final decision revoking Dr. Marrese's clinical privileges, the plaintiffs (Dr. Marrese and his solely owned company, Bone & Joint Surgeons, Inc.) filed suit in the United States District Court for the Northern District of Illinois against Interqual, Inc., Deaconess Hospital and its Board of Directors in their individual capacity, and members of the SAHC and Executive Committee at Deaconess, including seven doctors, one hospital administrator, and one attorney. [8] The suit alleged that the defendants had conspired to restrain trade in violation of the Sherman Act *§ 1*, had monopolized the market for orthopedic and neurological spinal surgical procedures in Evansville, Indiana in violation of **[**11]** the Sherman Act *§ 2*, and had violated *42 U.S.C. § 1983* by adopting an anticompetitive, unfair, and unconstitutional Fair Hearing Plan under color of the Indiana medical peer review statute, Ind. Code § 34-4-12.6-1 *et seq.* [9] According to the plaintiffs' first amended complaint, "beginning in early 1978 and continuing thereafter to the present, the Defendants have engaged in an unlawful conspiracy to exclude DR. MARRESE from the Evansville, Indiana marketing area by falsely charging that he is unqualified to practice and compete therein." The complaint alleged that the defendants "formulated and effectuated" this conspiracy through their actions as members of or consultants to the hospital board, the SAHC, and the Medical Staff Executive Council at Deaconess. The plaintiffs sought money damages for the alleged Federal antitrust violations and, pursuant to the Clayton Act § 16, *15 U.S.C. § 26*, a permanent injunction restraining defendants from continuing to engage in Federal antitrust violations. In addition, the plaintiffs requested a permanent injunction "enjoining the President of the Medical Staff . . . from naming a committee **[**12]** to sit in review of the recommendation of the Executive Committee of the Medical Staff."

For purposes of establishing the district court's subject matter jurisdiction over the alleged violations of the Sherman Act *§§ 1*, *2*, the plaintiffs claimed that the defendants' activities had a substantial and adverse effect upon interstate commerce. In support of this position, the plaintiffs alleged that:

> "Approximately 45% of the patients treated by DR. MARRESE travel from Western Kentucky and Southern Illinois into the State of Indiana and the vast majority of these patients are treated by DR. MARRESE at DEACONESS HOSPITAL. . . . In **[**13]** addition, DR. MARRESE **[*378]** is a team surgeon for an Illinois high

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[7] We express no view concerning the defendants' "good faith" and/or "bad faith" in the present case, as that issue is not presently before the court.

[8] The record reveals that the plaintiffs filed their initial complaint in this action on July 12, 1982. Some two weeks later, on July 27, 1982, the plaintiffs filed their first amended complaint.

[9] The plaintiffs' first amended complaint also included a pendent state claim, alleging that the defendants' actions constituted a tortious interference with business relations.

> school, and in this capacity has occasion to travel into the State of Illinois, treat injured athletes and when necessary brings them back to the DEACONESS HOSPITAL for the purpose of providing medical treatment for them. In the regular course of his treatment of both his interstate and in-state patients, Plaintiff, DR. MARRESE, through Plaintiff's Bone & Joint Surgeons, Inc. purchases medicine, equipment and related supplies from out-of-state purveyors, derives revenues from the Federal Health Care Program commonly known as Medicare and Medicaid as well as from private out-of-state insurance companies and pays management and accounting fees to various out-of-state consultants. The total amount of said out-of-state purchases, revenues, and fees exceed the sum of $500,000.00 [annually]."
>
> * * *
>
> If Defendants' conspiracy is successful in its ultimate objective of driving DR. MARRESE from the Evansville, Indiana marketing area, he will . . . be unable to practice orthopedic medicine anywhere in the continental United States because of the cost of medical malpractice insurance, and because no other hospital **[**14]** could afford the risk of accepting DR. MARRESE on its staff." [10]

The plaintiffs further alleged that:

> "Approximately 25% of the HOSPITAL'S patients travel from Kentucky and Illinois to the HOSPITAL for the purpose of receiving medical and surgical care from its professional staff.
>
> The HOSPITAL'S regular billings with respect to said out-of-state patients are not less than TEN MILLION DOLLARS ($10,000,000.00) per year.
>
> The HOSPITAL also purchases medical supplies and equipment in an amount not less than FIVE MILLION DOLLARS ($5,000,000.00) per year from various out-of-state sources."

In February 1983, the district court dismissed the plaintiffs' first amended complaint in its entirety. The court found that:

> "With respect to interstate commerce, plaintiffs have alleged that Dr. Marrese treats people **[**15]** who travel in interstate commerce; that they purchase medicine and related supplies from out-of-state; that Dr. Marrese travels in interstate commerce as part of his business; and that they receive revenues from out-of-state sources such as insurance companies and Medicare."

Based upon these findings, the court ruled, *inter alia*, that:

> "Plaintiffs have not alleged what effect the defendants attempts to revoke Dr. Marrese's clinical privileges have had on the aspects of interstate commerce alleged. Other than generalized, conclusory allegations plaintiffs have failed to allege any substantial effect on interstate commerce. . . . Thus, because the court concludes that defendants' allegedly unlawful actions do not have a substantial effect on interstate commerce, [the plaintiffs' claims under the Sherman Act *§§ 1*, *2*] must be dismissed for lack of subject matter jurisdiction." [11]

[16]** In March 1983, the plaintiffs filed a motion for reconsideration of the district court's order dismissing the first amended complaint and also filed a motion for leave to file a second amended complaint. The court denied both motions ruling that, "many of the allegations in the Second Amended Complaint are identical to paragraphs in the First Amended Complaint. To the extent that there are differences between the two complaints, they are differences **[*379]** merely of degree not of substance." [12] On appeal, the plaintiffs contend that the district court

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[10] The record before this court reveals that the plaintiffs' allegation of out-of-state purchases, revenues, and fees in excess of $500,000 refers to an annual sum.

[11] The court ruled that the plaintiffs' claim of an anticompetitive, unfair, and unconstitutional Fair Hearing Plan at Deaconess Hospital failed to allege sufficient "state action" to state a claim under *42 U.S.C. § 1983*. The court further ruled that because the federal claims were dismissed, it no longer retained jurisdiction over the pendent state law claim. The plaintiffs do not appeal these decisions.

[12] The district court denied the plaintiffs' motion for leave to file a second amended complaint and thus that complaint was never made a part of the district court record. It is clear, however, that the judge received and reviewed a copy of the second

erred in dismissing the plaintiffs claims under the Sherman Act §§ 1, 2, for failure to allege a substantial and adverse effect upon interstate commerce.

[17]** II

HN1[] The Sherman Act prohibits "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States," 15 U.S.C. § 1 (1982), and also prohibits "monopolizing any part of the trade or commerce among the several States." 15 U.S.C. § 2 (1982). **HN2**[] It is axiomatic that in pleading a cause of action under the Sherman Act §§ 1, 2, the plaintiff must adequately allege the jurisdictional requirement of interstate commerce. *See* McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 241-42, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980) ("McClain"); Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738, 743, 48 L. Ed. 2d 338, 96 S. Ct. 1848 (1976) ("*Hospital Building Co.*"). Thus, the plaintiff's complaint must allege sufficient facts to establish that the defendant's alleged illegal conduct is "in interstate commerce" or has a "substantial and adverse effect" upon interstate commerce. McLain, 444 U.S. at 241-42; **[**18]** Hospital Building Co., 425 U.S. at 743. One of the two threshold issues before this court is whether the plaintiffs in the instant case have alleged facts sufficient at the pleading stage of the proceeding to satisfy the jurisdictional requirement of interstate commerce under the Sherman Act. [13]

[19]** We note at the outset that **HN3**[] "in reviewing the dismissal of a complaint, 'the . . . factual allegations of the complaint are taken as true.'" Mid-America Reg. Bar. v. Will Cty. Carpenters, 675 F.2d 881, 883 (7th Cir.), *cert. denied*, *459 U.S. 860, 74 L. Ed. 2d 114, 103 S. Ct. 132 (1982)* (quoting **[*380]** Ashbrook v. Hoffman, 617 F.2d 474, 475 (7th Cir. 1980)). According to the plaintiffs' first amended complaint, approximately forty-five percent of Dr. Marrese's patients travel from Illinois and Kentucky into Indiana for treatment. [14] The complaint alleges that the vast majority of these patients are treated at Deaconess Hospital in Evansville, Indiana. In addition, Dr. Marrese claims that he travels into Illinois to treat injured athletes, and when necessary, brings them to Deaconess Hospital for medical treatment. Dr. Marrese further claims that he purchases medicine, equipment, and related supplies from

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amended complaint as did the defendants who filed a memorandum in opposition to the plaintiffs' motion for leave to file an amended complaint. On appeal, the plaintiffs have presented this court with a copy of the second amended complaint which alleges, in addition to the allegations of the first amended complaint, that:

> "Approximately 300 patients per year travel from Western Kentucky and Southern Illinois into the State of Indiana for treatment by DR. MARRESE. Each patient is seen by DR. MARRESE on six separate occasions for a total of approximately 1,800 visits per year by out-of-state patients into the State of Indiana from DR. MARRESE. These patients are billed approximately $1,000,000.00 per year by DR. MARRESE and approximately $10,000,000.00 by the HOSPITAL. . . . The vast majority of these patients are treated by DR. MARRESE at least once at the HOSPITAL and a large percentage of these cases involve complex spinal surgery. If DR. MARRESE's privileges at the HOSPITAL are terminated, these patients will not cross state lines into the State of Indiana for their medical treatment for they come to DR. MARRESE because of his superior expertise in spinal diagnosis and treatment."

The second amended complaint also alleges that Dr. Marrese had contracted to purchase a $500,000 computerized tomography body scanner from a New Jersey firm. Specifically, Dr. Marrese alleges that he had made a down payment on the machine, had arranged financing with a Missouri firm, and had entered into an agreement with an out-of-state physician, a "national expert in the field of computerized tomography scanning," to read and interpret the specialized x-rays. Dr. Marrese claims that as a result of the defendants' alleged illegal conduct, he was forced to cancel the agreement to purchase the scanner, the financing arrangement with the x-ray reading agreement with the out-of-state physician.

[13] The record reveals that at the pleading stage of this proceeding the defendants filed a motion to dismiss the plaintiffs' complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. For purposes of the Sherman Act claims, the district court treated the defendants' motion as a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), and dismissed the claims. According to the Supreme Court in *Hospital Building Co.*, the jurisdictional requirement of interstate commerce may be analyzed under Fed. R. Civ. P. 12(b)(1) or 12(b)(6), "the critical inquiry is into the adequacy of the nexus between [defendants'] conduct and interstate commerce that is alleged in the complaint." 425 U.S. at 742 n.1.

[14] Due to the fact that the plaintiffs' second amended complaint was never made a part of the district record, this court limits its review to the plaintiffs' first amended complaint.

out-of-state purveyors, derives revenues from Medicare, Medicaid, and private out-of-state insurance companies, and pays management **[**20]** and accounting fees to out-of-state consultants. These out-of-state purchases, revenues, and fees allegedly exceed $500,000 annually. Moreover, according to the plaintiffs' first amended complaint, approximately twenty-five percent of the patients receiving medical and surgical care at Deaconess Hospital travel from Illinois and Kentucky, accounting for $10,000,000 in annual hospital billings. The complaint alleges that the hospital purchases approximately $5,000,000 in medical supplies and equipment annually, from out-of-state sources. Finally, Dr. Marrese claims that upon revocation of his clinical privileges at Deaconess, he will no longer be able to practice orthopedic medicine in Evansville, Indiana or anywhere in the United States because no hospital will be able to afford the risk of granting Dr. Marrese staff privileges. It is the plaintiffs' position that these allegations are sufficient, at the pleading stage of the proceeding, to establish a "substantial and adverse effect" upon interstate commerce, and thus satisfy the jurisdictional requirement of interstate commerce under the Sherman Act.

[21]** In *Williams v. St. Joseph Hospital, 629 F.2d 448 (7th Cir. 1980)*, this court set forth the general rule that ***HN4***[] "medical practice *per se* and without more is a local activity. To bring it within reach of the [Federal] antitrust laws a substantial and adverse effect upon interstate commerce is requisite." *629 F.2d at 454* (citing *Polhemus v. American Medical Assn., 145 F.2d 357, 359 (10th Cir. 1944))*. ***HN5***[] "As long as the restraint in question 'substantially and adversely affects interstate commerce,' the interstate commerce nexus required for Sherman Act coverage is established." *Hospital Building Co., 425 U.S. at 743* (citations omitted). According to the Supreme Court in *McLain*, ***HN6***[] the defendant's activities must "be shown 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved." *444 U.S. at 246* **[**22]** (citing *Hospital Building Co., 425 U.S. at 745*). ***HN7***[] Though each case involves a unique set of facts, "if it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *Hospital Building Co., 425 U.S. at 743* (quoting *Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195, 42 L. Ed. 2d 378, 95 S. Ct. 392 (1974))*; *Williams v. St. Joseph Hospital, 629 F.2d at 453 n.11*; *Tiger Trash v. Browning-Ferris Industries, Inc., 560 F.2d 818, 825-26 (7th Cir. 1977)*, *cert. denied*, *434 U.S. 1034, 54 L. Ed. 2d 782, 98 S. Ct. 768 (1978)* (quoting *United States v. Women's Sportswear Assn., 336 U.S. 460, 464, 93 L. Ed. 805, 69 S. Ct. 714 (1949))*.

In *Hospital Building Co.*, the Supreme Court stated that ***HN8***[] "an effect can be 'substantial' under the Sherman Act even if its impact on interstate commerce falls far short of causing enterprises to fold **[**23]** or affecting market price." *425 U.S. at 745*. According to the Court, ***HN9***[] if the allegations of the plaintiff's complaint "fairly claim that the alleged conspiracy, to the extent it is successful, will place 'unreasonable burdens on the free and uninterrupted flow' of interstate commerce," that is sufficient, at the pleading stage of a **[*381]** proceeding, to establish a substantial effect upon interstate commerce under the Sherman Act. *Id. at 746*. This court has added that ***HN10***[] under the "substantial effect" test, "it is unnecessary for an antitrust plaintiff to allege the defendant 'had the purposeful goal of affecting interstate commerce' . . . or that 'the conspiracy threatens the demise of out-of-state businesses or that the conspiracy affects market prices.'" *Tiger Trash v. Browning-Ferris Industries, Inc., 560 F.2d at 826* (brackets original) (quoting *Hospital Building Co., 425 U.S. at 745, 746)* ("*Tiger Trash*").

Indeed, in **[**24]** *Tiger Trash*, the plaintiff alleged that the defendant, Browning-Ferris Industries ("BFI"), was attempting to monopolize the solid waste collection service of Evansville, Indiana and Henderson, Kentucky, in violation of the Sherman Act *§ 2*. According to the undisputed facts, BFI was an Indiana corporation with twenty customer accounts in Henderson, Kentucky, comprising approximately five percent of BFI's total accounts. The Kentucky accounts produced annual revenues of $30,000 amounting to approximately three to four percent of the annual revenues produced by BFI's Evansville, Indiana accounts. In addition, BFI maintained $6,000 worth of equipment in Kentucky on a permanent basis and used another $100,000 worth of equipment within the state. On the issue of whether or not these facts were sufficient to satisfy the test of "substantial and adverse effect" upon interstate commerce, at the pleading stage of the proceeding, this court ruled that:

> "Plaintiff Tiger Trash may be able to prove that defendants' monopolization caused an effect on interstate commerce 'that is more than merely inconsequential.' *Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1303 (5th Cir. 1971)*, **[**25]** *cert. denied*, *404 U.S. 1047, 30 L. Ed. 2d 736, 92 S. Ct.*

> *701 (1972)*. Since the relation of the alleged restraints to interstate commerce and their effect upon it are not 'clearly nonexistent' summary judgment for BFI Indiana was inappropriate.
> * * *
>
> What the proofs will show is another matter, but at least plaintiff must be permitted to show (if it can) that an interstate market, the Henderson-Evansville area, was being monopolized by defendants. *Hospital Building, supra, 425 U.S. at 747 n.5*"

Id. at 826. Similarly, the Supreme Court has stated that at the pleading stage of a proceeding:

> ***HN11***[] "[A] complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)*; see 5 C. Wright & A. Miller, Federal Practice and Procedure §§ 1202, 1205-1207, 1215-1224, 1228 (1969). This rule applies with no less force to a Sherman **[**26]** Act claim, where one of the requisites of a cause of action is the existence of a demonstrable nexus between the defendants' activity and interstate commerce."

McLain, 444 U.S. at 246. *See also* *Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272, 1282 (7th Cir. 1983)*; *Williams v. St. Joseph Hospital, 629 F.2d at 453-54*.

Since the decisions in *Hospital Building Co.* and *McLain*, the Federal courts have embarked upon a new and vastly expanded interpretation of the interstate commerce requirement under the Sherman Act. As a result, the courts have been deluged with complaints alleging that a hospital's denial or revocation of a doctor's staff privileges constitutes a restraint of trade and/or an attempt to monopolize trade in violation of the Sherman Act *§§ 1*, *2*. *See* *Pontius v. Children's Hospital, 552 F. Supp. 1352, 1362-63 (W.D. Pa. 1982)*; Kissam, Webber, Bigus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 Cal. L. Rev. 595 (1982). A common element in these hospital staff denial **[*382]** or revocation cases is a threshold **[**27]** determination by the court of whether or not the doctor's complaint alleges facts sufficient to satisfy the jurisdictional requirement of interstate commerce under the Sherman Act. For example, in *Cardio-Medical Assoc. v. Crozer-Chester Med. Ctr., 721 F.2d 68 (3rd Cir. 1983)* ("*Cardio-Medical*"), four cardiologists claimed that their denial of specialized staff privileges, preventing them from using advanced equipment at the defendant hospital, violated the Sherman Act *§§ 1*, *2*. The plaintiffs alleged that twelve to fifteen percent of their patients were from out-of-state, and that these patients accounted for $100,000 in annual revenues. The plaintiffs further alleged that in the absence of the defendant's illegal activity, they would have another twelve to fifteen percent interstate patients, additional interstate revenues, and additional purchases of out-of-state medications. The court held that:

> "Interferences with the interstate travel of patients, the interstate payment of fees, and the interstate purchase of medication are well-recognized methods for demonstrating an effect on interstate commerce in antitrust litigation. We therefore conclude **[**28]** that plaintiffs' pleadings meet the jurisdictional requirements of the Sherman Act. . . ."

721 F.2d at 76 (citations omitted). In accord with the court's broad language in *Cardio-Medical*, Federal courts have relied upon the treatment of out-of-state patients, the receipt of Medicare, Medicaid, and out-of-state insurance funds, and the purchase of medicine, equipment, and medical supplies from out-of-state purveyors by the plaintiff doctor and/or the defendant hospital, to rule that the doctor's complaint satisfies the jurisdictional requirement of interstate commerce under the Sherman Act. *See, e.g.,* *Weiss v. York Hospital, 745 F.2d 786*, slip op. at 79-82, n.63 (3d Cir. 1984) (osteopath denied staff privileges); *Mishler v. St. Anthony's Hosp. Systems, 694 F.2d 1225, 1227-28 (10th Cir. 1981)* (neurosurgeon excluded from emergency room referral list); *Crane v. Intermountain Health Care, Inc., 637 F.2d 715, 725 (10th Cir. 1981)* (en banc) (pathologist denied staff privileges); *Stone v. William Beaumont Hospital, 1983-2 Trade Cases 69,475, 69,479 (E.D. Mich. 1983)* (cardiologist denied staff **[**29]** privileges); *Konik v. Champlain Val. Physicians Hosp. Med. Ctr., 561 F. Supp. 700, 709-10 (N.D.N.Y. 1983)*, *aff'd*, *733 F.2d 1007 (2nd Cir. 1984)* (anesthesiologist denied use of hospital facilities); *Pontius v. Children's Hospital, 552 F. Supp. at 1361-62*; (cardiovascular surgeon denied reappointment to staff); *McElhinney v. Medical Protective Co., 549 F. Supp. 121, 127-28 (E.D. Ky. 1982)* (surgeon denied reappointment to staff); *Pao v. Holy Redeemer Hospital, 547 F. Supp. 484, 489-90 (E.D. Pa. 1982)* (opthalmologist denied staff privileges); *Everhart v. Jane C. Stormont Hospital, 1982-1 Trade Cases 73,895, 73,896 (D. Kan. 1982)* (cardiovascular surgeon denied staff privileges); *Williams v. Kleaveland, 534 F. Supp. 912, 918 (W.D. Mich. 1981)* (doctor denied reappointment to staff); *McDonald v. St. Joseph's Hospital of Atlanta, 524 F. Supp. 122, 126-30 (N.D. Ga. 1981)* (urological surgeon denied staff privileges); *Robinson v. Magovern, 521 F. Supp. 842, 876 (W.D. Pa. 1981)*, *aff'd without opinion*, *688 F.2d 824* (3rd **[**30]** Cir.), *cert. denied*, *459 U.S. 971, 103 S. Ct. 302, 74 L. Ed. 2d 283 (1982)* (thoracic surgeon denied staff privileges); *Malini v. Singleton & Associates, 516 F. Supp. 440, 442-43 (S.D. Tex. 1981)* (radiologist denied staff privileges); *Feldman v. Jackson Memorial Hospital, 509 F. Supp. 815, 819-21 (S.D. Fla. 1981)* (podiatrist denied membership on medical staff). [15]

[31]** **[*383]** In the instant case, the plaintiffs' first amended complaint alleges that Dr. Marrese treats out-of-state patients; purchases medicine, equipment, and medical supplies from out-of-state purveyors; derives revenues from Medicare, Medicaid, and out-of-state private insurance companies; and pays management and accounting fees to out-of-state consultants. The plaintiffs' complaint further alleges that the impending revocation of Dr. Marrese's clinical privileges at Deaconess will prevent him from practicing orthopedic medicine in Evansville, Indiana or anywhere in the United States. Based upon these allegations, and the Federal courts' expansive interpretation of the interstate commerce requirement under the Sherman Act, it may be that the plaintiffs can demonstrate a substantial and adverse effect upon interstate commerce as a matter of practical economics. At this point we cannot say beyond doubt that the plaintiffs will be unable to prove a set of facts that will establish this required effect upon interstate commerce. [16] It is true that at the time the plaintiffs filed their first amended complaint, Dr. Marrese's clinical privileges at Deaconess had not yet been **[**32]** revoked and thus, no substantial and adverse impact upon interstate commerce had yet occurred. The Supreme Court has stated, however, that ***HN12***[] jurisdiction is not defeated "by plaintiff's failure to quantify the adverse impact of defendant's conduct." *McLain, 444 U.S. at 243*. According to the Court, ***HN13***[] "even where there is an inability to prove that concerted activity has

[15] We note that courts have also dismissed doctors' claims under the Sherman Act, for the denial or revocation of hospital staff privileges, due to the plaintiff doctors' failure to allege a sufficient interstate commerce nexus. *See* *Hayden v. Bracy, 744 F.2d 1338*, slip op. at 8-9 (8th Cir. 1984); *Furlong v. Long Island College Hosp., 710 F.2d 922, 927-28 (2d Cir. 1983)*; *Capili v. Shott, 620 F.2d 438, 439 (4th Cir. 1980)* (per curiam); *Wolf v. Jane Phillips Episcopal-Memorial Med. Ctr., 513 F.2d 684, 687-88 (10th Cir. 1975)*; *Moles v. Morton F. Plant Hospital, Inc., 1980-1 Trade Cases 77,186, 77,189-90 (M.D. Fla. 1978)*, *aff'd without opinion*, ***617 F.2d 293*** (5th Cir.), *cert. denied*, ***449 U.S. 919, 66 L. Ed. 2d 147, 101 S. Ct. 317 (1980)***.

[16] In *Western Waste Service v. Universal Waste Control, 616 F.2d 1094* (9th Cir.), *cert. denied*, ***449 U.S. 869, 66 L. Ed. 2d 88, 101 S. Ct. 205 (1980)***, the Ninth Circuit interpreted *McLain* to mean "that it was not necessary for the alleged antitrust violations complained of to have affected interstate commerce as long as *defendants*' business activities, independent of the violations, affected interstate commerce." *616 F.2d at 1097* (emphasis added). In *Crane v. Intermountain Health Care, 637 F.2d at 724*, the Tenth Circuit stated that "we do not believe *McLain* signals a shift in analytical focus away from the challenged activity and towards the defendant's general or overall business. The analytical focus continues to be on the nexus, assessed in practical terms, between interstate commerce and the challenged activity." In the instant case, we need not reach the issue of whether the plaintiffs could rely upon the interstate business activities of defendant, Deaconess Hospital, to satisfy the jurisdictional requirement of interstate commerce under the Sherman Act. *See* *Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d at 1282* (this court does not find it necessary to choose between the various interpretations of *McLain*). Based upon the plaintiffs' allegations that Dr. Marrese treats out-of-state patients and has interstate purchases, revenues, and fees in excess of $500,000 annually, it may well be that the plaintiffs can demonstrate a substantial and adverse impact upon interstate commerce. *Accord* *Cardio-Medical Associates, 721 F.2d at 76*.

resulted in legally cognizable damages, jurisdiction need not be impaired, though such a failure may confine the available remedies to injunctive relief." *Id.* In light of the expansive interpretation of the interstate commerce requirement under the Sherman Act, and the fact that the plaintiffs seek injunctive relief under the Clayton Act § 16, we hold that the plaintiffs' first amended complaint alleges facts sufficient at the pleading stage of the proceeding to establish the jurisdictional requirement of interstate commerce under the Sherman Act, thus satisfying one of the two threshold issues before this court. **[**33]**

[34]** We hasten to note that our analysis of the plaintiffs' first amended complaint does not end with a determination of this jurisdictional issue of interstate commerce under the Federal antitrust laws. Rather a thorough reading of the plaintiffs' complaint reveals that the defendants' alleged conspiracy to "exclude DR. MARRESE from the Evansville, Indiana marketing area" was formulated and effectuated through the defendants' actions as members of or consultants to the hospital board, the SAHC, and the Medical Staff Executive Council at Deaconess. Indeed, the complaint alleges that "in formulating and effectuating their . . . conspiracy to eliminate plaintiffs as competitors in the relevant market and particularly for patients treated at the HOSPITAL, defendants further **[*384]** specifically agreed and conspired" in February 1978 to conduct an internal audit of the "back" procedures, including lumbar laminectomies and spinal fusions, performed at Deaconess; in August 1980, to retain Interqual, Inc. to conduct an independent audit of Dr. Marrese's surgical "back" procedures; to recommend, based upon the findings of the Interqual audit, that Dr. Marrese's clinical privileges be revoked; **[**35]** and in April 1982, on behalf of the Medical Staff Executive Council, to adopt the recommendation that Dr. Marrese's clinical privileges at Deaconess be revoked. Thus, according to the plaintiffs' first amended complaint, the defendants' alleged illegal conduct under the Sherman Act consists of their actions as members of or consultants to the hospital board, the SAHC, and the Medical Staff Executive Council, in reviewing Dr. Marrese's surgical procedures and recommending that his clinical privileges at Deaconess be revoked. In effect, the plaintiffs' Federal antitrust lawsuit is an attack upon the defendants' overall conduct as participants in the medical peer review process at Deaconess Hospital and their motives in recommending that Dr. Marrese's clinical privileges be revoked.

In response to the allegations contained within the plaintiffs' first amended complaint, the focus of our analysis shifts to a review of the defendants' conduct in recommending that Dr. Marrese's clinical privileges be revoked. The plaintiffs' first amended complaint, dismissed in its entirety by the district court, clearly states that:

> "The professional staff of any hospital in the State of Indiana **[**36]** is *authorized*, pursuant to 31 [sic] Burns Indiana Statute 4-12-6(2)(c)(B) [Ind. Code 34-4-12.6-1(c)(2)] to establish a 'Peer Review Committee', which is a committee charged with the responsibility of evaluating the qualifications of professional health care providers at a hospital. DR. MARRESE is a 'professional health care provider' within the meaning of said statute.
>
> Defendant HOSPITAL attempted to implement the provisions of that statute on June 2, 1980 [sic] by adopting a 'Fair Hearing Plan' . . . ."

(Emphasis added). As a result of the plaintiffs' factual assertions that Ind. Code § 34-4-12.6-1 authorizes hospitals to establish peer review committees to evaluate staff members' qualifications and that Deaconess Hospital acted to implement the provisions of that statute, we must consider ***HN14***[] the second threshold issue; whether the defendants' conduct is "clearly articulated and affirmatively expressed as [Indiana] state policy" and "actively supervised" by the State so as to be exempt from the Federal antitrust laws under the doctrine of state action. *See Hoover v. Ronwin, 466 U.S. 558, 104 S. Ct. 1989, 1995, 80 L. Ed. 2d 590 (1984)*; **[**37]** *California Liquor Dealers v. Midcal Aluminum, 445 U.S. 97, 105, 63 L. Ed. 2d 233, 100 S. Ct. 937 (1980)* ("*California Liquor Dealers*"). Such an analysis at the pleading stage of the proceeding is proper because ***HN15***[] the state action doctrine provides an *exemption* from the Federal antitrust laws and, if applicable, allows for dismissal of the complaint. *See, e.g., Hoover v. Ronwin, 104 S. Ct. at 1994*; *Gambrel v. Kentucky Board of Dentistry, 689 F.2d 612, 613-21 (6th Cir. 1982)*, *cert. denied*, *459 U.S. 1208, 103 S. Ct. 1198, 75 L. Ed. 2d 441 (1983)*; *Benson v. Arizona State Bd. of Dental Examiners, 673 F.2d 272, 274-76 (9th Cir. 1982)*.

We initially note that the district court, in dismissing the plaintiffs' first amended complaint, did not address the issue of state action. *HN16*[] The general rule is that "a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff, 428 U.S. 106, 120, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976)*; **[**38]** *Sharp v. Ford Motor Credit Co., 615 F.2d 423, 424 n.1 (7th Cir. 1980)*. It is clear, however, that the issue of state action has been addressed in the parties' briefs before this court and that *HN17*[] "the matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff, 428 U.S. at 121*. **[*385]** [17] In the instant case the plaintiffs challenge the defendants' conduct and motives as participants in the medical peer review process at Deaconess Hospital. A review of the plaintiffs' complaint along with the parties' briefs and the relevant Indiana statutory law reveals that the medical peer review process in the State of Indiana was developed and enacted by the Indiana legislature to regulate and improve the quality of medical care within the state. *See* *Ind. Code §§ 16-10-1-1 et seq.*, 25-22.5-2-1 *et seq.*, 34-4-12.6-1 *et seq.* This comprehensive statutory scheme mandates hospital medical staffs **[**39]** to review the professional practices and procedures of hospital staff members, *see* Ind. Code § 16-10-1-6.5, and authorizes the formation of peer review committees to perform this review process, *see* Ind. Code § 34-4-12.61(c). In light of this comprehensive statutory scheme in the State of Indiana, the plaintiffs' allegation that Deaconess Hospital acted to implement the provisions of this statutory scheme, and the fact that *HN18*[] the state action doctrine *exempts* conduct that is "clearly articulated and affirmatively expressed as state policy" and "actively supervised" by the State from the Federal antitrust laws, this court is "justified in resolving [the state action] issue not passed on below. . . ." *Singleton v. Wulff, 428 U.S. at 121*.

[40]** The doctrine of state action originated in *Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)* ("*Parker*"), where a raisin producer in the State of California challenged a state statute that authorized "programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers." *317 U.S. at 346*. According to the Supreme Court, the program restricting the marketing of raisins in California:

> "derive[d] its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. *We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature*. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly **[**41]** to be attributed to Congress."

Id. at 350-51 (emphasis added). *See also* *Hoover v. Ronwin, 104 S. Ct. at 1995*.

Since the seminal decision in *Parker*, the Supreme Court has further refined the doctrine of "state action." *See, e.g.,* *Goldfarb v. Virginia State Bar, 421 U.S. 773, 791, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975)* (state bar association's enforcement of a minimum legal fee schedule not exempt under *Parker* because not compelled by state); *Cantor v. Detroit Edison Co., 428 U.S. 579, 591-92, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976)* (opinion of Stevens, J.) (private utility company's regulation of light bulbs, approved by state and required to be continued until new tariff is filed, not exempt under *Parker*); *Bates v. State Bar of Arizona, 433 U.S. 350, 362-63, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977)* (enforcement of clearly articulated disciplinary rules by state supreme court, acting in its legislative capacity, exempt under *Parker*); *Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415, 55 L. Ed. 2d 364, 98 S. Ct. 1123 (1978)* (opinion of **[**42]** Brennan, J.) (city's operation of electrical utility system exempt under *Parker* if state contemplated the action complained of when it authorized city to operate in that area); *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 109, 58 L. Ed. 2d 361, 99 S. Ct. 403 (1978)* (state board's enforcement of a clearly articulated, **[*386]** affirmatively expressed state regulation of automobile dealerships is exempt under

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[17] On August 10, 1984, the parties were ordered to furnish the court with supplemental briefs, analyzing the applicability of the "state action" doctrine in the present case. The plaintiffs and defendants each submitted a supplemental and a reply brief on this issue.

Parker); *California Liquor Dealers*, 445 U.S. at 105-06 (wine wholesaler's enforcement of a clearly articulated state system for wine pricing is not exempt under *Parker* because the state neither establishes nor reviews the price schedules, nor regulates the terms of fair trade contracts); *Community Communications Co. v. Boulder, 455 U.S. 40, 55, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982)* (municipality's enforcement of its cable television ordinance is not exempt under *Parker* because the state's position is one of mere neutrality respecting the municipality's actions). Most recently, the Court in *Hoover v. Ronwin*, reaffirmed its rationale in *Parker* that ***HN19***[] "when **[**43]** a state legislature adopts legislation, its actions constitute those of the State . . . and *ipso facto* are exempt from the operation of the antitrust laws." *104 S. Ct. at 1995*. The Court added that a "closer analysis is required when the activity at issue is not directly that of the legislature . . . but is carried out by others pursuant to state authorization." *Id.* It is "important to ensure that the anti-competitive conduct of the State's representative was contemplated by the State." *Id.* *See also Lafayette v. Louisiana Power & Light Co., 435 U.S. at 413-15* (opinion of Brennan, J.); P. Areeda, ***Antitrust Law*** para.212.3 at 53-54 (Supp. 1982). According to the Court:

> "If the replacing of entirely free competition with some form of regulation or restraint was not authorized or approved by the State then the rationale of *Parker* is inapposite. As a result, in cases involving the anti-competitive conduct of a nonsovereign state representative the Court has required a showing that the conduct is pursuant to a 'clearly articulated and affirmatively expressed state policy' to **[**44]** replace competition with regulation. The Court also has found the degree to which the state legislature . . . supervises its representative to be relevant to the inquiry."

Hoover v. Ronwin, 104 S. Ct. at 1995 (citations omitted). [18] Thus, our review of the defendants' conduct in reviewing Dr. Marrese's surgical procedures and recommending that his clinical privileges at Deaconess be revoked is guided by ***HN20***[] the Supreme Court decisions, which "establish two standards for antitrust immunity under *Parker v. Brown*. First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *California Liquor Dealers*, 445 U.S. at 105 (quoting *City of Lafayette v. Louisianna Power & Light Co., 435 U.S. at 410* (opinion of Brennan, J.)).

[45]** At the outset, we note the underlying rationale of *Parker* that "the state action doctrine is grounded in concepts of federalism and state sovereignty." *Hoover v. Ronwin, 104 S. Ct. at 1998 n.24* (citing *Community Communications Co. v. Boulder, 455 U.S. at 54*). Indeed, "the *Parker* exemption reflects the federalism principle that we are a Nation of *States," Community Communications Co. v. Boulder, 455 U.S. at 50* (emphasis original), and "under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority," *Parker, 317 U.S. at 351*. This court's concern in resolving the state action issue is to preserve the principles of state sovereignty **[*387]** and federalism without disregarding the procompetitive, free enterprise values embodied in the Federal antitrust laws. [19] The presence of a clearly articulated and affirmatively expressed state policy, as well as active state supervision, reduces the "concern that federal policy is being unnecessarily and inappropriately subordinated to state policy." *Bates v. State Bar of Arizona, 433 U.S. at 362*. **[**46]** Moreover, the active supervision requirement "ensures that state-federal conflict will be avoided in those areas in which the state

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[18] ***HN21***[] To satisfy the "clearly articulated and affirmatively expressed state policy" element of the state action doctrine, the state legislature must authorize the challenged activity and the legislature must intend to displace the Federal antitrust laws. *See* P. Areeda, ***Antitrust Law*** para. 212.3 at 53 (Supp. 1982). *See also Community Communications Co. v. Boulder, 455 U.S. at 51-52*; *Lafayette v. Louisiana Power & Light Co., 435 U.S. at 415* (opinion of Brennan, J.). ***HN22***[] The state legislature's intent to displace the federal antitrust laws exists if the challenged restraint is a necessary consequence of engaging in the authorized activity. P. Areeda, ***Antitrust Law**, supra*, at 54. *See also HyBud Equip. Corp. v. City of Akron, 742 F.2d 949*, slip op. at 19 (6th Cir. 1984).

[19] *See, e.g.*, S. Sachs, *Antitrust, The States, and The Professions*, 52 Antitrust L.J. 189, 191-92 (1983) (professional areas create a potential tension between Federal antitrust laws and states' legitimate interest in regulation); D. Smith, *Antitrust Immunity for State Action: A Functional Approach*, 31 Baylor L. R. 263, 289-92 (1979) (state action doctrine is an accommodation of potentially competing sovereigns).

has demonstrated its commitment to a program through its exercise of regulatory oversight." 1 P. Areeda & D. Turner, ***Antitrust Law*** para. 213a at 73 (1978). We add that in the instant case, a further concern of this court is to promote the intended purpose of the Sherman Act as a "consumer welfare prescription." *NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 104 S. Ct. 2948, 2964, 82 L. Ed. 2d 70 (1984)* (quoting *Reiter v. Sonotone Corp., 442 U.S. 330, 343, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979))*. *See also* *Indiana Federation of Dentists v. F.T.C., 745 F.2d 1124*, slip op. at 30 (1984); R. Bork, *The Antitrust Paradox* 66 (1978); 21 Cong. Rec. 2455, 2456-63 (March 21, 1890) (statement of Sen. Sherman). The State of Indiana has developed and enacted a comprehensive statutory scheme of medical peer review to protect consumer welfare. Indeed, the State's medical peer review process ensures Indiana citizens of the highest quality of medical care, while protecting them from incompetent, unqualified **[**47]** medical treatment. It is within this framework that we analyze the comprehensive statutory scheme developed and enacted by the Indiana legislature to establish, regulate, and supervise the medical peer review process within the State. [20]

[48]** Our initial inquiry is whether the defendants' review of Dr. Marrese's surgical "back" procedures at Deaconess and the recommendation that his clinical privileges be revoked is conduct "clearly articulated and affirmatively expressed as [Indiana] state policy." The Indiana statutory scheme clearly mandates that:

> "The governing board of the hospital *shall* be the supreme authority in the hospital, responsible for . . . the appointment of members of the medical staff and the assignment of privileges to members of the medical staff with the advice and recommendations of the medical staff consistent with their individual training, experience, and other qualifications. The medical staff of a hospital shall be an organized group which . . . *shall* have the responsibility of reviewing the professional practices in the hospital for the purpose of reducing morbidity and mortality, and for the improvement of the care of patients in the hospital. This review shall include, but shall not be limited to, the quality and necessity of the care provided patients. . . ."

[*388] Ind. Code § 16-10-1-6.5 (emphasis added). [21] To implement this review process, the statutory **[**49]** scheme provides that hospitals establish a peer review committee that shall have "the responsibility of evaluation of

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[20] In the instant case, our state action analysis is, by necessity, limited to a review of the Indiana statutory scheme regulating the medical peer review process. We note, however, that peer review is mandated by Congress when medical services are paid for with Medicare, *see* ***42 U.S.C. § 1395x(k)***, ***(r)***, ***(s) (1982)***, and/or Medicaid, *see* ***42 U.S.C. § 1396a(a)(19)***, ***(26) (1982)***, funds, and also when hospitals seek certification for participation in the Medicare program by obtaining accreditation from the Joint Commission for the Accreditation of Hospitals, *see* *42 U.S.C. § 1395bb(a) (1982)*. It is clear that Congress, by mandating hospital staff members or members of the local medical society to participate in the peer review process, *see* ***42 U.S.C. § 1395x(k)(2)***, accepts the potential anticompetitive effects of the medical peer review process in favor of quality medical care. *See* *49 Fed. Reg. 14977 (1984)* (proposed rules to protect information of Peer Review Organizations); *49 Fed. Reg. 29026 (1984)* (revised rules for Peer Review Organizations). *Cf.* *Pontius v. Children's Hospital, 552 F. Supp. at 1376* (Congress has attempted to improve the process of peer review through the Peer Review Improvement Act, *42 U.S.C. §§ 1320c-1 et seq. (1984)*).

[21] Similarly, the administrative regulations of the Indiana Hospital Licensing Board provide that:

> "THE GOVERNING BODY. The governing board of the hospital shall be the supreme authority in the hospital, responsible for the management, operation, functioning, and control of the hospital. The Governing Body shall:
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> * * *
>
> (g) Approve the bylaws, rules, and regulations of the Medical Staff and audit procedures or other measures used to assure quality of care. (h) Appoint members of the Medical Staff and assign privileges consistent with their individual training, experience, and other qualifications on a periodic basis (at least every two (2) years) with the advice and recommendations of the organized Medical Staff."

410 Ind. Adm. Code 15-1-5 (Cumm. Supp. 1983). Furthermore:

> "THE MEDICAL STAFF. (1) The Medical Staff of a hospital composed of two (2) or more physicians shall be an organized group which shall be responsible to the governing board for the clinical and scientific work of the hospital, advise regarding professional matters and policies to the governing board, or the board's designee, and shall have the responsibility of

qualifications of professional health care providers, or of patient care rendered by professional health care providers, or of the merits of a complaint against a professional health care provider that includes a determination or recommendation concerning the complaint." Ind. Code § 34-4-12.6-1. The peer review committee must be organized, *inter alia*, "by the professional staff of a hospital" and a "majority of the members [must be] professional health care providers holding licenses in the stated profession of the committee." *Id.*

[50]** The plaintiffs admit that Deaconess Hospital has "attempted to implement the provisions" of Ind. Code 34-4-12.6-1 *et seq.* Additionally, the plaintiffs allege that the SAHC and the Executive Council at Deaconess were organized by the hospital and consisted of a majority of licensed doctors (seven doctors, one hospital administrator, and one attorney). The record reveals that the medical staff at Deaconess Hospital has acted pursuant to Ind. Code § 34-4-12.6-1, to establish a peer review process that complies with the requirements of Ind. Code § 34-4-12.6-1(c). The State of Indiana has "clearly articulated and affirmatively expressed as state policy" that hospital medical staffs are to form peer review committees and that such committees are to review the quality and necessity of the care provided patients, to evaluate the qualifications of staff members, and review the merits of any recommendation against a staff member. Ind. Code §§ 16-10-1-6.5, 34-4-12.6-1. As a necessary and reasonable consequence of this state mandated medical peer review process, hospital staff members must review the medical treatments, diagnostic procedures, and surgical procedures of competing staff **[**51]** members and, when required, recommend the revocation of staff privileges. Thus, the defendants' conduct, as members of or consultants to the hospital board, the SAHC, and the Medical Staff Executive Council, in reviewing Dr. Marrese's surgical procedures **[*389]** and recommending that his staff privileges be revoked, satisfies the first element of the *Parker* test. *See* Borsody & Tiano, *Peer Review and the Anti-Trust Laws: An Analysis and a Proposal*, 26 St. Louis U.L.J. 511, 514-15 (1982).

We turn our attention to the second element of the *Parker* test, whether the State of Indiana "actively supervises" the medical peer review process. The Indiana statutory scheme provides that the Indiana Medical Licensing Board shall, *inter alia*, promulgate rules and regulations necessary for the licensing of doctors within the state and also "adopt rules establishing standards for the competent practice of medicine or osteopathic medicine, or any other form of practice regulated by a limited license or permit issued [by the Board]." *Ind. Code § 25-22.5-2-7(h)* (1982). The Medical Licensing Board, created by the Indiana legislature, consists of five physicians, **[**52]** one osteopathic physician, and one lay member of the general public, all appointed by the Governor. The Board closely supervises the Indiana medical profession by requiring that every physician within the state biennially register and qualify for licensure by the Board. 844 Ind. Adm. Code 4-6-1 *et seq.* (Cumm. Supp. 1983). Pursuant to Ind. Code § 25-22.5-6-2.1, the Board is authorized to commence revocation proceedings to revoke or suspend the medical license of any practitioner who knowingly violates the rules of competent medical practice established and promulgated by the Board. In furtherance of this duty to regulate the Indiana medical profession, the Board reviews

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reviewing the professional practices in the hospital for the purpose of reducing morbidity and mortality, and for the improvement of the care of patients in the hospital. This review shall include, but shall not be limited to, the quality and necessity of the care provided patients and the preventability of complications and deaths occurring in the hospital.

(2) The medical staff shall initiate and, with the approval of the Governing Body, adopt and periodically amend bylaws, rules, regulations, and policies which shall include, but need not be limited to, provisions for:

(a) Qualifications to be met for appointment to staff membership and for delineation of privileges.

* * *

(d)(1) Review of applications for staff membership, delineation of privileges, and recommendations on appointment to the Governing Body.

(2) Appeal of decisions regarding Medical Staff membership and privileges.

(3) Review and analysis, at regular stated intervals, of clinical performance, pathological reports, the completeness of medical records and of the enforcement of requirements related thereto, of infection control, of use of blood and blood-related elements, and of total patient care.

410 Ind. Adm. Code 15-1-7 (Cumm. Supp. 1983).

the communications, records, and determinations of hospital peer review committees. According to the Indiana statutory scheme:

> "Communications to, and the records and determinations of, a peer review committee may only be disclosed to the specific credentials committee of a hospital or other health facility, the disciplinary authority of the professional organization of which the professional health care provider under question is a member, or *the appropriate state board of registration and licensure* **[**53]** which the committee deems necessary for recommended disciplinary action. . . ."

Ind. Code § 34-4-12.6-2(b) (emphasis added). [22] Thus, the Indiana legislature has created the Indiana Medical Licensing Board as an official body of the State to promulgate and enforce standards of competent medical practice, regulate the licensing of doctors within the State, and review the confidential communications, records, and determinations of medical peer review committees. The examination of confidential peer review data and records is an essential element of the Board's function in regulating the medical profession and in assuring that the citizens of Indiana receive the highest quality of medical care.

[54]** In addition, the Indiana statutory scheme provides that the State Board of Health shall license and regulate hospitals within the State through the Hospital Licensing Council. *Ind. Code §§ 16-10-1-1*, 16-10-1-3. Pursuant to Ind. Code § 16-10-1-12, the Council shall promulgate rules and regulations pertaining to the proper operation and management of hospitals within the State, amend rules and regulations "for the establishment and maintenance of standards of hospitalization required for the efficient care of patients," and prescribe, through rules and regulations, "the minimum standards as to equipment and provision for the care of patients to which an institution must conform in order to operate lawfully as a hospital" within the State. The Hospital Licensing Council, just as the Medical Licensing Board, is a creature of the **[*390]** Indiana legislature and consists of one physician, one registered nurse, four hospital administrators, one member of the Indiana Department of Public Welfare, and one member of the State Board of Health, all appointed by the Governor. Ind. Code § 16-10-1-3. The Council continually reviews the operation of hospitals within the State and, based **[**55]** upon its compiled data, recommends to the State Board of Health whether or not a hospital qualifies for annual license renewal. Ind. Code § 16-10-1-9. According to the Indiana statutory scheme, representatives of the State Board of Health are required to review all hospitals within the state on a periodic basis, Ind. Code § 16-10-1-13, and the Hospital Licensing Council is authorized to employ field inspectors to inspect hospitals and "give advice, aid, and encouragement to such institutions, in maintaining high professional ideals and good care of patients." Ind. Code § 16-10-1-17. Pursuant to 410 Ind. Adm. Code 15-1-8(1)(c) (1979), these field inspectors are entitled to review the confidential minutes of meetings of the hospital board, the medical staff, and the medical staff peer review committees. Included within the confidential minutes of peer review meetings are records of staff membership applications, delineations of staff privileges, appeals of decisions regarding medical staff membership and privileges, and records of clinical performance and total patient care within the hospital. 410 Ind. Adm. Code 15-1-7(d), (f). Thus, the Hospital Licensing Council of the Indiana **[**56]** State Board of Health is an official body created by the Indiana legislature to promulgate and enforce the proper standards of hospital care and regulate the licensing and operation of hospitals within the State. As an integral part of its hospital inspection program, the Council reviews the confidential communications, records, and determinations of medical peer review committees, assuring Indiana citizens that hospital medical staffs are providing quality medical care while acting in accordance with approved medical standards.

In *California Liquor Dealers*, the Supreme Court analyzed the nature of the supervision that a state must exercise over a nonsovereign state representative to satisfy the second element of the *Parker* test. In that case the State of California had a plan for wine pricing that constituted resale price maintenance in violation of the Sherman Act. The

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[22] Similarly, the Indiana legislature amended Ind. Code § 16-10-1-6.5, effective April 22, 1983, to require that:

> "The governing board shall report, in writing, to the Indiana medical licensing board the results and circumstances of any final, substantive, and adverse disciplinary action taken by the governing board regarding a physician on the medical staff, or an applicant for the medical staff, if the action results in voluntary or involuntary resignation, termination, nonappointment, revocation, or significant reduction of clinical privileges or staff membership."

Ind. Code Ann. § 16-10-1-6.5(b) (Burns Supp. 1983).

defendant, a wholesaler of California wines, argued that his enforcement of the wine pricing system was exempt from the Federal antitrust laws under the doctrine of state action. The Supreme Court held that the resale plan was "clearly articulated and affirmatively expressed as state policy" because "the **[**57]** legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance." *California Liquor Dealers*, 445 U.S. at 105. The Court added, however, that the plan "does not meet the second requirement for *Parker* immunity. The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts." *Id. at 105-06*.

As contrasted to the facts in *California Liquor Dealers*, the State of Indiana, through the Indiana Medical Licensing Board, enacts, promulgates, and enforces rules of competent medical practice within the State and reviews the confidential records of medical peer review committees to determine if further action is required. This Medical Licensing Board, acting on behalf of the State's interest in protecting the health and ensuring the safety of Indiana citizens, closely supervises the Indiana medical profession and with the assistance of medical peer review committees, regulates the licensing of physicians within the State. Moreover, **[**58]** the State of Indiana, through the Hospital Licensing Council, promulgates standards of proper hospital care, regulates the licensing of hospitals within the State, and, as an integral part of its hospital inspection program, reviews the confidential records of medical peer review committees. In light of the Medical Licensing **[*391]** Board's active supervision of the medical profession and the Hospital Licensing Council's active supervision of hospitals and their medical staffs, it is clear that the State of Indiana ensures its citizens of quality medical care and "actively supervises" the medical peer review process within the State. Thus, the defendants' conduct, as members of or consultants to the hospital board, the SAHC, and the Medical Staff Executive Council, in reviewing Dr. Marrese's surgical procedures and recommending that his staff privileges be revoked satisfies the second element of the *Parker* test.

Furthermore, the Indiana statutory scheme provides that:

> "The members of any medical staff committee organized for the purpose of conducting medical review, being retrospective and not a part of current patient care, shall have an absolute immunity from **[**59]** civil liability for communications made in committee meetings, and reports and recommendations made by the committee arising from deliberations by the committee to the governing board of the hospital or another duly authorized medical staff committee."

Ind. Code § 16-10-1-6.5. [23] Similarly, Ind. Code § 34-4-12.6-3 provides that:

> "There shall be no liability on the part of, and no action of any nature shall arise against, the personnel of a peer review committee for any act, statement made in the confines of the committee, or proceeding thereof made in good faith in regard to evaluation of patient care
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> * * *
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> The personnel of a peer review committee shall be immune from any civil action arising from any determination made in good faith in regard to evaluation of patient care. . . ."

This immunity from civil liability afforded members of the medical peer review process is in accord with the court's reasoning in *Pontius v. Children's Hospital*, that subjecting members of the peer review process to a Federal antitrust lawsuit will "chill the rights and obligations of physicians to participate in peer review." *552 F. Supp. at 1376*. According **[**60]** to that court:

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[23] The Indiana legislature amended § 16-10-1-6.5, effective April 22, 1983, to provide that:

> "The governing board and its employees, agents, consultants, and attorneys have absolute immunity from civil liability for communications, discussions, actions taken, and reports made concerning disciplinary action or investigation taken or contemplated, if such reports or actions are made in good faith and without malice."

Ind. Code Ann. § 16-10-1-6.5 (Burns Supp. 1983).

> "if *individual physicians* , who manage to overcome their traditional reluctance to testify about the professional conduct of a colleague, know that by so doing they risk incurring legal fees running into six figures and a trial of a duration measured in months, on the mere allegation that they have conspired to restrain trade, the discovery of incompetent physicians will be rendered extraordinarily difficult."

Id. at 1362 (emphasis original).

It is only logical that physicians **[**61]** within the State of Indiana, when presented with allegations of Federal antitrust violations and the threat of treble damages, will either dilute their peer review reports and cease recommending the revocation of a hospital staff member's privileges or will discontinue their participation in the state mandated and supervised peer review process. As a result, the very lifeline of the medical peer review process will be severed. Indeed, as the Supreme Court observed in *Hoover v. Ronwin*, with regard to the legal profession and a committee of State Bar Examiners, "there can be no question that the threat of being sued for [treble] damages [under the Sherman Act] particularly where the issue turns on subjective intent or motive -- will deter 'able citizens' from performing [an] essential public service." *104 S. Ct. at 2002 n.34*. Similarly in the medical profession, the threat of a Federal antitrust lawsuit will compel able and qualified physicians, with particular expertise in complex areas of **[*392]** medicine, to abdicate their participation in the medical peer review process. The overall effect will be to destroy the intended purpose of medical peer review; **[**62]** to assure Indiana citizens of quality medical care and protect them from incompetent, unqualified medical treatment.

In the context of an academic setting this court recently stated that:

> "the peer review process is essential to the very lifeblood and heartbeat of academic excellence and plays a most vital role in the proper and efficient functioning of our nation's colleges and universities. The process of peer evaluation has evolved as the best and most reliable method of promoting academic excellence and freedom by assuring that faculty tenure decisions will be made objectively on the basis of frank and unrestrained critiques and discussions of a candidate's academic qualifications."

E.E.O.C. v. University of Notre Dame Du Lac, 715 F.2d 331, 336 (7th Cir. 1983). So too, peer review is essential to the very lifeblood and heartbeat of medical competency and quality medical care in the State of Indiana and throughout the nation. In furtherance of this policy, the Indiana statutory scheme provides that "a committee having the responsibility of evaluation of qualifications of professional health care providers, or of patient care rendered by **[**63]** professional health care providers, or of the merits of a complaint against a professional health care provider" shall be immune from any civil action arising from a determination made in good faith. Ind. Code §§ 34-4-12.6-1, 34-4-12.6-3. Though this immunity attaches only after a finding that the committee's determinations were made in good faith, the concept to be gleaned from Ind. Code §§ 16-10-1-6.5 *et seq.*, 34-4-12.6-1 *et seq.* is that the State of Indiana realizes the real threat of lawsuits arising from the revocation of hospital staff privileges and has acted to protect the personnel involved in the medical peer review process. This protection encourages competent and qualified physicians to participate in the medical peer review process, thus assuring the citizens of Indiana that hospital medical staffs are competent, qualified, and practicing in accord with approved medical standards. The "good faith" immunity provision is an essential element of the state mandated and supervised peer review process in the State and, in conjunction with the other provisions of the comprehensive statutory scheme, it furthers the underlying policy of the Sherman Act to protect consumer **[**64]** welfare.

We further note that under the Indiana statutory scheme any practitioner investigated by a medical peer review committee shall receive the due process safeguard of an evidentiary hearing before any disclosure of the committee's findings. Pursuant to Ind. Code § 34-4-12.6-2:

> "Any professional health care provider under investigation shall be permitted at any time to see any records accumulated by a peer review committee pertaining to his personal practice and shall be offered the

> opportunity to appear before the peer review committee with adequate representation to hear all charges and findings concerning his practice and to offer rebuttal information, which shall be a part of the record before any disclosure of the charges and findings. . . ."

According to the Fair Hearing Plan at Deaconess, any practitioner adversely affected by a recommendation of the Medical Staff Executive Council has a right to an evidentiary hearing and, if necessary, a review before the joint conference committee of the hospital. The practitioner may request to be represented by an attorney and/or be accompanied by a member of the medical staff. In addition he shall be allowed to **[**65]** introduce evidence, examine witnesses, and be on record throughout the entire hearing process. Moreover, if the hospital board, upon completion of the hospital hearings, adopts the Medical Staff Executive Council's recommendation of suspension or revocation, the practitioner may appeal that final decision, challenge the hospital staff members' "good faith" in reaching that decision, and challenge the Fair Hearing Plan on constitutional grounds, through the Indiana state court system. *See Kiracofe v. Reid Memorial Hosp.*, Ind. App. , 461 N.E.2d at 1139-41; *Yarnell v. Sisters of St. Francis Hlth. Serv.*, Ind. App. , 446 **[*393]** N.E.2d at 361-63. *See also,* *[Renforth v. Fayette Memorial Hospital Ass'n., 178 Ind. App. 475, 383 N.E.2d 368, 377 (1978)](#)* (en banc), *cert. denied*, *444 U.S. 930, 62 L. Ed. 2d 187, 100 S. Ct. 273 (1979)*. In the instant case, it is clear that before his clinical privileges at Deaconess hospital are revoked, Dr. Marrese is entitled to the due process safeguards of a hearing and a review before the joint conference committee of the hospital. In the event that the hospital board adopts the recommendation **[**66]** of the Medical Staff Executive Council and revokes Dr. Marrese's clinical privileges, he is entitled to a complete review of that decision and all its proceedings within the Indiana state court system.

In light of the hearings provided by the Fair Hearing Plan at Deaconess, and the availability of the Indiana state courts to appeal an adverse decision of the hospital board, it is clear that the plaintiffs have a more than adequate forum to challenge the defendants' conduct and motives in reviewing Dr. Marrese's surgical procedures and in recommending that his clinical privileges at Deaconess be revoked. The plaintiffs' Federal antitrust lawsuit, attacking the defendants' conduct as members of the peer review process at Deaconess and challenging their motives in recommending that Dr. Marrese's clinical privileges be revoked, circumvents the hospital hearings and the state court review process in favor of a Federal forum. It is well recognized that "Federal courts . . . are now straining under excessive caseloads." *Patsy v. Florida Board of Regents, 457 U.S. 496, 517, 73 L. Ed. 2d 172, 102 S. Ct. 2557 (1982)* (O'Connor, J., concurring). ***HN23***[] **[**67]** As a matter of judicial economy, [24] the Federal courts must not be further burdened by complex antitrust litigation when the alleged illegal conduct is mandated and supervised by the state and, furthermore, the plaintiff is afforded the due process safeguards of hearings and state court review. Common sense dictates that a cause of action under the Sherman Act is not created every time a lawyer, accountant, or architect is denied partnership status in a national firm, a business executive is fired or denied a promotion by a national corporation, or a physician, surgeon, or specialist has hospital staff privileges denied or revoked. In the instant case, Dr. Marrese is entitled to challenge the defendants' motives and conduct in a hearing before the Deaconess medical staff, a review hearing before the joint conference committee of the hospital, and finally through proceedings in the Indiana state court system. Just as a disgruntled state bar applicant who is denied admission to a state bar has no cause of action under the Sherman Act against a state mandated and supervised bar review committee, *Hoover v. Ronwin, 104 S. Ct. at 2001*, **[**68]** Dr. Marrese has no cause of action under the Sherman Act against the defendants as participants in the state mandated and supervised medical peer review process. Instead, Dr. Marrese must challenge the defendants' conduct and motives through the proper forums; the hospital hearing committees and the Indiana state court system.

Finally, we note the proviso of the court in *Pontius v. Children's Hospital*, that:

> "If a physician, terminated from hospital privileges after receiving due process, is able to force the hospital to assume the burdens of an antitrust **[**69]** trial on the mere allegation that the hospital's decision was grounded

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[24] We here note Judge Fairchild's separate view that judicial economy is irrelevant in this context. As he sees it, our decision is an interpretation of the state action doctrine of Federal ***antitrust law***. Our conclusion that the doctrine applies to the present situation does, of course, result in relieving the district court of this lawsuit, but in his view achievement of that result is not an appropriate consideration in reaching our conclusion.

on reasons violative of the Sherman Act, the ability of hospitals to regulate their medical staffs will be seriously impaired."

552 F. Supp. at 1362. The evident trend among an increasing number of state supreme courts is to find that a hospital's "failure to investigate a medical staff applicant's qualifications for the privileges requested gives rise to a foreseeable risk of unreasonable harm and [thus] a hospital has a duty to exercise due care in the selection of its medical staff." *Johnson v. Misericordia Community Hosp., 99 Wis. 2d 708, 723,* ***[*394]*** *301 N.W.2d 156, 164 (1981)* and cases cited therein. *See also* *Vuciecevic v. MacNeal Memorial Hosp., 572 F. Supp. 1424, 1428 (N.D. Ill. 1983)*; Annot., 51 A.L.R. 3d 981 (1973). Indeed, according to the court in *Johnson v. Misericordia Community Hosp.*:

> "'One of the hospital's primary functions is to screen its staff of physicians to "insure" that only competent physicians are allowed to practice in the hospital.'
>
> * * *
>
> Obviously, the promotion of quality care and treatment **[**70]** of patients requires hospitals to perform a thorough evaluation of medical staff applicants from the standpoint of professional competence, ethics, established reputation, and further, to periodically review the qualifications of its staff through a peer review or medical audit mechanism. Hospitals, like doctors, must, above all else, be concerned with the welfare of their patients and must establish basic procedures to prevent subjecting them to harm and injury by physicians and surgeons who fail to possess an adequate level of technical skill, competence and ethical principles."

99 Wis.2d at 732, 734-35, 301 N.W.2d at 168-70 (quoting *Ferguson v. Gonyaw, 64 Mich. App. 685, 697, 236 N.W.2d 543, 550 (1976))*. *Cf.* *Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 1568, 80 L. Ed. 2d 2 (1984)* ("hospital's unquestioned right to exercise some control over the identity and the number of doctors to whom it accords staff privileges").

In the instant case, the State of Indiana's comprehensive statutory scheme, mandating and supervising the medical peer review process, enables the hospitals to fulfill their **[**71]** common law duty of exercising due care in selecting and maintaining a qualified and competent medical staff and, as a result, assures Indiana citizens that medical practices and procedures within the State are being closely monitored and reviewed. An attack upon this state mandated and supervised peer review process, through the Federal antitrust laws, will compel able and qualified physicians to abdicate their participation in the review of hospital staff members. This, in turn, will destroy the medical peer review process and prevent hospitals from fulfilling their duty to provide patients with a competent medical staff. In addition, the expenses in time and money, incurred by hospitals and physicians in defending their actions, as members of the state mandated and supervised medical peer review process, against the Federal antitrust laws, will eventually be reflected in increased medical costs to the consumer. Accordingly, we are reluctant to further burden the Federal courts with a greater influx of complex antitrust litigation, when a state such as Indiana in the instant case, clearly articulates and affirmatively expresses a state policy mandating medical peer review; actively **[**72]** supervises peer review committees' communications, records, and determinations through the Medical Council; enacts legislation to assure an adversely affected practitioner that he will receive the due process safeguard of an evidentiary hearing within the hospital; and provides the adversely affected practitioner with a state court forum to challenge the conduct and motives of participants in the peer review process.

Based upon the foregoing analysis it is apparent that the State of Indiana has established a thorough peer review process to assure the citizens of Indiana that only competent and qualified physicians, who practice only approved methods of medical care, are licensed within the state. True, the members of a peer review committee, as trained experts in highly specialized fields of medicine, are often in direct competition with the practitioner whom they are reviewing, and the committee's decision to revoke hospital staff privileges may conceivably have a "substantial and adverse effect" upon interstate commerce. Nonetheless, "we are a Nation of *States" Community Communications Co. v. Boulder, 455 U.S. at 50* (emphasis original), and "under the Constitution, **[**73]** the states are sovereign, save only as Congress may constitutionally subtract from their authority," *Parker, 317 U.S. at 351*. "The Sherman Act . . . ***HN24***[] gives no hint that it was intended to restrain . . . **[*395]** official action directed by a state." *Parker, 317 U.S. at 351*. ***HN25***[] 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 nonsovereign representatives] from activities directed by its legislature." *Id. at 350-51*. In fact, the purpose of the Sherman Act is to protect consumer welfare.

The State of Indiana has made a policy decision that the peer review process is necessary to protect the citizens of Indiana and promote consumer welfare. It runs contrary to the very concepts of state sovereignty and federalism for a Federal court to review the conduct of a peer review committee, under the guise of the Sherman Act, when the State of Indiana: mandates that **[**74]** hospital medical staffs review the quality and necessity of care provided patients; establishes a peer review process to assure for a competent medical staff throughout the State; immunizes members of a peer review committee, who act in good faith, from civil liability; creates a Medical Licensing Board and a Hospital Licensing Council to enforce rules of medical competence and review the actions of medical peer review committees; provides adversely affected practitioners with the due process safeguards of an evidentiary hearing; and provides adversely affected practitioners with the due process safeguards of an evidentiary hearing; and provides adversely affected practitioners with a state court forum to challenge the conduct and motives of participants in the peer review process. In the instant case, the defendants' actions in reviewing Dr. Marrese's surgical procedures and in recommending that his clinical privileges be revoked are "clearly articulated and affirmatively expressed as state policy" and are "actively supervised" by the State. Thus, in light of the plaintiffs' allegations that the defendants alleged illegal conduct consists solely of their actions as members of or **[**75]** consultants to the hospital board, the SAHC, and the Medical Staff Executive Council, acting within the Indiana medical peer review process, we hold that the defendants' actions are exempt from the Federal antitrust laws under the doctrine of state action. [25]

[76]** III

Accordingly, we affirm the district court's dismissal of the plaintiffs' complaint.

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[25] We are cognizant of the district court's ruling that the plaintiffs did not allege sufficient "state action" to state a cause of action under *42 U.S.C. § 1983*. The plaintiffs did not appeal the district court's dismissal of their claim under *42 U.S.C. § 1983* nor was this court presented with any argument on the issue. We note that the elements required for a cause of action under *42 U.S.C. § 1983*, a "deprivation . . . caused by the exercise of some right or privilege created by the State" and "the party charged with the deprivation must be a person who may fairly be said to be a state actor," *Lugar v. Edmondson Oil Co., 457 U.S. 922, 937, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982)* differ from the elements required for state action under *Parker*. We further note that the Fair Hearing Plan at Deaconess Hospital provides Dr. Marrese with the due process safeguard of an evidentiary hearing and, if necessary, a review hearing before the joint conference committee of the hospital. Moreover, if Dr. Maresse's clinical privileges at Deaconess are, in fact, revoked, the hospital's decision can be appealed through the Indiana state court system.

Olympia Co. v. Celotex Corp.

United States District Court for the Eastern District of Louisiana

November 9, 1984

Civil Action No. 76-373

Reporter

597 F. Supp. 285 *; 1984 U.S. Dist. LEXIS 22073 **; 1985-1 Trade Cas. (CCH) P66,494

OLYMPIA COMPANY, INC., and OLYMPIA ROOFING COMPANY, INC. v. THE CELOTEX CORPORATION, STANDARD-TAYLOR INDUSTRIES, INC., ET AL.

Core Terms

roofing, roofers, superceded, summary judgment, bonded, products, contractors, prices, competitors, pretrial statement, plaintiffs', sales, price discrimination, roofing material, asphalt, allegations, Deposition, market share, purchases, damages, discriminatory, monopolization, relevant market, Commodity, Asbestos, instances, roofing company, Robinson-Patman Act, specifications, furnishing

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Supporting Materials > Affidavits

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 > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

Civil Procedure > ... > Summary Judgment > Supporting Materials > General Overview

Civil Procedure > ... > Summary Judgment > Supporting Materials > Discovery Materials

HN1[] **Supporting Materials, Affidavits**

Summary judgment is appropriate where 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 summary judgment as a matter of law. *Fed. R. Civ. P. 56(c)*.

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

HN2[] **Clayton Act, Claims**

In order to recover damages under § 4 of the Clayton Act, *15 U.S.C.S.§ 15*, a plaintiff must prove (1) a violation of the antitrust laws, (2) cognizable injury attributable to that violation, and (3) at least the approximate amount of damage.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

HN3[] **Relevant Market, Geographic Market Definition**

The relevant product and geographic markets must be defined with some degree of precision to enable the trier of fact to determine the existence of monopoly power.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

The offense of monopoly under the Sherman Act, *15 U.S.C.S. § 2* has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

Antitrust & Trade Law > Clayton Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

Governments > Legislation > Statute of Limitations > General Overview

HN5[] **Antitrust & Trade Law, Clayton Act**

A four-year statute of limitations is provided in § 4B of the Clayton Act, *15 U.S.C.S. § 15b*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

Antitrust & Trade Law > Robinson-Patman Act > General Overview

HN6[] Robinson-Patman Act, Claims

Under *§ 2* of the Robinson-Patman Act, *15 U.S.C.S. § 13*, a plaintiff, in order to prevail, would be required to prove that Celotex discriminated in price (1) between different purchasers (2) of commodities of like grade and quality (3) where the effect of such discrimination is to substantially lessen competition or tend to create a monopoly, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, and (4) where such differential is not in response to changing market conditions.

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 > General Overview

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN7[] Robinson-Patman Act, Defenses

Section 2(b) of the Robinson-Patman Act *15 U.S.C.S. § 13(b)*, has been interpreted to afford an absolute defense to a charge of violating *§ 2(a)* of the Act, *15 U.S.C.S. § 13(a)* where the defendant shows that lower prices were extended in good faith to meet an equally low price of a competitor.

Antitrust & Trade Law > Sherman Act > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN8[] Antitrust & Trade Law, Sherman Act

Under *Section 1* of the Sherman Act, *15 U.S.C.S. § 1*, every contract, combination or conspiracy in restraint of trade or commerce is illegal.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN9[] **Tying Arrangements, Clayton Act**

There are four characteristics of an illegal tying arrangement, as follows: (1) two separate products, the tying product and the tied product, (2) sufficient economic power in the tying market to coerce purchase of the tied product, (3) involvement of a not insubstantial amount of interstate commerce in the tied market, and (4) anticompetitive effects in the tied market.

Counsel: **[**1]** Jack N. Price, Austin, Texas, for Olympia Company, Inc. and Olympia Roofing Company

Charles Kohlmeyer, Jr., Ernest L. Edwards, George Frazier, New Orleans, Louisiana, for Celotex Corp., Jack M. Alltmont, New Orleans, Louisiana, for Standard-Taylor Industries, Inc. and related entities and persons.

Judges: Charles Schwartz, Jr., Judge.

Opinion by: SCHWARTZ, JR.

Opinion

[*288] ORDER AND REASONS

This matter came before the Court on the motion of defendant Celotex Corporation (Celotex) and the motion of defendants, Standard-Taylor Industries, Inc. and related entities and persons (Standard) [1] for summary judgment. Following oral argument, the motions were taken under submission. Having considered the memoranda, the record and the law applicable to this motion, the Court grants the motions of defendants for the following reasons.

[2]** I. *Course of the Litigation*

Plaintiffs, Olympia Company and Olympia Roofing Co., Inc. (hereinafter jointly referred to as Olympia) instituted this litigation in 1976, alleging, inter alia, various violations of the antitrust laws. The subsequent course of this litigation, as is evidenced **[*289]** by the voluminous record, involved extensive discovery, several amendments to plaintiffs' complaint, substitutions of counsel for plaintiffs, and numerous extensions of cut-off dates, continuances and the like, granted at the instance of plaintiffs. In late 1979, defendants Celotex and Standard filed motions for summary judgment, seeking dismissal of the action. However, prior to the hearing on those motions, the Court was apprised of plaintiffs' intention to again substitute counsel. The Court allowed the substitution. In order to afford plaintiffs' latest counsel an opportunity to develop the necessary facts, the Court also ordered that the pending motions for summary judgment be continued indefinitely. [2]

[3]** By an Order of the Court, plaintiffs then filed their Fourth Amended Complaint, which superseded all prior pleadings of plaintiffs. [3] As the result of a status conference held on May 14, 1980, the Court entered an Order, setting forth the manner in which this case was to further proceed, and requiring plaintiffs to file a Pretrial Statement

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[1] In Plaintiffs' Fourth Amended Complaint, (Record (R.) Vol. X, Document (D.) 218), superseding all prior pleadings of plaintiffs, the following defendants were named: (1) The Celotex Corporation, (2) Standard-Taylor Industries, Inc., (3) Standard Roofing Company of New Orleans, Inc., (4) Robbins Taylor, and (5) Pierre F. Carriere. All of the defendants, with the exception of Celotex, are hereinafter sometimes referred to jointly and collectively as "Standard."

[2] In a Minute Entry of January 4, 1980, the Court noted that it was "of the opinion that [plaintiffs' counsel's] entrance in the case [would] result in a narrowing and clarifying of the issues and [would] in all probability obviate the necessity of hearing all of the contentions set forth in the motions for summary judgment." R. Vol. X, D. 211.

[3] R. Vol. X, D. 212, 218, 219 and 220.

which would thoroughly set forth plaintiffs' case and the factual and evidentiary basis for same. [4] Specifically, plaintiffs were directed to articulate their claims, by setting forth "in simple, declarative sentences all material facts relied upon by Plaintiffs in support of their claims for relief . . ." The Court directed that the "Pretrial Statements shall serve as each parties' contribution to the Pretrial Order," and specified that "any factual contention, legal contention, any claim for relief or defense in whole or in part, or affirmative matter not set forth in detail as provided hereinabove shall be deemed abandoned, uncontroverted, or withdrawn, notwithstanding the contentions of any pleadings or other papers previously filed herein. The case shall be tried upon the Pretrial Statements." Finally, the Court provided that "in the event **[**4]** defendants choose to do so, they may admit Plaintiffs' narrative facts relating to a legal contention or contentions for purpose of a Motion for Summary Judgment or Partial Summary Judgment. Any such Motion will be heard in accordance with the Federal Rules of Civil Procedure and the Local Rules of this Court, except that the narrative statements of fact in the parties' Pretrial Statements shall serve as the Statements of Material Facts required by Local Rule 3.9." [5] Furthermore, plaintiffs were allowed to take additional discovery subject only to the restriction that such discovery not be duplicative. Plaintiffs' Pretrial Statement, although it was filed approximately six months after the deadline set by the Court for its filing, was accepted by the Court. [6] Thereafter, the voluntary dismissal of certain of plaintiffs' claims and the motions of defendants to strike necessitated amendments to the plaintiffs' Pretrial Statement. [7] In its final form, Plaintiffs' factual contentions are set forth in their Second Amended Pretrial Statement. In response to the motions of defendants for summary judgment, plaintiffs filed into the record a letter of counsel, stating that "the pretrial **[**5]** statement contains both the facts and law on which Plaintiffs must rely." The motions were fixed for hearing on a date approximately two weeks prior to the pretrial conference and two days prior to the expiration of the discovery deadline set by the Court.

HN1[] **[*290]** Summary judgment is appropriate where "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 summary judgment as a matter of law." *Rule 56(c), Fed.* ***[**6]*** *Rules Civ. Proc.* When a motion for summary judgment is made and supported in the manner provided in *Rule 56(e) of the Federal Rules of Civil Procedure*, "an adverse party may not rest upon the mere allegations or denials of his pleadings, 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." *Rule 56(e), Fed. Rules Civ. Proc.*

The Court is not unmindful of the Fifth Circuit's admonition to approach summary judgment with caution, particularly with respect to anti-trust litigation. *Transource International, Inc. v. Trinity Industries, Inc., 725 F.2d 274, 279 (5th Cir. 1984)*. Nonetheless, summary judgment is sometimes appropriate in anti-trust actions. "It is now established that 'simply because a suit is brought under the antitrust laws does not foreclose a summary judgment. '" *Transource International, Inc. v. Trinity Industries, Inc., 725 F.2d 274, 279*, quoting *In re Municipal Bond Reporting Antitrust Litigation, 672 F.2d 436, 440 (5th Cir. 1982)*, citing, *Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1112 (5th Cir. 1979)*.

Despite the long and arduous course of this litigation, **[**7]** despite every reasonable opportunity afforded the plaintiffs to discover triable issues of fact, and despite the Court's many efforts to ensure that plaintiffs' alleged grievances, if proved, would be redressed, the Court finds that defendants are entitled to summary judgment, based upon the uncontroverted evidence and the law applicable to this case.

II. *Motion of Celotex for Summary Judgment*

A. The Facts

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[4] R. Vol. X, D. 221.

[5] R. Vol. X D. 221, Order of May 14, 1980, paras. 25, 26, 37-39.

[6] Defendants filed motions to dismiss in May of 1982 based upon the failure of plaintiffs to comply with the Court's Order in this regard. On August 10, 1982, one day prior to the scheduled hearing date on those motions, plaintiffs filed the Pretrial Statement.

[7] R. Vol. XII-XIII, D. 282-298.

For the purpose of this motion, Celotex has admitted all of the narrative statements of fact in plaintiffs' Second Amended Pretrial Statement, except for those which Olympia admits have no factual basis or support and which have been conclusively refuted with sworn testimony based upon personal knowledge. The narrative statements of fact are incorporated herein by reference and are attached hereto as Appendix I. Additionally, Celotex has submitted other facts which are uncontested and which may be material. These are contained in Celotex's Rule 3.9 Statement of Material Facts, incorporated herein by reference and attached hereto as Appendix II. The facts contained in Celotex's 3.9 Statement are supported by the evidence and have not been rebutted or controverted by plaintiffs **[**8]** in the manner provided under *Rule 56(e)*. Thus, the Court accepts these facts as undisputed.

Based upon plaintiffs' narrative statement of facts and the record herein, Olympia's contentions may be summarized as follows. Olympia competed with Standard and other similar companies in securing roofing jobs and furnishing roofing services within the New Orleans area. In doing so, Olympia purchased roofing materials from Celotex or its business predecessors. For several years, Olympia was on Celotex's Approved Roofers list. This, based upon the uncontroverted evidence, enabled Olympia to secure a Celotex roofing bond covering any roof that (1) was installed and repaired by an approved roofer (2) using Celotex materials (3) in accordance with Celotex's published specifications. Roofing bonds are significant in the context of this case for two reasons. First, Olympia was a union roofing contractor. [8] Architectural specifications control whether a roofing job must be performed with union labor and whether a roofing bond will be required. According to Olympia, these specifications provide that virtually all large commercial roofing jobs ($250,000 and over) must be bonded and applied by union **[**9]** roofers. Accordingly, Olympia contends that the ability **[*291]** to secure a bond was indispensible to a union roofing contractor in securing such jobs. Second, when Celotex's competitors reduced their bond coverage for unspecified reasons, Celotex "became possessed of a unique bond program," and was, thus, able to achieve a significant share of the market for "sale of roofing materials to bonded union roofing contractors" in the Greater New Orleans Area "because of its unique bonding program." [9] According to Olympia, Celotex thereby obtained a "dominant and monopolistic position" in the relevant market, and enjoys a market share in excess of 60%. [10] Plaintiffs also assert that in several instances, Standard was granted lower prices on certain materials by Celotex than those granted to Olympia. The factual allegations are the basis for the alleged violations specified by plaintiffs in the Pretrial Statement, as follows: (1) monopolization and attempted monopolization of the relevant markets, (2) unreasonable restraint of trade within the relevant markets in violation of *Section 1* of the Sherman Act, (3) price discrimination in violation of *Section 2(a)* and *(f)* of the Robinson-Patman **[**10]** Act, and (4) tying in violation of *Section 1* of the Sherman Act and Section 3 of the Clayton Act. [11] (On the latter allegation, Olympia contends that Celotex tied the furnishing of roofing bonds to the sale of materials.) The allegations of plaintiffs' Pretrial Statement contain the implication that Celotex and Standard conspired, but there is no specific allegation to that effect. A strict application of the Court's order relative to the Pretrial Statement would require that this legal contention be deemed abandoned or withdrawn. Nonetheless, the Court has addressed the issue of conspiracy herein.

Celotex contends that all of Olympia's allegations are either irrelevant, insufficient, unsupported, or contradicted by unrefuted evidence. Celotex further contends that certain **[**11]** of Olympia's claims are time-barred.

B. Fact of Damage and Amount of Injury

Plaintiffs seek treble damages under § 4 of the Clayton Act, *15 U.S.C. § 15*, based upon alleged antitrust violations under several theories. ***HN2***[] In order to recover such damages, a plaintiff must prove (1) a violation of the antitrust laws, (2) cognizable injury attributable to that violation, and (3) at least the approximate amount of damage. *Chrysler Credit Corp. v. J. Truett Payne Co., Inc., 670 F.2d 575, 579* (5th Cir.), *cert. denied*, *459 U.S. 908, 74 L.*

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[8] Although this is not specified, it is implicit in plaintiffs' contentions.

[9] Olympia's Second Amended Pretrial Statement, paras. 18-26, 36.

[10] *Id*.

[11] Olympia's Second Amended Pretrial Statement, Legal Contentions, p. 32.

Ed. 2d 169, 103 S. Ct. 212 (1982). Mere proof of an antitrust violation, in and of itself, is not sufficient to support an award for damages; rather, a plaintiff must prove, as a matter of fact and with a fair degree of certainty, injury attributable to something the antitrust laws were designed to prevent. *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562-563, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)*. "It is imperative that the fact of the damage causing injury be established." *In Re Municipal Bond Reporting Antitrust Litigation, 672 F.2d 436, 443 (5th Cir. 1982)*.

Olympia's conclusory allegations do not demonstrate that **[**12]** it has suffered actual injury. The only element of damage that Olympia has attempted to identify and quantify is that allegedly attributable to price discrimination. [12] **[**14]** However, that calculation merely presumes damages from the differential between prices extended to Olympia and Standard. As is developed further in our discussion of plaintiff's price discrimination claims, it does not purport to show actual injury by demonstrating the likelihood that Olympia lost sales or profits because Celotex extended discriminatory prices to Standard, as required by law for **[*292]** Olympia to prevail on its claims. [13] Summarily, none of Olympia's allegations support the conclusion, or even attempt to demonstrate, that it suffered actual injury. The Court's review of the entire record in this matter leads to the inevitable conclusion that plaintiffs' claim of injury and for damages resulting therefrom amounts to nothing more than unsupported assumptions, conclusory allegations, and undocumented hypotheses, which are insufficient to withstand a summary judgment motion. In this case, as in the case of *In Re Municipal Bond Reporting Antitrust Litigation, 672 F.2d 436, 443 (5th Cir. 1982)*, **[**13]** plaintiffs have not established a triable issue of *fact* of injury, or of its cause, much less the amount of damage. There is a dearth of evidence which would establish this fact. Yet, at the trial of this matter, the plaintiffs would have been required to put forth substantial evidence on this issue. *Chrysler Credit Corp. v. J. Truett Payne Co., Inc., 670 F.2d 575, 582 (5th Cir. 1982)*, *cert. denied*, *459 U.S. 908, 74 L. Ed. 2d 169, 103 S. Ct. 212 (1982)*. Olympia relies on the statement that it "proposes to offer proof of damages . . . employing a ten year straightline projection of sales and loss net profits for a 'future' period of ten years from and after 1976." [14] However, this proposed methodology is of no moment, absent sufficient allegations of, and evidence to support, the fact of injury, which are nowhere to be found in the record of this case. Since Olympia has apparently chosen to rest upon its pleadings rather than substantiating its claims with evidence, summary judgment is appropriate. *Rule 56(e) Fed. Rules Civ. Proc.*; *See, e.g., In Re Municipal Bond Reporting Antitrust Litigation, supra*; *Jones v. Borden Co., 430 F.2d 568, 574 (5th Cir. 1970)*.

Having found that plaintiffs' claim for damages is fatally deficient in that plaintiffs have failed to produce evidence of injury and the amount of damages, the Court has in effect found that summary judgment on Olympia's claims is warranted herein. Nonetheless, for the sake of completeness, the Court further finds that summary judgment is warranted as to each of Olympia's allegations of violations of the antitrust laws, as set forth herein.

C. Monopolization

Olympia has failed to adduce evidence upon which a trier of fact could conclude that a *prima facie* case of monopolization has been established. The gravamen of Olympia's claim is its contention that from and after the year 1974, Celotex's unique bonding program eventually allowed it to **[**15]** achieve a market share in excess of 60%. [15] Olympia's allegations in connection with this claim are either unsupported by the facts or directly contradicted by the evidence, thus, requiring that summary judgment be granted.

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[12] Olympia's Second Amended Pretrial Statement, para. 55.

[13] *See, e.g., J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562-563, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981)*; *Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 580* (5th Cir.), *cert. denied*, ***459 U.S. 908, 74 L. Ed. 2d 169, 103 S. Ct. 212 (1982)***.

[14] Olympia's Second Amended Pretrial Statement, para. 55.

[15] Olympia's Second Amended Pretrial Statement, para. 36.

Olympia alleges that the relevant product market consists primarily of union bonded commercial roofing jobs over $250,000.00 in value. [16] Yet, it is uncontested that the largest job Olympia performed during the period from 1972 to date was in the range of $60,000.00 to $100,000.00. Olympia's president testified to this fact. [17] Thus, Olympia has defined the relevant product market, for purposes of this litigation, as one in which it was not even a participant for two years prior to and during the period of time when Celotex allegedly began to acquire monopoly power. Moreover, Olympia's definition of this market reflects an effect on a specific competitor, rather than the realities of competition, ignoring a major premise of antitrust **[**16]** litigation, **[*293]** that is, that the antitrust laws are concerned with "the protection of competition, not competitors." *See,* Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962). [18] **[**17]** Olympia's allegations of monopolization, in conformance with the evidence, cannot proceed past the threshold determination of the product market allegedly monopolized. As such, its contentions can only be construed as going to an effect on a competitor, [19] rather than to competition in a defined product market.

Furthermore, the relevant geographic market alleged by Olympia has been artificially delineated without a full consideration of the facts and evidence. Olympia's own experts conceded that the existing information did not indicate whether the market chosen took into account either the areas in which Olympia actually competed [20] **[**18]** or the areas in which Olympia's actual competitors competed. [21] This reinforces the conclusion that the nature of the alleged wrong to Olympia must be couched in terms of an effect on a specific competitor, rather than on competition. And, as previously stated, it is the latter of these which the antitrust laws seek to protect.

Moreover, Olympia's allegation that Celotex acquired a market share in excess of 60% can only be termed sheer speculation, unsupported by any evidence which could possibly create a triable issue of fact in this regard. The lack of any evidence which would allow a trier of fact to determine Celotex's market share is predicated primarily upon the failure of Olympia to define the relevant product and geographic markets on the basis of any evidence of record. There is simply no data of record from which even a rough approximation of market shares could be derived, and the Court is left with no evidence of the origin or accuracy of this figure. Olympia's experts admitted that the data accompanying its Second Amended Pretrial Statement showed only the percentage of Celotex sales that went to certain selected roofers in the New Orleans **[**19]** area, and agreed that this information had little (if any) meaning, in the context of this case, absent comparable figures for Celotex competitors. These same experts testified that the information was incomplete even as to Celotex sales and conceded that even complete information as to such sales would not enable them to adequately define Celotex's share of the relevant market. [22]

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[16] Olympia's Second Amended Pretrial Statement, paras. 56(g), 58(d).

[17] Deposition of William J. Manion, taken on May 31 and June 2, 1977, Vol. III, Tr. 114-115.

[18] The fallacy of plaintiff's reasoning is shown by Justice Stevens' comments in Mullis v. ARCO Petroleum Corp., 502 F.2d 290, 298-299, (7th Cir. 1974):

> "The fact that an injury to a particular competitor may be unusually severe is not a justification for adopting a market definition which only considers the particular product line which he has previously sold or purchased . . . And whether the competition is more intense on the seller's or the buyer's side of the market, we may not arbitrarily segregate one brand from equally acceptable substitutes in order to protect a particular competitor from injury."

[19] From the standpoint of adverse effects, the competitor in question is Olympia; from the standpoint of desirable effects, the competitor in question is Standard, based upon plaintiffs' allegations.

[20] Deposition of Dr. Jane S. Cromartie, taken on January 5, 1984, Tr. 140-148; Deposition of Phillip W. Jeffress, taken on January 4, 1984, Tr. 79-93, 140-141 & Exhibits 3, 4.

[21] Indeed, the geographic market utilized by plaintiffs' experts did not include Baton Rouge, Louisiana, although it was a controversy surrounding a Baton Rouge project which precipitated this litigation. See, Jeffress deposition, Tr. 54-63; Complaint (R. Vol. I, D. 1).

[22] Cromartie Deposition, Tr. 33-35, 62-69, 77-80, 148-149, 207, 266-272, Exhibits 5 & 6; Jeffress Deposition, Tr. 79-83, 140-141, Exhibits 3 & 4.

It is well-settled that ***HN3***[] the relevant product and geographic markets must be defined with some degree of precision to enable the trier of fact to determine the existence of monopoly power. *Dimmitt Agri Industries, Inc. v. CPC International Inc., 679 F.2d 516 (5th Cir. 1982)*, *cert. denied*, *460 U.S. 1082, 76 L. Ed. 2d 344, 103 S. Ct. 1770 (1983)*. "[A*] section 2* plaintiff attempting to prove either completed monopolization or attempt must provide the jury with sufficient evidence **[**20]** to permit it to **[*294]** define the relevant geographic and product market." *Id. at 525*. *See also, Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 15 L. Ed. 2d 247, 86 S. Ct. 347 (1965)*; *Municipal Bond Reporting Antitrust Litigation, 672 F.2d 436, 441 (5th Cir. 1982)*; *Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 276, 284-286 (5th Cir. 1978)*, *cert. denied*, *440 U.S. 939, 59 L. Ed. 2d 499, 99 S. Ct. 1289 (1979)*. Absent evidence to create a triable issue of fact in this regard, summary judgment is appropriate. *Scranton Construction Co. v. Litton Industries Leasing Corp., 494 F.2d 778, 783 (5th Cir. 1974)*, *cert. denied*, *419 U.S. 1105, 42 L. Ed. 2d 800, 95 S. Ct. 774 (1975)*.

Furthermore, in this Circuit, "it appears that something more than 50% of the market is a prerequisite to a finding of monopoly." *Cliff Food Stores, Inc. v. Kroger Co., 417 F.2d 203, 207 n. 2 (5th Cir. 1969)*. *See also, Dimmitt Agri Industries, Inc. v. CPC International, Inc., 679 F.2d 516, 528-531*, nn. 11-13 (5th Cir. 1982), *cert. denied*, *460 U.S. 1082, 76 L. Ed. 2d 344, 103 S. Ct. 1770 (1983)*. The Fifth Circuit subscribes **[**21]** to the view that evidence of defendant's conduct in the market is inadequate to sustain a finding of monopoly, absent accurate information demonstrating a requisite market share. *Dimmitt Agri Industries, Inc. v. CPC International, Inc., 679 F.2d 516, 528-531* and nn. 11-14 (5th Cir. 1982), *cert. denied*, *460 U.S. 1082, 76 L. Ed. 2d 344, 103 S. Ct. 1770 (1983)*; *see also, P. Areeda & D. Turner, II* ***Antitrust Law*** para. 515 (1978).

In the instant case, the record discloses little more than unsupported and conclusory allegations of Celotex's conduct. And, viewing all inferences from the evidence of record in favor of the non-moving party, there is no evidence from which a trier of fact could conclude that Celotex enjoyed the requisite market share. Olympia argues that "industry observers" have concluded that Celotex acquired such a market share. Again, this is a conclusory allegation which is not borne out by the facts of this case, as shown by the record. Olympia's experts concede that there is insufficient data to come to a conclusion, with any degree of precision or accuracy, as to Celotex's share of the market. [23] Nor has Olympia demonstrated for purposes of defeating summary **[**22]** judgment, anywhere of record, including in its Pretrial Statement, that there is evidence to support a finding, based on other than speculation, relative to Celotex's market share. Although in certain instances, an examination of the evidence on the issue of market share would reveal deficiencies which go to the weight and sufficiency of the evidence, in the instant case, there is simply no basis for a trier of fact to determine what is the relevant product and geographic markets and what is the defendant's market share. Under these circumstances, it would be futile for plaintiffs to proceed to trial on these claims.

[23]** Moreover, Olympia's allegation of the manner in which Celotex acquired monopoly power warrants the conclusion that defendants are entitled to judgment in their favor as a matter of law. Olympia alleges that Celotex "became possessed of a unique bond program", which allowed it to achieve a share of the market for sale of roofing materials to bonded union roofing contractors in excess of 60%. [24] Olympia asserts that this achievement resulted from changes in the bond programs of Celotex's competitors, and the circumstances attendant therein. [25] Thus, based solely upon Olympia's allegations in this regard, it is clear that if, in fact, Celotex achieved a **[*295]** market share of greater than 60% by reason of the bond program, then that achievement was the result of the unilateral actions of its competitors. Indeed, Olympia's experts stated unequivocally that Celotex's monopoly power, if any, was attributable to its bond becoming unique through the actions of its competitors with regard to their respective

[23] Jeffress deposition, Tr. 63-75; Cromartie deposition, Tr. 207. We note that one of these experts testified that he reached a conclusion of market power, based upon Celotex's bonding program which set it apart from other competitors. Jeffress deposition, Tr. 74-75. However, as is discussed, infra, Celotexthe bonding program does not constitute a willful acquisition of monopoly power, as required for a finding of monopolization.

[24] Olympia's Second Amended Pretrial Statement, para. 36.

[25] *Id*.

bond programs, as opposed to a willful acquisition of monopoly power by Celotex. [26] The United States Supreme Court has made it clear that a claim of monopoly will not lie absent **[**24]** willful acquisition of power:

> "***HN4***[] The offense of monopoly under *§ 2* of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

United States v. Grinnell Corp., 384 U.S. 563, 570-571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966). Olympia's allegations, insofar as they might be construed to assert the acquisition of monopoly power through other means are addressed in the discussion below of the remaining claims.

D. Attempted Monopolization

In order to prove attempted monopolization under *§ 2* of the Sherman Act, *15 U.S.C. § 2*, Olympia must demonstrate that (1) Celotex had the **[**25]** specific intent to accomplish the illegal result, and (2) there was a "dangerous probability" that the attempt would be successful. *Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 276 (5th Cir. 1978)*, *cert. denied*, *440 U.S. 939, 59 L. Ed. 2d 499, 99 S. Ct. 1289 (1979)*.

Celotex argues that summary judgment should be granted on this claim based upon Olympia's failure to produce any evidence of specific intent. Following our review of all of the evidence of record, taking the factual allegations of Olympia's Pretrial Statement as true, and viewing all inferences from the evidence in favor of the non-moving party, we are inclined to agree. Olympia's claim of attempted monopolization, again, rests primarily on Celotex's acquisition of a unique bond program, which arose solely from the unilateral actions of Celotex's competitors. Based upon the facts, there is a dearth of evidence from which a trier of fact could conclude that Celotex had specific intent to acquire a monopoly. We are not unmindful that summary judgment is rarely appropriate on the issue of a party's intent. However, in the instant case, there is a more compelling basis upon which summary judgment **[**26]** must be granted as to this claim. The Fifth Circuit has held that proof of the relevant market in attempt cases is required in connection with the dangerous probability of success element of the attempt offense. *Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256, 286 (5th Cir. 1978)*, *cert. denied*, *440 U.S. 939, 59 L. Ed. 2d 499, 99 S. Ct. 1289 (1979)*. Specifically, it is necessary for the plaintiff to establish a dangerous probability of monopolization *in the relevant markets. Id*. Thus, Olympia cannot prevail on this claim, based upon its failure to sufficiently define and establish the relevant markets, as discussed in sub-part C, above. In this case, evidence is "entirely lacking of the relevant market, its conditions, or of a monopoly or a dangerous probability of one"; thus, summary judgment is appropriate. *Scranton Construction Co. v. Litton Industries Leasing Corp., 494 F.2d 778, 783 (5th Cir. 1974)*, *cert. denied*, *419 U.S. 1105, 42 L. Ed. 2d 800, 95 S. Ct. 774 (1975)*.

E. Price Discrimination

Celotex contends that Olympia's claims of price discrimination are ***HN5***[] time-barred. A four-year statute of limitations is provided in § 4B of the Clayton **[**27]** Act, *15 U.S.C. § 15b*. It is uncontested that Olympia chose to discontinue dealing with Celotex **[*296]** in October of 1973. [27] The original complaint in this matter was filed on February 5, 1976. [28] Price discrimination was not specifically alleged by plaintiffs until the filing of an amended

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[26] Cromartie deposition, Tr. 38-39, 51-55, 174-178; Jeffress deposition, Tr. 74-75, 94, 113-117, 125-126, 132-134, 189-190.

[27] Deposition of William J. Manion, taken on June 2, 1977. Tr. 126.

[28] R. Vol. 1 D. 1.

complaint on August 31, 1977. [29] *Rule 15(c) of the Federal Rules of Civil Procedure* provides, in pertinent part, as follows:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

Pleadings must be construed "as to do substantial justice." *Rule 8(f) Fed. Rules Civ. Proc.* In an antitrust action, pleadings must be given a liberal reading. *Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 421 F.2d 1313 (5th Cir. 1970)*, *cert. denied*, *400 U.S. 991, 27 L. Ed. 2d 439, 91 S. Ct. 454 (1971)*. Although Olympia's original complaint did not specifically set forth an allegation of price discrimination, it is clear that this claim arose out of the same general type of conduct **[**28]** as that alleged in the original complaint. Thus, the claim is not time-barred.

Nonetheless, Olympia's claim of price discrimination cannot withstand summary judgment for several reasons. Olympia seeks damages for price discrimination allegedly (1) in violation of *§ 2* of the Robinson-Patman Act and (2) as part of a conspiracy in violation of *§ 1* of the Sherman Act. Even assuming that the underlying factual contentions upon which Olympia bases this claim are true, the claim is untenable.

(1) *Robinson-Patman Act*

HN6[] Under *§ 2* of the Robinson-Patman Act, *15 U.S.C. § 13*, Olympia, in order to prevail, would be required to prove that Celotex discriminated in price (1) between different purchasers (2) of commodities of like grade and quality (3) where the effect of such discrimination is to substantially lessen competition or tend to create a monopoly, or to injure, destroy, or prevent competition **[**29]** with any person who either grants or knowingly receives the benefit of such discrimination, and (4) where such differential is not in response to changing market conditions. *M.C. Manufacturing Co., Inc. v. Texas Foundries, Inc., 517 F.2d 1059, 1065 (5th Cir. 1975)*, *cert. denied*, *424 U.S. 968, 47 L. Ed. 2d 736, 96 S. Ct. 1466 (1976)*. Thus, a finding that the Act has been violated requires a showing that purchasers are in competition with one another at the time of the purchases, and that there was a sale of like goods to at least two different purchasers at different prices with an adverse effect upon competition. *Id*.

The uncontested evidence indicates that Olympia neither purchased materials from, nor placed orders with, Celotex after October of 1973. [30] **[**31]** Yet, Olympia claims damages for price discrimination from 1972 to 1976. [31] It is abundantly clear that Olympia cannot recover on any claim for damages allegedly resulting from price discrimination occurring after October of 1973, based upon the specific elements of the statute. Furthermore, Olympia has summarized forty-nine alleged instances of price discrimination in its Pretrial Statement, asserting that these "relate **[**30]** to contract work with respect to which Olympia and Standard were in direct competition." [32] This allegation is directly contradicted by the only relevant evidence on the issue. Specifically, of these forty-nine instances, only six represented situations in which **[*297]** Olympia and Standard made roughly contemporaneous purchases of similar goods from Celotex at different prices. [33] And, in those six instances, it is undisputed that Standard purchased materials from Celotex only after it had been awarded a roofing job. Based upon these facts, and upon the definition of a violation under the Robinson-Patman Act, no such violation is implicated. As previously stated, the Act protects purchasers in competition with one another at the time of the purchases; it is irrelevant that the companies may have entered into competitive bidding, or that the successful bidder was ultimately able to obtain prices below those offered to its competitors in the bidding process. *M.C. Manufacturing Co., Inc. v. Texas*

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[29] R. Vol. III D. 63.

[30] III Manion deposition (1977) Tr. 112-114, 127-129, II Manion deposition (1977), Tr. 23-24.

[31] Olympia's Second Amended Pretrial Statement, para. 55.

[32] Olympia's Second Amended Pretrial Statement, para. 32.

[33] Deposition of William J. Manion, taken on August 24, 1978. Tr. 186.

Foundries, Inc., 517 F.2d 1059, 1066-1068 (5th Cir. 1975), *cert. denied*, *424 U.S. 968, 47 L. Ed. 2d 736, 96 S. Ct. 1466 (1976)*.

Additionally, even if Olympia had succeeded in showing that these six instances of "discrimination" constituted contemporaneous purchases of similar goods at different prices, the claim still could not rise to the level of a violation of the Robinson-Patman Act. A simple mathematical calculation reveals that Olympia paid between $150 and $235 more than Standard did for the same materials. Olympia's expert agreed that price differential in the amount of $1,000.00 was "definitely" de minimus. [34] As previously stated, the Robinson-Patman Act is only violated where the effect of price discrimination may be to substantially lessen competition. It is inconceivable that the de minimus price differential at issue could be said to have such a substantial, if any, effect on competition. *See, e.g., Hanson v. Pittsburgh Plate Glass Industries, Inc., 482 F.2d 220, 224 n.8 (5th Cir. 1973)*, *cert. denied* **[**32]** , *414 U.S. 1136, 38 L. Ed. 2d 761, 94 S. Ct. 880 (1974)*.

It should be noted at this juncture that Olympia has apparently sought to reserve the right to present additional instances of price discrimination. [35] Nonetheless, the time to have presented such further evidence would have been in opposition to the motions herein, particularly since Olympia has had over seven years in which to discover relevant evidence on the issue and to compile this information.

As defendant points out, at a trial of this matter, based upon the undisputed facts, Olympia would fail to make out a prima facie case on the issue of price discrimination. Moreover, and more importantly for purposes of summary judgment herein, Celotex has established by uncontroverted evidence **[**33]** that any discriminatory price was extended in good faith to meet a lower competitive offer. ***HN7***[] *Section 2(b)* of the Robinson-Patman Act *15 U.S.C. § 13(b)*, has been interpreted to afford an absolute defense to a charge of violating *§ 2(a)* of the Act, *15 U.S.C. § 13(a)* where the defendant shows that lower prices were extended in good faith to meet an equally low price of a competitor. *FTC v. Sun Oil Co., 371 U.S. 505, 513-514, 9 L. Ed. 2d 466, 83 S. Ct. 358 (1963)*. The Affidavits of Sam E. Brasher and W. W. LeGrow demonstrate that Celotex lowered its prices to individual roofers only when necessary to do so in order to meet a lower competitive offer, and only after a formal, detailed multi-tier system of verification. [36] The verification methods employed by Celotex exceeded even those suggested by Olympia's expert. [37] And, these methods fall well within the appropriate ones discussed by the Supreme Court in *United States v. United States Gypsum Co., 438 U.S. 422, 454-455, 57 L. Ed. 2d 854, 98 S. Ct. 2864 (1978)*. [38] Indeed, this defense has been **[*298]** sustained based upon less comprehensive schemes than that employed by Celotex for verification. *See, e.g., Great Atlantic* **[**34]** *& Pacific Tea Co. v. FTC, 440 U.S. 69, 59 L. Ed. 2d 153, 99 S. Ct. 925 (1979)*; *Jones v. Borden Co., 430 F.2d 568 (5th Cir. 1970)*; *Callaway Mills Co. v. FTC, 362 F.2d 435 (5th Cir. 1966)*. The Supreme Court recently set forth the elements of this defense, as follows:

> "In summary, the meeting-competition defense requires the seller at least to show the existence of facts that would lead a reasonable and prudent person to believe that the seller's lower price would meet the equally low price of a competitor; it also requires the seller to demonstrate that its lower price was a good faith response to

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[34] Cromartie deposition, Tr. 264.

[35] Olympia's Second Amended Pretrial Statement, para. 32.

[36] Affidavit of Sam E. Brasher paras. 7-20; Affidavit of W. W. LeGrow paras. 20-30.

[37] Cromartie deposition, Tr. 245-252.

[38] On the issue of the good faith, meeting-competition defense, the Supreme Court stated:

> "Given the fact-specific nature of the inquiry, it is difficult to predict all the factors the FTC or a court would consider in appraising a seller's good faith in matching a competing offer in these circumstances. Certainly, evidence that a seller had received reports of similar discounts from other customers . . . or was threatened with a termination of purchases if the discount were not met . . . would be relevant in this regard. Efforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data would also be probative as would the seller's past experience with the particular buyer in question." *438 U.S. at 454-455*. [citations omitted.]

a competitor's lower price." Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 103 S. Ct. 1282, 1297, 75 L. Ed. 2d 174 (1983).

[35]** Celotex has established this defense based upon uncontroverted evidence. Olympia has asserted no substantiated facts to put the meeting-competition defense at issue, as it must do in order to defeat summary judgment on its price discrimination claim. Olympia's president conceded that he has no information concerning (1) what Celotex products Olympia bought or attempted to buy at which prices and at what times, (2) whether Celotex was actually meeting competitive offers when it extended price discounts to other roofers, and (3) whether Celotex attempted to verify competitive prices. [39] Nor has Olympia provided the Court with any evidence to create an issue of fact on its price discrimination claims. Under circumstances such as these, summary judgment is appropriate. Jones v. Borden Co., 430 F.2d 568, 572 (5th Cir. 1970).

We note that this claim is also subject to summary judgment for the reason to which we previously **[**36]** alluded, i.e., failure to show any actual injury and damage. Olympia has calculated its alleged damage from price discrimination on the basis of an average differential of 5% between the cost it and Standard paid for Celotex materials. Olympia has then projected the effect upon its business, both in terms of profits and increased business, based upon the hypothetical premise of Olympia being granted an average 5% price reduction. [40] This approach is not a proper method for proving injury and damage under the Robinson-Patman Act. *J.* Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562-563, 68 L. Ed. 2d 442, 101 S. Ct. 1923 (1981); Chrysler Credit Corp. v. J. Truett Payne Co., 670 F.2d 575, 577 (5th Cir.), *cert. denied*, *459 U.S. 908, 74 L. Ed. 2d 169, 103 S. Ct. 212 (1982)*. Assuming a violation of the Act has been shown, damages must be proven rather than presumed on the basis of the price differentials, since proof of actual injury is a prerequisite to recovery. *Id*. As previously stated, Olympia has come forth with nothing but its conclusory allegations of injury and damage, based upon improper assumptions. Furthermore, Olympia's calculation of alleged damages **[**37]** is premised upon the assumption that the allegedly unlawful price discrimination will be extended to Olympia, as well as to Standard. This assumption is unacceptable in actions such as the present one. M.C. Manufacturing Co. v. Texas Foundries, Inc., 517 F.2d 1059, 1063-1065 (5th Cir. 1975), *cert. denied*, *424 U.S. 968, 47 L. Ed. 2d 736, 96 S. Ct. 1466 (1976)*.

(2) *Sherman Act*

HN8[] Under Section 1 of the Sherman Act, 15 U.S.C. § 1, "every contract, combination

[*299] . . . or conspiracy in restraint of trade or commerce . . . is . . . illegal." The conspiracy issue will be specifically dealt with in a separate discussion. However, suffice it to say that this claim suffers from many of the same deficiencies addressed above. Primarily, the claim is deficient for plaintiffs' failure to produce evidence to create a triable issue of fact as to actual injury and damage. *See*, e.g. M.C. Manufacturing Co., Inc. v. Texas Foundries, Inc **[**38]** ., 517 F.2d 1059 (5th Cir. 1975), *cert. denied 424 U.S. 968, 47 L. Ed. 2d 736, 96 S. Ct. 1466 (1976)*. Under the *Texas Foundries* rationale, Olympia would have to show not merely that Celotex conspired to drive Olympia out of business by extending discriminatory prices to its competitors, but also that (1) its competitors were awarded jobs, (2) the competitors received unjustified discounts, and (3) Olympia was the next lowest bidder. There are not even the barest of factual allegations, or inferences therefrom, in Olympia's Pretrial Statement to support such a conclusion.

F. Tying

Olympia alleges that buyers were "coerced" into buying Celotex's building materials in order to obtain the more desirable bonds, and thus, Celotex tied roofing materials to roofing bonds in violation of § 3 of the Clayton Act, 15 U.S.C. § 14. [41] The Fifth Circuit has identified **HN9**[] four characteristics of an illegal tying arrangement, as

[39] Manion deposition (1978), Tr. 55-62, 69-72, 86-88, 91-93, 108-111, 115-116, 133, 136.

[40] Olympia's Second Amended Pretrial Statement, para. 55.

follows: (1) two separate products, the tying product and the tied product, (2) sufficient economic power in the tying market to coerce purchase of the tied product, (3) involvement of a not insubstantial amount of interstate commerce in the tied market, and (4) **[**39]** anticompetitive effects in the tied market. *Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d 321, 323 (5th Cir. 1974)*. More recently, the Supreme Court has discussed the elements of a tying arrangement, and particularly, the necessity that there be two separate products, in the case of *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*. The considerations on such a claim are whether two separate products were being sold that may be tied together, and, if so, whether the sellers used their market power to force their purchasers to accept the tying arrangement. *Id. at 1561*. Whether two distinct products are involved "turns not on the functional relation between them, but rather on the character of the demand for the two items." *Id. at 1562*. A tying arrangement cannot exist unless two separate product markets have been linked. *Id. at 1563*. We find that the principles enunciated in *Hyde* are dispositive of the instant case. Olympia has not alleged, nor can it conceivably claim, that Celotex's materials and its bonds are two separate and distinct products derived respectively from two separate and distinct **[**40]** product markets. There is simply no market for roofing bonds in and of themselves, absent bonded materials. Furthermore, and as previously discussed, Olympia has not even defined the relevant markets sufficiently to state such a cause of action. Summary judgment on the tying claim is appropriate.

G. Conspiracy

Olympia's factual allegations do not state a viable claim of conspiracy, and the record is completely devoid of any evidence to support this claim. Olympia apparently relies on its contention that Celotex "secretly" communicated to Standard that Olympia would not be accorded approved status at the same time Celotex published and circulated its current Approved Roofer list, from which Olympia had been excluded. [42] Celotex had produced sworn affidavits denying the existence of any conspiracy between it and Standard. [43] Olympia has produced nothing in response **[*300]** thereto to create a triable issue of fact on the claim. The Fifth Circuit **[**41]** has consistently held that summary judgment is appropriate where a plaintiff rests on its mere allegations and fails to produce substantial evidence showing the existence of a genuine issue of fact, as required by *Rule 56(e) of the Federal Rules of Civil Procedure*. *See*, e.g., *Parsons v. Ford Motor Co., 669 F.2d 308, 313 (5th Cir. 1982)*, *cert. denied*, *459 U.S. 832, 103 S. Ct. 73, 74 L. Ed. 2d 72 (5th Cir. 1982)*; *Southern Concrete Co. v. United States Steel Corp., 535 F.2d 313, 318 (5th Cir. 1976)*; *Solomon v. Houston Corrugated Box Co., 526 F.2d 389, 395-397 (5th Cir. 1976)*; *Scranton Construction Co. v. Litton Industries Leasing Corp., 494 F.2d 778, 782 (5th Cir. 1974)*, *cert. denied*, *419 U.S. 1105, 42 L. Ed. 2d 800, 95 S. Ct. 774 (1975)*. Considering the several years of the pendency of this litigation, "the mere hope that evidence may turn up to support a conspiracy does not suffice to warrant a trial." *Bougeois v. A.B. Dick Co., 386 F. Supp. 1094, 1097 (W.D. La. 1974)*.

[42]** *III. Motion of Standard for Summary Judgment*

For the reasons set forth relative to Olympia's motion for summary judgment, Standard's motion should, likewise, be granted. We shall not belabor and reiterate these reasons. However, we note certain additional points warranting summary judgment in favor of Standard.

A. Monopolization and Attempted Monopolization

Subparts II B, C and D are incorporated herein by reference. Additionally, the affidavit of Pierre F. Carriere further supports the conclusion that the relevant markets have not been accurately or sufficiently defined by Olympia.

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[41] Olympia's Second Amended Pretrial Statement, p. 53.

[42] Olympia's Second Amended Pretrial Statement, paras. 47, 49.

[43] Brasher Affidavit paras. 7, 34; LeGrow Affidavit paras. 16-19.

Olympia's reliance upon gross sales solely to New Orleans roofers necessarily assumes that the market for roofing jobs in New Orleans is restricted to roofing contractors actually located in New Orleans, and further assumes that those contractors who are located in New Orleans do not perform jobs outside the New Orleans area. Both of these assumptions are unsupported by the facts and evidence, and are specifically refuted by the affidavit of Mr. Carriere. That affidavit indicates that although Standard is and always has been located in New Orleans, it has done extensive business throughout **[**43]** the State of Louisiana, and in the adjoining States of Mississippi and Texas, as well as in Georgia. Accordingly, the figures which Olympia has compiled as to Standard's purchases from Celotex and Johns-Manville include purchases by Standard not only for work which Standard performed in the New Orleans area, but also for work which Standard performed throughout Louisiana and in other states. As is further indicated and unrefuted by Carriere's affidavit, non-local roofing contractors constitute a significant segment of competitors in the New Orleans area. Yet, this fact has been ignored by Olympia in delineating the relevant geographic markets and in its allegations of market share.

B. Price Discrimination

Subpart II E is incorporated herein by reference. Furthermore, Standard has established, based upon unrefuted evidence, that it legitimately shopped for the best available price on roofing materials, and that it never received a price known or believed to be improper or discriminatory against a competitor. [44] In order to defeat summary judgment, Olympia would have had to come forward with evidence to create an issue of fact in this regard. This, Olympia has not done.

[44]** Accordingly, and for the foregoing reasons, it is ordered that the motions of defendants for summary judgment, dismissing plaintiffs' claims, be and they are hereby GRANTED. The clerk of court is directed to enter judgment in accordance herewith.

[*301] ATTACHMENT #1

JURY DEMANDED

SECOND AMENDED PRETRIAL STATEMENT

TO THE HONORABLE COURT:

Plaintiffs present this Second Amended Pretrial Statement in conformance with order of the Court dated December 15, 1982.

A. *Narrative Statement of Facts Proposed to be Proved by Plaintiffs*.

1. Plaintiffs Olympia Company, Inc. and Olympia Roofing Company, Inc. (Olympia) are Louisiana corporations with their principal place of business in Metairie, Louisiana.

2. The Defendant, The Celotex Corporation (Celotex) is a Delaware corporation, having its principal place of business outside the State of Louisiana, which does business in the State of Louisiana on a regular and systematic basis.

3. The Defendant, Standard-Taylor Industries, Inc., (S-T) is a Delaware corporation having its home office and principal place of business in Montgomery, Alabama; it was formerly Standard Roofing Co., Inc., and is a foreign corporation **[**45]** doing business in the State of Louisiana, on a regular and systematic basis.

4. Standard Roofing Company of New Orleans, Inc. (S-NO) is a Delaware corporation, having its home office and principal place of business in Montgomery, Alabama; it was formerly part of Standard Roofing Co., Inc., and is

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[44] Affidavit of Pierre F. Carriere.

presently a division of Standard-Taylor Industries, Inc., and is a foreign corporation which does business within the State of Louisiana on a regular and systematic basis.

5. Defendant Robbins Taylor is a resident of Montgomery, Alabama, and is the Chief Executive Officer of Standard-Taylor Industries, Inc., and one of the principal executive officers of Standard Roofing Company of New Orleans, Inc.

6. Defendant Pierre F. Carriere is a resident of the City of New Orleans, State of Louisiana, and is the Chief Executive Officer of Standard Roofing Company of New Orleans, Inc.

7. Olympia was in the roofing contracting business since its inception in 1926 until it recently became inactive.

8. From its inception, Olympia purchased roofing materials from either the Celotex Corporation or its business predecessors (Carey Company and Barrett Company).

9. In securing roofing **[**46]** jobs, and furnishing roofing services and materials, Olympia has been in direct competition with Standard-Taylor Industries, Inc., and Standard Roofing Company of New Orleans, Inc. (hereinafter collectively referred to as Standard) and other contractors, in the union bonded roofing market (hereinafter defined).

10. For many years, Olympia was on Celotex's list of approved roofers for the State of Louisiana, which enabled it to secure Celotex roofing and bond protection for any roofing assembly installed by Olympia and incorporating materials purchased from Celotex.

11. Under a roofing bond, the roofing contractor alone is responsible for the maintenance of the roof for the first two years, without fee.

12. At the end of the two years, the roof is reinspected and, after any necessary repairs have been made, the manufacturer assumes responsibility for repairs occasioned by ordinary wear and tear during the remaining term of the bond.

13. The manufacturer receives a fixed amount for the bond, similar to an insurance premium, and neither the premium nor the penal sum is negotiable.

[*302] 14. Both the premium and the penal sum are based on a fixed amount **[**47]** per 100 square feet of the roof's surface.

15. A roofing bond is not a guarantee, nor is it a warranty of the work of the roofer.

16. In no event can the manufacturer's obligation exceed the penal sum of the bond.

17. The significant difference between bonds offered by different manufacturers is the term of the coverage available and the amount of the premium, which is paid by the owner of the roof.

18. The Celotex bonding policy is the most liberal and consumer oriented, in that it offers a 20 year bond for a penal sum of either $20.00 or $10.00 per 100 square feet of covered surface, plus a service guarantee of 10 years, with an option of an additional 10 year renewal.

19. During the early 1970's, GAF reduced its bond coverage by one-half, and thereafter, at times pertinent to this suit, offered a 10 year bond for a penal sum of either $20.00 or $10.00 per 100 square feet of surface coverage and a surface guarantee of only 5 years with an option of an additional 5 year renewal.

20. During the pertinent period, Johns-Manville offered a 20 year or 15 year bond for a penal sum of either $20.00 or $10.00 per 100 square feet of area coverage, but no service **[**48]** guarantee.

21. During the pertinent period, Koppers dealt only in coal tar pitch products, which are more expensive than other roofing products, thus considerably limiting its position in the roofing market, and its bond for the coal tar pitched products did not equal the bond extended by Celotex.

22. Beginning approximately in 1970, the Defendant Celotex began an aggressive program designed to secure increase sales of roofing materials to union bonded contractors, stressing the roofing bond protection that it furnished.

23. At that time, only Johns-Manville and Celotex offered a bond giving a 20 year term and a service guarantee of 10 + 10, i.e., a 10 year term with an option of a 10 year renewal, for a specified penal sum per "square", i.e., per 100 square feet of roofing.

24. By the year 1974, Johns-Manville had reduced its bond coverage protection, and Celotex thus became possessed of a unique bond program.

25. Because of its aggressive sales and bond policies, and its unique bond protection, the Defendant Celotex achieved and has maintained a dominant and monopolistic position in the market for sales of roofing materials for use on union bonded roofing **[**49]** jobs in the New Orleans area throughout the 1970's.

26. Celotex's market share of this market exceeds 60%.

27. Celotex employs certain criteria in determining which roofer is to include on its "approved" roofer list for the purpose of providing bond coverage.

28. These criteria are: (a) Celotex must be satisfied that the roofer possesses the requisite expertise in applying Celotex materials; (b) the roofer must maintain this expertise by using Celotex products on a "reasonably frequent" basis; and (c) Celotex must be satisfied with the roofer's credit standing "at all times."

29. Celotex professes that if a roofer meets these standards he may become an approved roofer by entering into an approved roofer agreement.

30. The agreement provides that Celotex will issue a bond covering the roof that (a) is installed and repaired by an approved roofer, (b) using Celotex materials, (c) applied in accordance with Celotex published specifications.

31. If Celotex's inspection reveals that the roof does not meet these specifications, it will not issue a bond. Celotex has reserved to its arbitrary determination whether a roofer possesses the requisite expertise and **[**50]** credit standing, and has increased its sales by requiring that a roofer maintain this "expertise" by using Celotex products on a frequent basis, and by customarily deleting roofers from its approved roofer **[*303]** list if they have not made purchases from Celotex within a 12 month period.

32. During the pertinent period, Celotex regularly and systematically extended to Standard discriminatory prices on roofing materials. Specifically, Celotex granted Standard the following discriminatory prices not received by Plaintiffs or other competing roofing companies:

	(Dates)	[1] Records	(Products)	Price [2] Differential	Duration
(1)	09/16/68	(c) 350-42763	Spec. felt	10% + 5%	Until cancelled, superceded or extended to the trade.

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[1] Records were taken from files of either Celotex or Standard, identified by (c) and (s).

[2] Represent amount of discrimination, i.e. difference in price accorded Standard and price given Olympia and others.

	(Dates)	[1] Records	(Products)	Price [2] Differential	Duration
	09/23/68	(c) 350-7444	Spec. felt	5% + 7%	
(2)	04/30/69	(c) 350-9836	asphalt-steep;	2.00 per unit	01/14/71
		(c) 350-9836	metal asphalt anchor bond		
(3)	04/30/69	(c) 350-J-8279	1" Fiberboard	4.00 per unit	Until 6/30/69
		(c) 350-21032	celotherm	2.00 per unit	Until cancelled, superceded, or extended to the trade.
(4)	04/16/69	(c) 350-J-3210	celotherm	2.00 per unit	Until 8/31/69
	09/23/69	(c) 350-J-3844	Vapor bar	[3] ?	Until 10/15/69
	10/31/69	(c) 350-J-4081	1" IMP RFG Ins.	2.00 per unit	Until superceded
	06/14/70	(c) 350-21098	2d Base sheet	10%	Until superceded
		(c) 350-21097	#15 Perf. felt		
(5)	08/24/70	(s) P.O.1677	2" Celotherm	8.00 per unit	Duration of order
(6)	10/07/69	(c) 350-J-4755	Vapor bar and coated felt	[3] ?	3/23/70
	03/23/70	(c) 350-J-4755	Vapor bar and coated felt	[3] ?	Until 7/31/70
(7)	05/06/71	(c) 350-E-1854 (c) 360-3154 (c) 360-3155	Bond ply	10% + 5%	5/30/71
(8)	01/26/70	(s) P.O.1966	43# Base	10%	Until 3/31/70

[3] Amount of differential not reflected on instruments noted, to be calculated by use of current price list.

	(Dates)	[1] Records	(Products)	Price [2] Differential	Duration
			sheet 15# Asbestos felt		
	03/04/70	(s) P.O.1604	Celotherm	[3] ?	
	01/26/70	(s) P.O.1965	Celotherm	[3] ?	
	08/24/70	(c) 350-21053	Celotherm	[3] ?	
(9)	01/02/70	(c) 350-21088	R1-4 #15 & #30 felt	10% + 5%	Until 1/20/70
	01/27/70	(c) 350-J-4497	R1-4 #15 & #30 felt	10% + 5% + 5%	Until 3/9/70
(10)	03/24/70	(c) 350-J-4769	1" Celotherm	[3] ?	Until 3/24/70
	03/24/70	(c) 350-J-4780	Celotherm	[3] ?	Until 5/30/70
(11)	09/01/70	(c) 350-E-7703	#15 felt	5% + 5% + 5% + 5%	2/28/71
	03/01/70	(c) 350-E-1716	#15 felt		4/15/71
(12)	04/30/70	350-21095	various	.03 per roll	Until superceded, etc.
(13)	06/10/70	J-5146	#15 & 30 Perf. felt	.03 per roll	Until 11/30/70
(14)	10/31/72	(s) P.O.1182	43# base	.49 and .79 per roll	Until superceded, etc.
	10/31/72	(s) P.O.1182	Asphalt felts	75% + 5%	Until superceded, etc.
	10/31/72	(s) P.O.1182	Asbestos flashing	5%	Until superceded, etc.
(15)	05/22/72	(s) P.O.1326	Asbestos base	5% + 5%	Until superceded, etc.
(16)	10/06/72	(s) P.O.1320	43# base sheet & 33# coated felts	5% + 5%	Until superceded, etc.
(17)	01/ /72	P.O.1770	43# base sheet	5% + 5%	Until superceded, etc.

	(Dates)	Records [1]	(Products)	Price Differential [2]	Duration
(18)	11/22/72	(c) Inv.82-2783	coated felt	5% + 5%	Until superceded, etc.
(19)	(N/A - questions actions during price "freeze.")				
(20)	10/29/73	(s) P.O.1026	Asbestos Base sheet	3% or $.30 per unit	Eff. 6/11/73 until further notice
		(c) 350-E-573	15# Asbestos felt		
(21)	06/13/72	(s) P.O.1335	Asbestos products	5%	Until superceded, etc.
(22)	09/11/72	Inv.82-2305	Various products	5% + 5%	Until superceded, etc.
(23)	09/01/72	(c) 82-225	Various	5% + 5%	Until superceded, etc.
		(s) P.O.1345	products		
(24)	11/31/72	(c) 350-16949 (c) 350-13651	15# Asphalt	5%	Until superceded, etc.
(25)	11/11/70 04/12/72	(c) 350-7145 (c) 350-13660	Specifica-tion felt	5% + 2%	Until 4/30/71
(26)	01/03/72	(c) 350-24861	15# Asphalt	(N/A - reflects price increase; included to show false and misleading price information - quoted price inconsistent with current price list.)	
(27)	02/02/72	(c) 82-864	#15 flt perf blk shd 2	N.O. tax & Orleans Parish tax	Until superceded, etc.
	09/28/71	(s) P.O.1725	Deep asphalt	$2.20 per unit (4-1/2% discount + freight)	Until superceded, etc.
(28)	11/24/70	(c) 350-7146	1" insula-	8%	Until superceded,

	(Dates)	[1] Records	(Products)	Price [2] Differential	Duration
			tion		etc.
	01/26/71	(c) 350-7162	1.4" insulation	18%	Until superceded, etc.
(29)	10/18/72	(s) P.O.1733 & (c) Inv.82-730	Asphalt	$53.00 per unit	Until 12/31/71
	10/18/71	(s) P.O.1733 & (c) 350-16941	Carton asphalt & asbestos	5 + 5 + 5	Until 12/31/71
(30)	03/19/73	(c) Inv.39-04532 (c) P.O.1167	Commodity 37142	5 + 5	Until superceded, etc.
(31)	02/07/73	(c) 350-35759 (c) Inv.39-05340 (s) P.O.1139	Commodity Nos. 73109 & 73085, asbestos products	5%	Until superceded, etc.
(32)	12/04/72 05/30/73	(s) P.O.'s 1155 & 1175 Inv. 86-23950	Commodity Nos. 74312 & 74418	5%	Until superceded, etc.
(33)	06/21/73	(s) Inv.86-23978	Commodity No. 74312	3%	Until superceded, etc.
(34)	06/25/73	(c) Inv.86-24237, (s) P.O.1276	Commodity No. 74312	3%	Until superceded, etc.
(35)	07/08/73	(c) Inv.82-04001, (s) P.O.1003	Commodity No. 74312	3%	Until superceded, etc.
(36)	09/04/73	(c) Inv.86-0015	Various products	10%	Until superceded, etc.
	04/17/73	(c) 350-29479	Commodities 74312, 74418, &	5% + 5%	Until superceded, etc.

	(Dates)	[1] Records	(Products)	Price [2] Differential	Duration
			72143		
(37)	09/19/73	(s) P.O.1121, (c) Inv.No 3900790	Commodity No. 73142 Commodity No. 73109	5% + 5% 9%	Until superceded, etc. Until superceded, etc.
(38)	(N/A - Compares Celotex, Inv. No. 39 -00202 to Olympia on Commodity No. 73109				
(39)	10/02/73	(c) Inv.No. 3900790	Commodity No. 73142, 73051	2 to 3%	Until superceded, etc.
(40)	10/08/73	(s) P.O.1019	Asphalt products	5% + 5%	Until superceded, etc.
(41)	07/30/73	(s) P.O.1006 (c) Inv.82-00585	Asphalt products	2 to 3%	Until superceded, etc.
(42)	03/12/77	(s) P.O.1063 (c) Inv.82-0999	Asbestos & felt products	8-1/2%	Until superceded, etc.
(43)	02/01/74	P.O.1081	Various products	5% + 5%	Until superceded, etc.
(44)	02/01/74	P.O.1080	Various products	5% + 5%	Until superceded, etc.
(45)	(N/A - refers to Carriere letter to Curtis, 08/02/74				
(46)	10/14/74	Inv.39-07544	Asbestos products	5%	Until superceded, etc.
	12/16/74	Inv.39-08408	Asbestos products	5%	Until superceded, etc.
(47)	(N/A - refers to correspondence between Celotex				

	(Dates) and Standard)	[1] Records	(Products)	Price [2] Differential	Duration
(48)	05/20/75	(c) 350-79977 (c) 350-53843 (s) P.O.1371	Asbestos felt	5% + 5%	Until superceded, etc.
(49)	11/17/76	(c) Inv.39-18442	Vaporbar; Carey Tread	$120.85	N/A

[51]**

[*305] The foregoing instances of discrimination relate to contract work with respect to which Olympia and Standard were in direct competition, and are noted in Plaintiffs' Exhibit 241. P.Ex. 241 will be revised to reflect a summarization of information from pertinent documents, as reflected above. As so revised, it is Plaintiffs' intention to offer the instrument in evidence. However, as hereafter noted, the Exhibit does not purport to describe all instances of discriminatory pricing extended to Standard by Celotex.

33. In most instances, the extension of the discriminatory pricing was implemented through the covert use of forms known as "350's" and "360's", some of which **[**52]** are referenced above.

34. Ostensibly the "350's" were forms employed by Celotex to verify competitive **[*306]** prices offered to roofing contractors by roofing material suppliers on particular orders or for particular jobs, and to indicate the extension of a discounted price to "meet" the competitive offer. The "360's" supposedly were used to grant a lower price to all customers (roofing contractors) in a particular area. When granted, the "360's" at times had the effect of equalizing prices extended to other contractors with discriminatory prices previously given to Standard. However, the non-favored contractors were not aware of this, and were not even aware of the term "360," or its significance.

35. In truth, the forms were not employed in good faith, but, to the contrary, were sham artifices used to mask the granting of discriminatory prices to Standard. As shown by P.Ex. 252 Standard Roofing of New Orleans received a total of 183 "350's" which were revealed in the process of discovery of records in Tampa, Florida. Additionally, 74 more "350's" were furnished, and are identified on P.Ex.'s 252A and 250B. A check of invoices during the discovery in Tampa, Florida, **[**53]** revealed an additional 39 "350's", which were not produced. These are listed on P.Ex. 252C. This brings the total "350's" price allowances received by Standard to 296. By comparison, P.Ex. 253 shows that other competing roofing companies received virtually no "350's". Taylor Brothers received 5, Vicinelli received 1 and Ellis received 3. Exhibit 185 shows that Olympia received a total of 16 "350's". Eight of those were received during the period 1968-1969. Four were received in 1971. No "350's" were issued from March 31, 1971, forward. Olympia was unaware that any "350's" were issued by Celotex in connection with the purchase of any materials by Olympia, and/or that it was the beneficiary of any "350" consideration. It also appears that if other competing roofing contractors received "350" consideration, they were not aware of it, as evidenced by affidavit and proposed testimony of John D. Robertson, Jr., former President and Chief Operating Officer of Dixie Roofing & Sheetmetal Works, Inc., who states that he knew nothing of any competitive allowance request procedure or competitive pricing procedure offered or granted by Celotex.

36. The systematic extension of discriminatory **[**54]** prices to Standard allowed Standard to achieve cost advantages enabling it to secure a dominant position in the union bonded roofing contracting market. That market was serviced, at pertinent times by four companies -- Celotex, GAF, Johns-Manville, and Koppers. From and after the year 1974, Celotex maintained a dominant position in the market. During the early 1970's GAF reduced its bond coverage by one-half, thereby rendering it essentially non-competitive. Koppers dealt only in coal tar pitch products, which are more expensive than other roofing products, and offered a bond only for coal tar pitched products. The

bond offered did not equal the bond extended by Celotex. Johns-Manville reduced its bond coverage by eliminating any service guarantee, by the year 1974. Therefor, from and after the year 1974, the bond program offered by Celotex was unique in the New Orleans metropolitan market. It offered a 20 year bond for a penal sum of either $20.00 or $10.00 per 100 square feet of covered surface, plus a service guarantee of 10 years, with an option of an additional 10 year renewal. No definite figures are available to Plaintiffs regarding the relative share of bond protection afforded **[**55]** by each of the four named companies, but based on sales figures that are available and witnesses' observations of the industry from and after 1974, Defendant Celotex, because of its unique bonding program, achieved a share of the market for sale of roofing materials to bonded union roofing contractors of over 6090. With respect to contracting for the furnishing of bonded union roofing services, Plaintiffs have complied from their own records and records obtained during the course of discovery the information as to Celotex sales contained in Plaintiffs' Exhibits 134, 135, 136, 137, 138, 143, 144, 145, 146 and 259. Plaintiffs have also obtained information regarding Johns-Manville sales to roofing contractors and wholesalers in **[*307]** the New Orleans metropolitan area, reflected by Exhibit 248. This information is summarized, in chart form, in Exhibits attached hereto. This information is partial, and therefore does not reflect precise market shares of the competing roofing contractors. However, based on this information, and the proposed testimony of witnesses' observations of the industry, from and after 1974, the Defendant Standard Roofing of New Orleans achieved a share of **[**56]** the union bonded roofing contracting market in the New Orleans metropolitan area in excess of 50%. The remainder of the market was divided between those competitors named in paragraph 57 of this Second Amended Pretrial Statement. Though the information in the attached charts is partial, it supports the conclusion that the market was divided in the approximate percentages reflected by sales of roofing materials to the competitors.

37. The lower prices resulting from the "350's" and "360's" were extended secretively, and the resulting discriminatory pricing was not made known to Olympia or other roofing contractors and, during the pertinent period, Olympia and other roofing contractors were not given the opportunity to achieve pricing comparable to that extended to Standard.

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47. Celotex secretly communicated to Standard that Olympia would not be accorded "approved" status . . . .

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49. Concurrently, Celotex, through its Southwest Division Manager, Legrow, prepared, published and circulated its "current" list of approved bonded **[**57]** roofers for the State of Louisiana, which excluded Olympia.

50. No written notice of termination of Olympia's approved status had been given, and there was no cause or justification for withholding "approved" status from Olympia.

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55. Olympia was substantially damaged as a result of the discriminatory pricing, and the dominant position achieved by Standard in the market for roofing contracting services in the New Orleans area. The records obtained through discovery, and discussed herein, indicate an average price differential of 5% in the cost paid for materials purchased from Celotex by Olympia and Standard. This materially inhibited Plaintiffs' ability to compete for jobs, particularly since virtually all union bonded roofing contracting jobs are awarded on a bid basis. During the damage period 1972 through 1976, Olympia's purchases of roofing materials affected by the discrimination amounted to $763,153.00. If it be assumed that had Olympia been granted an average 5% price reduction, and it be further assumed that Olympia pocketed that price reduction in the form of profits, its loss for the period 1972 through **[**58]** 1976 would be $38,157.65. However, if it be assumed that Olympia used the 5% price reduction as a basis for more vigorously competing for awards of jobs in the market, in reasonable probability Olympia's participation in the market would have increased. Based on this factor, and Olympia's history in the market, Olympia could easily have increased its total "sales", i.e. gross revenues realized from rendering roofing contracted services by 40%. During the period 1972-1976, Olympia's sales actually amounted to $2,704,539.00, with a net pre-tax profit of 1.06 cent per dollar of sales. Increase in sales, assuming equality of pricing and use of reduced prices to compete in the market, would amount of $1,081,816.00. **[*308]** Plaintiffs propose to offer proof of damages using this basic methodology and employing a ten year "straight-line" projection of sales and loss net profits for a "future" period of ten years from and after 1976.

56. Contracting for the furnishing of bonded union roofing services within the geographical area known as metropolitan New Orleans is a separate market or sub-market, distinct from the total roofing market in the geographical area, which has peculiar **[**59]** characteristics, including:

(a) The initial determination whether a roofing job will be union and/or bonded is controlled by architectural specifications;

(b) These specifications are influenced in large part through the roofers industrial promotion program, an integral part of the bargaining agreement between the union and roofing contractors;

(c) The contractors contribute 25 cents per man per working hour to the program;

(d) The executive director of the program runs the bid depository, and prepares bid forms, to be used in submission of bids by contractors;

(e) He also serves as an industrial promotion man making contact with architects and securing specifications designed to require union labor;

(f) Specifications which require "prevailing wage to be paid" insure that a job is performed with union labor;

(g) Union roofing work is primarily commercial, and virtually all commercial jobs over $250,000.00 in value are union jobs, and are bonded;

(h) There is no competition between union and non-union contractors where bonds and "prevailing wage" are required;

(i) Union contractors, in order to compete effectively in the market, must possess the power to apply for and obtain **[**60]** roofing bonds from suppliers of roofing materials.

57. In addition to the Defendant Standard and the Plaintiff Olympia, other companies which have competed in this market, since the year 1970, include Dixie Roofing Company, Inc., Ellis Roofing, Inc., Taylor-Seidenback, Inc., Holzer Sheetmetal, Inc., Edward Chassinol Roofing, Orleans Roofing and Materials, and Delta Decks, Inc.

58. A second market consists of sales of roofing materials to union bonded roofers in the New Orleans area.

(a) The basic roofing materials consist of flashing materials (which is a laminated felt paper product), insulation, (which may be inorganic or fiberglass), paper and felt (which can be treated with pitch or asphalt), plastic sheets, adherent material (which is ordinarily asphalt, pitch (tar), or putty (a cut-back asphalt) and shingles (which are asphalt).

(b) Generally, roofing materials are categorized as either "tar" or "asphalt."

(c) In selling materials to union roofers for commercial application, suppliers furnish bonds to customers through approved roofers, i.e., the roofing contractor has to be approved before a bond will be furnished.

(d) Because of the common requirement of bonded **[**61]** roofs on larger commercial jobs, the ability to secure a bond is an indispensible requirement for the union contractor in securing jobs.

(e) Likewise, the furnishing of bonds is an indispensible element in the sale of roofing materials to union bonded roofing contractors in the New Orleans area.

(f) Defendant Celotex sells both asphalt and tar roofing materials, and bonds both tar and asphalt roofs.

(g) GAF, Inc., sells shingles and asphalt roofing materials, no insulation materials, and bonds asphalt roofs only.

(h) Johns-Manville sells shingles and insulation, and bonds asphalt products only.

(i) Koppers Company sells and bonds only tar products.

(j) Fiberglass markets a taped insulation system that has a minor portion of the roofing market.

(k) Bird & Son markets primarily shingle and asphalt products, with its primary sales being in the residential field.

[*309] (*l*) Each manufacturer will furnish a bond, and approve a contractor for bonding, only if its products are used in the construction of the roof, and thus the furnishing of the bond is inseparably tied to the sale of materials by the manufacturer to the union roofing contractor.

LIST OF WITNESSES AND DOCUMENTS

[62]** Plaintiffs expect to elicit testimony from the following witnesses, and to offer the following documents, in support of the facts set forth above.

WITNESSES

1. *William J. Manion*, 401 Metairie Road, Metairie, Louisiana

ATTACHMENT# 2

RULE 3.9 STATEMENT OF MATERIAL FACTS

The Court's Order of May 14, 1980 specified in para. 38 that "the narrative statements of fact in the parties' Pretrial Statements shall serve as the Statements of Material Facts required by Local Rule 3.9." Accordingly, Defendant The Celotex Corporation ("Celotex") admits for the purpose of this Motion all narrative statements of fact in the Second Amended Pretrial Statement filed by Plaintiffs Olympia Company, Inc. and Olympia Roofing Company, Inc. ("Olympia"). [1] Celotex also submits that the following facts as to which it contends there is no genuine issue to be tried may be material: [2]

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[1] A copy of the Narrative Statement of Facts in Olympia's Second Amended Pretrial Statement is attached as Appendix I, supra at pg. 301.

[63]** 1. Olympia neither purchased materials from nor placed orders with Celotex after October of 1973. (III Manion Deposition [1977], Tr. 112-14, 127-29; II Manion Deposition [1977], Tr. 23-24; Olympia's Answer to Celotex First Interrogatory No. 35(g) (filed May 18, 1978).)

2. Olympia has been able to identify only six instances in which Olympia and Standard made roughly contemporaneous purchases of similar goods from Celotex at different prices. (Manion Deposition [1978], Tr. 186.)

3. Olympia never requested a discount from Celotex or any other manufacturer, nor were discounts ever offered to Olympia by any competitors of Celotex. (Manion Deposition [1978], Tr. 43-46, 121, 126, 185.)

4. Olympia has no information whatsoever concerning (a) what Celotex products it attempted to buy at which prices and at what times, (b) whether Celotex was actually meeting lower competitive offers when it extended price discounts to other roofers, and (c) whether Celotex attempted to verify competitive prices. (Manion Deposition [1978], Tr. 55-62, 69-72, 86-88, 91-93, 108-11, 115-16, 133, 136.)

5. Celotex lowered its prices to individual roofers only when necessary to do so in order to meet **[**64]** a lower competitive offer, and only after a detailed and formalized multi-tier system of verification. (Brasher Affidavit paras. 7-20; LeGrow Affidavit paras. 20-30.)

[*310] 6. Celotex has never contracted, agreed, or conspired, through the use of the Approved Roofer list or otherwise, to (a) give one roofer lower prices than those extended to it competitors, or (b) to boycott or injure a roofer. (Brasher Affidavit paras. 7, 34; LeGrow Affidavit paras. 16-19.)

7. The sales data accompanying Olympia's Second Amended Pretrial Statement shows only Celotex sales to selected roofers in the New Orleans area, are incomplete, and support no conclusions whatsoever about Celotex's share of the relevant market. (Cromartie Deposition, Tr. 33-35, 62-69, 77-80, 148-49, 207, 266-72 & Exs. 5, 6; Jeffress Deposition, Tr. 79-83, 140-41 & Exs. 3, 4.)

8. Olympia did no roofing jobs equal to or over $250,000 in value in the period from 1972 to 1976. (III Manion Deposition [1977], Tr. 114-15; II Manion Deposition [1977], Tr. 75-77.)

9. No copy of the Approved Roofer Agreement between Celotex and Olympia has ever been found. (LeGrow Affidavit para. 7; Olympia's Answer to Celotex First Interrogatory **[**65]** No. 34(b) (filed May 18, 1978).)

10. An Approved Roofer Agreement is terminable at will. (LeGrow Affidavit para. 9.)

11. In late 1973, Celotex and Olympia engaged in a dispute involving the payment of bills. (III Manion Deposition [1977], Tr. 125-32; II Manion Deposition [1977], Tr. 6, 24-26.)

12. Celotex did not refuse to sell materials to Olympia, but rather insisted upon delivering them C.O.D. or to job-sites in order to preserve its lien rights. (III Manion Deposition [1977], Tr. 91-94, 112-14; II Manion Deposition [1977], Tr. 8-9, 23-24.)

13. As a result of the credit dispute, Olympia sued Celotex in the Civil District Court for the Parish of Orleans. (III Manion Deposition [1977], Tr. 43-44; II Manion Deposition [1977], Tr. 6; *Olympia Roofing Company, Inc. v. The Celotex Corporation, et al*., No. 574-437 (filed June 10, 1974).)

14. Although it was customary for Celotex to delete roofers from its Approved Roofer list if no purchases were made within a 12-month period, it was also customary to notify roofers deleted for this reason, both as a courtesy and in order to allow them to be reinstated if they wished. (LeGrow Affidavit paras. 9, 11.)

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[2] The following abbreviated references are used herein: Deposition of Dr. W. J. Manion taken on August 24, 1978 = Manion Deposition [1978]. Deposition of Dr. W. J. Manion taken on May 31, and June 2, 1977 = Manion Deposition [1977]. Deposition of Dr. J. S. Cromartie taken January 5, 1984 = Cromartie Deposition. Deposition of Dr. P. W. Jeffress taken January 4, 1984 = Jeffress Deposition. Affidavit of S. E. Brasher = Brasher Affidavit. Affidavit of W. W. LeGrow = LeGrow Affidavit.

15. In early **[**66]** 1974, it was decided that alterations in Celotex's corporate structure made it necessary to update and revise existing Approved Roofer lists. (LeGrow Affidavit para. 5.)

16. Accordingly, new Approved Roofer Agreement forms were forwarded to roofing applicators by the appropriate Regional offices. (LeGrow Affidavit para. 6.)

17. An Approved Roofer Agreement was delivered to Olympia in January of 1974; however, Olympia refused to sign the Agreement because of the continuing credit dispute with Celotex, and did not execute and forward the Agreement to Celotex until February of 1975. (III Manion Deposition [1977], Tr. 133-36.)

/s/ CHARLES KOHLMEYER, JR.

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Regents of University of California v. American Broadcasting Cos.

United States Court of Appeals for the Ninth Circuit

October 4, 1984, Argued and Submitted ; November 9, 1984, Decided

No. 84-6310

Reporter

747 F.2d 511 *; 1984 U.S. App. LEXIS 16845 **; 1984-2 Trade Cas. (CCH) P66,279

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, THE UNIVERSITY OF SOUTHERN CALIFORNIA, THE PACIFIC-10 CONFERENCE, AND THE BIG TEN CONFERENCE, Plaintiffs-Appellees, v. AMERICAN BROADCASTING COMPANIES, INC., ABC SPORTS, INC., ENTERTAINMENT AND SPORTS PROGRAMMING NETWORK, INC., THE COLLEGE FOOTBALL ASSOCIATION, THE BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, AND THE UNIVERSITY OF NOTRE DAME DU LAC, Defendants-Appellants

Prior History: [1]** Appeal from the United States District Court for the Central District of California. Richard A. Gadbois, Jr., District Judge, Presiding.

Core Terms

preliminary injunction, broadcast, district court, television, hardships, college football, games, plaintiffs', public interest, crossover, rule of reason, horizontal, merits, serious question, injunction, issuance, teams, football, trial court, network, sharply, antitrust, consumer, rights, legal standard, per se rule, athletes, abused, tipped, Sherman Act

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Appeals > Standards of Review

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

A trial court's decision in granting or denying a preliminary injunction will only be set aside when it is based on an abuse of discretion or on improper legal premises. The reviewing court must evaluate whether the trial court correctly identified and applied the pertinent legal standards in passing on the motion for a preliminary injunction.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN2[] **Injunctions, Preliminary & Temporary Injunctions**

Under the Ninth Circuit Court of Appeals traditional test, a preliminary injunction is justified when: (1) the moving party has established a strong likelihood of success on the merits; (2) the balance of irreparable harm favors the moving party; and (3) the public interest favors the issuance of an injunction.

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**

The court reviews anti-competitive action, ambiguous on its face, under the so-called Rule of Reason to determine whether its purpose and effect is to derail free competition.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

HN4[] **Regulated Practices, Private Actions**

Complete involvement does constitute a defense to a treble damages claim in an antitrust action. Nonetheless, the defense contemplates that the plaintiff at least be a participant, if not an equally culpable participant.

Counsel: John H. Hauser, McCutchen, Doyle, Brown & Enersen, San Francisco, California, Byron L. Gregory, Esq., McDermott, Will & Emery, Chicago, Illinois, for Appellees.

James Loftis, Esq., Washington, District of Columbia, for Appellant.

Judges: Anderson, Ferguson and Beezer, Circuit Judges. Beezer, Circuit Judge, dissenting.

Opinion by: FERGUSON

Opinion

[*512] FERGUSON, Circuit Judge:

On June 27, 1984, the Supreme Court held that the National Collegiate Athletic Association's (NCAA's) position as the exclusive bargaining agent for college football television rights violated *section 1* of the Sherman Act. *National Collegiate Athletic Association v. Board of Regents of University of Oklahoma (Regents), 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. Immediately thereafter, most universities with football programs began to renegotiate television contracts. Similarly, the television networks, particularly the American Broadcasting Company (ABC) and the Columbia Broadcasting System (CBS), eagerly sought to acquire the **[**2]** broadcasting rights previously disbursed by the NCAA. Less than a month after the Supreme Court's *NCAA* decision, a large number of college conferences and independent football powers entered into an exclusive **[*513]** broadcasting contract with ABC under the new banner of the College Football Association (CFA). A much smaller, but nonetheless formidable group of schools, the twenty members of the Pacific-10 and Big Ten Conference, signed with CBS for the 1984 football season. Shortly thereafter this smaller group of colleges, including the Regents of the University of California, the University of Southern California, the Pacific-10 Conference, and the Big Ten Conference, filed this antitrust suit against the defendants ABC, the CFA, and two CFA member institutions. The plaintiffs, mainly pressing their antitrust claims, sought and obtained a narrow preliminary injunction prohibiting Nebraska and Notre Dame from refusing to consent to the broadcast of one of their fall games solely on the basis of the exclusivity terms of their contract with the remaining defendants. By its terms, the preliminary injunction does not require the individual defendant schools to consent to **[**3]** the plaintiffs' broadcast offers. Instead, it merely bars the two universities from withholding consent solely on the terms of the contract between the CFA and ABC. After the district court denied the defendants' application for a stay of the preliminary injunction, which would have had the practical effect of barring live television coverage of the Nebraska-UCLA and Notre Dame-USC games, the defendants appealed. We affirm.

I. FACTS

The history of the college football television market is chronicled in the Supreme Court's *NCAA* decision, *468 U.S. 85, 104 S. Ct. 2948, 2954-57, 82 L. Ed. 2d 70 (1984)*, and need not be repeated here. Under both long and short term contracts, the defendant ABC and its sports broadcasting subsidiaries were the principal beneficiaries of the NCAA's former control over college football broadcast rights. In the wake of the Supreme Court's NCAA decision, ABC can lay claim to the broadcasting rights for the 63 major college football programs which make up the CFA. [1] An integral part of ABC's broadcasting contract with the CFA requires member schools to maintain, on pain of CFA sanctions, ABC's position as the exclusive network for member **[**4]** television coverage. The broadcast restraints posited by the ABC contract come in several forms. The particular restraint which triggered the preliminary injunction and precipitated this appeal is called the "crossover restriction." In essence, the crossover restriction contained in the ABC-CFA contract bars the broadcast of CFA member games on other networks even when the opposing team is not a member of the CFA.

By design, the ABC television contract with the CFA attempts to create an exclusive "network window" from 3:30 to 11:30 P.M. EST on Saturdays wherein two CFA games of ABC's selection will be broadcast. These two games, **[**5]** chosen by ABC or its subsidiary the Entertainment and Sports Programming Network, Inc. (ESPN), are the only two games between CFA members eligible for broadcast during this time period. The ABC contract further provides that this exclusive Saturday afternoon window also extends to games played between CFA members and other colleges not affiliated with the CFA. Hence, the ABC contract prohibits the broadcast of games between CFA and non-CFA teams, called crossover games, during this Saturday time frame through the enforcement of its exclusive broadcasting rights with the CFA. Stated differently, the ABC-CFA contract not only curtails broadcasting competition among member CFA schools, but also seeks to eliminate direct network competition by prohibiting the telecast of crossover games.

The Big Ten and Pac-10 Conferences (hereafter referred to as the Pac-10-Big **[*514]** Ten Conference) declined the opportunity to join the CFA. These two Conferences, with their twenty member schools, struck out on their own and negotiated a contract with CBS on July 18, 1984, several days before ABC entered into the agreement with the CFA. This fact is relevant to our inquiry because the function **[**6]** of a preliminary injunction is to preserve the status quo *ante litem.* *Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804, 809 (9th Cir. 1963)*. Discerning the status quo *ante litem* presents little problem in this case because the challenged conduct, the exclusivity provisions of the ABC-CFA contract, came into existence after the plaintiffs had contracted for their broadcasting package with CBS. There has been no counterclaim by the defendants regarding the plaintiffs' contract. Hence, the only matter in controversy is the terms of the ABC-CFA contract. Without question, "'the last, uncontested status which preceded the pending controversy,'" *id. at 809* (quoting *Westinghouse Electric Corp. v. Free Sewing Machine Co., 256 F.2d 806, 808 (7th Cir. 1958))*, is preserved by the preliminary injunction.

The terms of the Pac-10 and Big Ten contract gave CBS similar rights to broadcast Saturday games, selected by CBS, between Pac-10-Big Ten Conference teams. The contract also claimed rights to the crossover games between Pac-10 and Big Ten Conference members and non-Conference teams. [2] Not surprisingly, given the rich

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[1] Even to those uninitiated in the seasonal nuances of the college football game, the broad geographic span of the CFA member institutions, including schools such as Nebraska, Notre Dame, Boston College, Miami of Florida, Oklahoma, Texas, SMU, Alabama, Missouri, Brigham Young and Pittsburgh, reveals the imposing position the CFA occupies within the college football broadcast market.

[2] The legality of the Conference's crossover restriction is not at issue in this litigation in the absence of a cross-claim by the defendant. Accordingly, a comparison of the two is unnecessary.

tradition **[**7]** and perennial prominence of both Conference and CFA teams, two crossover confrontations, a Nebraska-UCLA game and a Notre Dame-USC match, had been previously scheduled for the 1984 season.

The Pac-10-Big Ten Conference desires to broadcast both of these games, only one of which remains at issue, [3] and ABC has attempted to prevent CBS coverage through the enforcement of the CFA crossover restrictions. Based on the complaint and the substantial record placed before it, the district court issued a preliminary injunction prohibiting two CFA members, Notre Dame and Nebraska, from withholding consent to the CBS broadcast of their games against the two PAC-10 teams, USC and UCLA, based solely on the terms of the ABC-CFA crossover restriction. The district court further enjoined the CFA and its members from imposing or **[**8]** threatening to impose any sanctions on either Nebraska or Notre Dame to inhibit these schools from voluntarily consenting to a CBS crossover broadcast. Consequently, at this very early stage in the antitrust litigation, the net effect of the trial court's preliminary injunction is limited to the telecast of the game between Notre Dame and USC on November 24, 1984. Moreover, while the preliminary injunction does insure that ABC and the CFA cannot unilaterally prevent the CBS broadcast of this game, the injunction does not compel Notre Dame to consent to the CBS broadcast of its Thanksgiving weekend game against USC. Instead, the preliminary injunction operates to liberate Notre Dame from the constraints of the crossover restriction while simultaneously permitting the school to make a truly independent decision on whether to accept CBS's Thanksgiving weekend broadcast package.

[9]** The premise behind the district court's preliminary injunction, and indeed the principal contention raised in plaintiffs' complaint, is that the ABC-CFA contract violates this nation's antitrust laws. Specifically, the plaintiffs allege that the defendants have violated *section 1* of the Sherman **[*515]** Act which prohibits "every contract, combination . . . or conspiracy in restraint of trade. . . ." *15 U.S.C. § 1*. The plaintiffs have challenged the exclusivity of the ABC-CFA television contract as to competition among CFA member institutions as well as that between CFA and non-CFA colleges. Although the district court did not reach any final conclusions on the merits of the plaintiffs' case, by necessity the court made some findings on the strength of the plaintiffs' antitrust claims. The only ultimate conclusion reached by the court was to preserve the status quo pending the resolution of the merits of plaintiffs' complaint. Our task, under the appropriate standard, is to review this limited and narrow exercise of the district court's equitable discretion.

II. STANDARD OF REVIEW

The standard of review for the issuance of a preliminary injunction **[**10]** has often been stated and needs no lengthy elaboration here. ***HN1***[] A trial court's decision in granting or denying a preliminary injunction will only be set aside when it is based on an abuse of discretion or on improper legal premises. *Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980)*. This court must evaluate whether the trial court correctly identified and applied the pertinent legal standards in passing on the motion for a preliminary injunction. This circuit has formulated different descriptions, some simple and some ornate, of the correct legal standard for the issuance of a preliminary injunction. *See, e.g.*, *Los Angeles Memorial Coliseum Comm'n. v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980)* (setting forth a four part test requiring strong likelihood of success on the merits, possibility of irreparable injury to plaintiff absent injunction, balance of hardships favoring plaintiff, and advancement of public interest); *American Motorcyclist Ass'n. v. Watt, 714 F.2d 962, 965 (9th Cir. 1983)* **[**11]** (articulating a three part standard for issuance of a preliminary injunction); *Benda v. Grand Lodge of IAM, 584 F.2d 308, 314-15 (9th Cir. 1978)*, *cert. dismissed*, *441 U.S. 937, 60 L. Ed. 2d 667, 99 S. Ct. 2065 (1979)* (approving use of an abbreviated two part test). Long or short, old or new, these tests "are not separate tests but the outer reaches 'of a single continuum'." *Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d at 1200* (quoting *Benda v. Grand Lodge of IAM, 584 F.2d at 315*).

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[3] The preliminary injunction was issued on September 10, 1984 and had its initial impact on the first scheduled crossover game between Nebraska and UCLA which took place on September 22, 1984. Faced with the terms of the preliminary injunction the University of Nebraska elected to give its consent to televising this game nationally on CBS rather than forgo any telecast. By not televising any college game during the Nebraska-UCLA telecast, ABC chose not to compete during this crossover match.

None of the respective factual inquiries described by the various standards are irrelevant to the district court's essential task of balancing the equities in the exercise of the equitable discretion vested in the district court. In this case the district court utilized the middle standard in the "continuum," which has been described as the "traditional" standard in this circuit. *See* American Motorcyclist Ass'n. v. Watt, 714 F.2d at 965. **HN2**[] Under this traditional test a preliminary injunction is **[**12]** justified when: (1) the moving party has established a strong likelihood of success on the merits; (2) the balance of irreparable harm favors the moving party; and (3) the public interest favors the issuance of an injunction. American Motorcyclist Ass'n. v. Watt, 714 F.2d at 965. In this case the district court expressly found that the public interest is served by the issuance of the preliminary injunction; that the balance of the hardships sharply favors the plaintiffs and, in fact, the defendants would suffer no appreciable hardship and the university defendants would even benefit from the injunction; and, finally, that the plaintiffs had raised serious questions [4] whether the defendants **[*516]** had violated the antitrust laws. We review the district court's findings to determine whether the court abused its discretion in reaching its conclusions.

[13]** A. Likelihood of Success on the Merits

In their complaint, the plaintiffs allege that the actions of the defendants violate section 1 of the Sherman Act in two different respects. First, plaintiffs characterize the CFA crossover restriction as refusal to deal by CFA members with non-CFA members on television broadcast coverage. In the alternative, the plaintiffs also assert that the defendants have formed a cartel restricting the output of televised games so as to raise artificially the value of the ABC-CFA contract. So cast, the plaintiffs' complaint alleges the classic antitrust violations of "group boycott" and "price-fixing." These two different types of commercial activity have traditionally been categorized as *per se* violations of the antitrust laws. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959) (agreement not to sell to individual retailer constituted group boycott subject to *per se* rule); Associated Press v. United States, 326 U.S. 1, 12-15, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945) (joint newspaper venture cannot expressly prohibit all transactions with non-members); **[**14]** United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940) (major oil refiners' concerted program to purchase distressed gasoline to prop up market price constitutes price-fixing subject to *per se* analysis).

Some forms of concerted action, however, cannot be and are not so easily categorized as patently anti-competitive. **HN3**[] Courts review such activity, ambiguous on its face, under the so-called Rule of Reason to determine whether its purpose and effect is to derail free competition. Plaintiffs further contend that even if the defendants' conduct is subject to this more searching rule of reason inquiry, the trial court correctly concluded that the plaintiffs are nonetheless likely to succeed on their antitrust claims. Conversely, the defendants object to the categorization of their conduct as per *se* violations and further aver that their actions will withstand review under the Rule of Reason.

We need not reach the issue of whether *per se* or Rule of Reason analysis will govern the evaluation of the plaintiffs' antitrust claims. **[**15]** Under either analysis the trial court did not abuse its discretion in finding that the plaintiffs had presented serious questions indicating a fair chance of success on the merits. Indeed, our confidence in the district court's finding on this matter cannot ask for a more firm footing than that found in the Supreme Court's recent decision in NCAA v. Regents, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984). Fortunately, the *NCAA* decision not only precipitated the present state of affairs in the college football television market, it also provided the concomitant legal insights necessary to facilitate our inquiry in this case.

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[4] Admittedly, the reference to the "serious questions" presented as to the defendant's compliance with section one of the Sherman Act suggests that the district court may have utilized the short, two-part, "alternative" standard set forth in Benda v. Grand Lodge of IAM, 584 F.2d at 315, which requires a lesser showing of only a balance of hardships tipped sharply in the plaintiff's favor coupled with a "fair chance of success on the merits" or presenting questions "serious enough to require litigation." Nonetheless, the district court did expressly find that the public interest favored the issuance of the preliminary injunction, a finding consonant with the plenary inquiry outlined by the traditional test. Hence, we review the district court's findings under the traditional standard.

In *NCAA v. Regents*, the Supreme Court held that the NCAA's exclusive control over the football broadcast rights of member institutions violated *section 1* of the Sherman Act. In reaching this conclusion the Court applied the "Rule of Reason," *id. at 2962*, and found that the plan constituted an impermissible restraint on the market. *Id. at 2967*. The Court further held that the NCAA had not established any affirmative defense sufficient to justify the perpetuation of the trade restraints under the Rule of Reason. Reference **[**16]** to the reasoning behind the Court's twin conclusions on the applicability of the Rule of Reason and the absence of any affirmative defense is instructive in evaluating the seriousness of plaintiffs' allegations in the present case.

In *NCAA v. Regents*, the Supreme Court rejected a *per se* approach to the analysis of the NCAA's clear domination of the college football broadcasting market. *104 S. Ct. at 2961-66*. In so doing, the Court **[*517]** recognized that the NCAA television plan constituted a horizontal restraint on trade of a character similar to prior restraints that had succumbed to the *per se* rule. *Id. at 2960*. Nonetheless, the Court dismissed the *per se* rule in favor of the Rule of Reason for one express reason: the very nature of the industry rendered "horizontal restraints on competition . . . essential if the product is to be available at all." *Id. at 2961*. In the Court's view, the college football industry must collectively adopt and enforce uniform rules; the integrity of the industry must be preserved through mutual agreement and enforceable standards; and, the quality of the common industrial "product" is inexorably linked to **[**17]** the vitality of the industry itself. The NCAA performed all of these essential functions. Presumably, the Court's acceptance of this essential entity argument, focusing as it does on the needs of an entire industry, would have equal force in both group boycott and price-fixing settings. Having found that the NCAA performed all of these essential roles in furthering and policing the college football industry, the Supreme Court held that the attendant horizontal restraints should be examined under the Rule of Reason rather than the *per se* rule.

Obviously, the Court's categorization of the NCAA's vital relationship to the college football "industry" is not equally transferable to the CFA. By any account, the purpose and effect of the horizontal restraints imposed by the CFA and the ABC-CFA contract have little, if any, bearing on the operative rules of collegiate football. Presumably, the essential ingredients of industry uniformity and product integrity are still being furnished by the same entity -- the NCAA. More to the point, if an industry depends on such an entity for its very sinews, logic suggests that there can be only one such entity per industry. With the NCAA having **[**18]** already occupied the field of "college football," the CFA and the ABC-CFA contract appear to constitute classic horizontal restraints unadorned by any organic relationship to the "character and quality of the 'product'." *Id. Cf. NCAA, 104 S. Ct. at 2969* (NCAA's "restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.").

Accordingly, the reasoning of the *NCAA* decision suggests that traditional antitrust analysis, and the attendant *per se* label, should apply to the plaintiffs' boycott and price-fixing allegations. Although we need not decide here whether the *per se* label shall attach to the antitrust inquiry in this case, we note that price-fixing and group boycotts have traditionally been subject to *per se* review. *See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)* (group boycott subject to *per se* rule); *United States v. Columbia Pictures Industries, Inc., 507 F. Supp. 412, 426-28 (S.D.N.Y. 1980)* **[**19]** (same); *United States v. Topco Associates, Inc., 405 U.S. 596, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972)* (horizontal restraints dividing market among joint venturers subject to *per se* rule); *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)* (joint program to purchase spot oil so as to influence market price subject to *per se* rule as price-fixing). The features of the ABC-CFA contract will no doubt have the effect of limiting the output of televised college football. The exclusionary nature of the crossover restriction appears on its face to be in furtherance of a concerted refusal to deal. *See E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee, 467 F.2d 178, 187 (5th Cir. 1972) cert. denied, 409 U.S. 1109, 34 L. Ed. 2d 690, 93 S. Ct. 912 (1973)*. On the record before the trial court, therefore, we cannot say that it abused its discretion in finding that the plaintiffs had presented serious questions regarding the defendant's compliance with *section 1* of the Sherman Act.

Conversely, application of the Rule of Reason does not diminish the thrust or **[**20]** **[*518]** force of the plaintiffs' case. Once again, the Supreme Court's *NCAA* decision illustrates the strength of the plaintiffs' case. The defendants contend that the CFA and the ABC-CFA contract are actually procompetitive. Citing *Broadcast Music,* Inc. v. CBS, Inc., 441 U.S. 1, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979), the defendants characterize their relationship as a joint selling arrangement creating a "new and different product, an ABC 'CFA Football' program." In *Broadcast Music*, the Supreme Court upheld a joint selling arrangement among music composers which had the effect of increasing the total volume of musical compositions sold in the market. Broadcast Music, Inc. v. CBS, 441 U.S. 1, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979). The Supreme Court, however, has already rejected a similar attempt to rely on the *Broadcast Music* opinion as a justification for the NCAA's restraints on individual college broadcasting competition. NCAA v. Regents, 104 S. Ct. at 2967-68. As the Supreme Court in *NCAA* noted, the possibility of individual competition, with the concomitant increase in output, was considered the saving **[**21]** grace of the joint selling arrangement in the *Broadcast Music* case. NCAA, 104 S. Ct. at 2968. The ABC-CFA "arrangement," just as the NCAA television plan that fell before it, shares the dual infirmities of an intentional reduction in output along with the imposition of sharp restraints on individual school competition. Moreover, this conclusion applies with as much force to the ABC-CFA contract considered as a whole as it does to the component restraints found in the crossover restriction.

Reversing their field, the defendants have also suggested that the CFA is not a mutual arrangement for the imposition of essential horizontal restraints but rather the CFA simply imposes non-price vertical restrictions on the ultimate distributors of its product. Once again, the defendants' arguments fail as a result of the Supreme Court's *NCAA* opinion. Substance, not form, will determine whether the CFA is a single economic entity engaged in distributing a product to its distributors. *See* United States v. Sealy, 388 U.S. 350, 352, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967). The Supreme Court, in the *NCAA* decision, despite its recognition of the **[**22]** many substantive and valuable functions the NCAA performs to advance the industry, found the NCAA television plan to be "a horizontal restraint -- an agreement among competitors on the way in which they will compete with one another." NCAA, 104 S. Ct. at 2959. *Cf.* Los Angeles Memorial Coliseum v. National Football League, 726 F.2d 1381, 1389 (9th Cir. 1984). It is unclear how the CFA, which does not even purport to perform the supervisory functions undertaken by the NCAA, occupies a different posture with respect to its member institutions. Even if the defendants' characterization of the CFA arrangement as a nonprice vertical restraint could successfully be argued after the NCAA decision, [5] this circuit has adopted a market share analysis of vertical restraints which, under the concentrated conditions of the college football television market and the CFA's position therein, significantly diminishes the defendants' chances under the Rule of Reason. *See* Continental T.V., Inc. v. G.T.E. Sylvania Inc., 694 F.2d 1132, 1138-39 (9th Cir. 1982) (adopting Fifth Circuit's use of market-structure analysis in Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1005-6 **[**23]** (5th Cir.), *cert. denied*, *454 U.S. 827, 70 L. Ed. 2d 102, 102 S. Ct. 119 (1981))*.

The defendants' final argument in the way of an affirmative defense is that the plaintiffs' antitrust suit is barred by the doctrines of *in pari delicto* or unclean **[*519]** hands. This contention need not detain us for long. Although the Supreme Court has broadly stated that the *in pari delicto* defense has no role in the antitrust **[**24]** field, Perma Life Mufflers Inc. v. International Parts Corp., 392 U.S. 134, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968), the Court left the decision open as to whether a plaintiff's "complete involvement" in an antitrust violation could ever be a basis for barring suit under the antitrust laws. Id. at 140. This circuit has "determined that ***HN4***[] 'complete involvement' does constitute a defense to a treble damages claim in an antitrust action." Thi-Hawaii v. First Commerce Fin. Corp., 627 F.2d 991, 995 (9th Cir. 1980). Nonetheless, the defense contemplates that the plaintiff at least be a participant, if not an equally culpable participant, *see* Berner v. Lazzaro, 730 F.2d 1319, 1324 (9th Cir. 1984), in the alleged violation of the antitrust laws. *See* THI-Hawaii v. First Commerce Fin. Corp., 627 F.2d at 995. The only alleged violation currently before the court is that of the ABC-CFA "arrangement." The defendants have not even alleged, much less proven, complicity on the part of the plaintiffs in this alleged violation.

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[5] In finding the NCAA television plan a "horizontal" restraint, 104 S. Ct. at 2959, the Supreme Court apparently reversed the Tenth Circuit's prior determination that the NCAA stood in a vertical relation to the networks. *See* Board of Regents v. NCAA, 707 F.2d 1147, 1161 (10th Cir. 1983), *aff'd on other grounds*, 468 U.S. 85, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984). We need not decide the effect of this inconsistency on this case at this juncture but we can readily infer which characterization will have the greater weight.

[25]** In conclusion, we cannot say that the trial court abused its discretion in finding that the plaintiffs have raised serious questions about the legality of the defendant's conduct under section one of the antitrust laws. We need only look to the reasoning of the Supreme Court in the *NCAA* case to confirm the trial court's preliminary conclusions on the plaintiffs' likelihood of success in the prosecution of their antitrust claims.

B. Balance of Hardships

The trial court found that the "balance of hardships tilts rather sharply in favor of the plaintiffs." Referring to the "intangible" benefits of nationwide television coverage that the parties had discussed at length, the court held that the hardships imposed by declining to issue the injunction far outweighed the hardship that a narrow preliminary injunction would present to the defendants. Again, our role is not to determine what we would do if first presented with the issue. Rather, we must ascertain whether the trial court abused its discretion in finding that the center of gravity for the hardships in this case fell squarely on the side of the plaintiffs. Moreover, we review the trial court's decision based on **[**26]** the record as it then existed, and not on subsequent developments. Finally, we examine the balance of the hardships to the parties, not the scope of injunction, to determine where the equities lie. Of course, if the scope of the injunction is unclear or overbroad, a situation not alleged or present in this case, we may find an abuse of discretion on that basis.

At oral argument before the district court the plaintiffs demonstrated that they would suffer irreparable injury if the ABC-CFA crossover restriction was enforced. The plaintiffs described, along with supporting evidence, the numerous ways in which they would be injured from the enforcement of the allegedly illegal crossover restriction. The trial court was persuaded and found that the plaintiffs would be "clearly harmed" in the absence of a preliminary injunction "both monetarily and with respect to the intangibles discussed at length in argument on the motion." Now, of course, a party is not entitled to a preliminary injunction unless he or she can demonstrate more than simply damages of a pecuniary nature. *Los Angeles Memorial Coliseum Comm'n. v. National Football League, 634 F.2d 1197, 1202 (9th Cir. 1980)*. **[**27]** This is nothing more than a corollary to the principle that the exercise of equitable jurisdiction is predicated on the absence of an adequate remedy at law. We do not think, however, a trial court's recognition of the obvious -- i.e., that monetary losses can indeed attend the infliction of intangible injuries -- requires that this court ignore an otherwise unambiguous finding of intangible injury. Instead, we must look to the record, mindful of the celerity of the proceedings, to determine whether the trial court abused its discretion in finding irreparable injury strongly favoring the plaintiffs' case.

[*520] The plaintiffs described several ways in which they would suffer injury beyond the mere loss of income from broadcasting. These injuries include: the impairment of their ongoing recruitment programs; the dissipation of alumni and community goodwill and support garnered over the years; placement of plaintiffs' teams at a significant disadvantage for purposes of national ranking; [6] the deprivation of the opportunity to showcase rivalries of unique tradition and moment in the "industry"; and a reduction in the attractiveness of the Pac-10-Big Ten Conference "product" **[**28]** which would doom the Pac-10-Big Ten's efforts to compete in the market. These disparate injuries are obviously interrelated, and, if there is one common thread it lies in the conclusion that the plaintiffs would suffer some palpable diminution in national reputation and following from their inability to telecast their premier contests. We also recognize that although these hardships are shared by all of the plaintiffs, they affect the Pac-10-Big Ten Conference plaintiffs in a manner somewhat distinct from the individual plaintiff institutions.

[29]** With the possible exception of the competitive injury to the Pac-10-Big Ten program, we cannot find that the district court abused its discretion in depicting these hardships as sufficient to support the issuance of the very narrow preliminary injunction. One doesn't have to be a football coach to realize that the successful recruitment of student athletes depends on a combination of athletic prowess, national and conference ranking and esteem, the

[6] While at first blush this concern may appear remote, the importance of the national rankings, from the perspective of both the colleges and the networks, cannot be ignored. In fact, the parties to both the ABC-CFA and the CBS-Conference contracts have taken great pains to insure that the televised college games are followed by promotional segments emphasizing the respective rank of the various teams and promoting the conference and inter-conference rivalries. Obviously, if the parties devote so much attention to identifying the graphic detail to which national rankings will be promoted, we would be hard pressed to dismiss national rankings, and the networks' role in fostering them, as trivial.

frequency of post-season bowl appearances, a program's incidence of individual athletic awards such as the prestigious Heisman trophy, and the successful placement of student athletes in the ranks of professional sports. Given the amateur status of collegiate football, a successful recruitment program is the principal means of improving or maintaining the competitive "quality" of the "product." To be sure, successful coaching plays a critical role in furthering the competitive stature of a college team. Coaches, especially successful ones, are not themselves immune from the recruitment efforts of college football programs. The parties do not dispute that the nationwide exposure that television provides college football games directly **[**30]** affects the ability of a college program to attract and retain student athletes. Nationwide television coverage expands the horizons of a college recruitment program and telegraphs to potential athletes the skill, enthusiasm, and esprit that differentiates one program from the next. Coaching skills, student body support, and athletic ability are all on display to students, parents, and alumni during these weekly fall contests. Especially in light of the NCAA's role in regulating and policing uniform recruitment practices, a function left undisturbed by the *NCAA* opinion, television exposure offers a unique opportunity for colleges in their battle to win the enrollment of prospective student athletes. We fail to discern an abuse of discretion by the trial court in refusing to say categorically that the injuries non-exposure would inflict are insubstantial, fleeting, or fully compensable in monetary terms.

The record fails to reveal any significant injury to the defendants stemming from the issuance of the preliminary injunction. The terms of the preliminary injunction will have no effect on the individual college defendants other than removing the fetters of the ABC-CFA contract **[**31]** from their game broadcast bargaining negotiations. National exposure by either network would advance the goals of their college football programs. The defendant ABC argues **[*521]** that its efforts for "product identification" of CFA football as a distinct "brand" will suffer if it cannot enforce its crossover restriction. In other words, permitting the broadcast, over ABC's protest, of a CFA-non-CFA contest, would somehow diminish ABC's program to differentiate "CFA football" from all other varieties of college football. If the preliminary injunction somehow interfered with ABC's ability to select particular games for ABC broadcast the network may have a stronger hardship argument. Instead, the only identifiable injury to ABC is to its ability to prevent the broadcast of one game in which both teams have not previously agreed to an ABC broadcast. We readily concur with the district judge's finding that this hardship merits little, if any, weight. From the individual college's perspective, on the other hand, the "quality" =P0001*21 of the college football program is affected by national exposure regardless of which network performs the task. The preliminary injunction simply **[**32]** frees the individual institutions to assess the needs of their programs from their own perspective.

C. The Public Interest

The district court found that the public interest also favored the issuance of the preliminary injunction. In *NCAA v. Regents, 468 U.S. 85, 104 S. Ct. 2948, 2964, 82 L. Ed. 2d 70 (1984)*, the Supreme Court also took stock of where the public interest lay in evaluating the NCAA's horizontal restraints on the college football television market. In particular, the Supreme Court found that "perhaps the most significant" point in favor of striking the NCAA's horizontal restraints is the "importance of consumer preference in setting the price and output" of the televised college football games. *Id.* Viewing the Sherman Act as a "'consumer welfare prescription'" *id.* (quoting *Reiter v. Sonotone Corp., 442 U.S. 330, 343, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979))*, the Court invalidated the NCAA's horizontal restraints because they removed the consumer from the economic picture in determining the supply and demand of televised college football games. From the Supreme Court's perspective, then, the public interest is served **[**33]** by preserving the competitive influence of consumer preference in the college broadcast market. Obviously, the district court's issuance of the preliminary injunction in this case accomplishes precisely this salutary objective. Absent the injunction the defendants could unilaterally determine that the public would not have the choice of viewing an admittedly popular college football game. Although the preliminary injunction does not guarantee that the November 22nd game will be televised, the injunction does preserve the efficacy of consumer preference in that the participants in the game are free to take account of consumer interest when evaluating the merits or terms of a nationwide broadcast of the game. Without the preliminary injunction, the consumer has no influence on the broadcast decision and the ABC-CFA crossover restriction will prevent a nationwide broadcast based on competitive considerations unrelated to consumer demand for the particular game.

Guided by the Supreme Court's recent articulation of the "public interest" in the college football television market, we cannot say that the district court abused its discretion in finding that the public interest is directly **[**34]** served through the issuance of a narrow preliminary injunction. With the issuance of the preliminary injunction the economic voice of the consumer may still be heard; without the preliminary injunction the options of the consumer have already been prescribed by the defendants.

III. CONCLUSION

In sum, after a complete review of the record in this case, we cannot say that the trial court abused its discretion in finding that the balance of hardships tips sharply in favor of the plaintiffs. Moreover, the record in this case presents serious questions raised by plaintiffs indicating that they have a fair chance of succeeding on the merits of the underlying antitrust litigation. Finally, the district court did not abuse its discretion in finding that the **[*522]** public interest is better served by the issuance of the preliminary injunction. [7]

[35]** The preliminary injunction is AFFIRMED.

Dissent by: BEEZER

Dissent

BEEZER, Circuit Judge, dissenting

I respectfully dissent. For the reasons stated below, I believe that the district court employed incorrect legal standards in granting the preliminary injunction.

I

BACKGROUND

A. *Facts*

The only findings of fact made by the district court were as follows:

> The court concludes that plaintiffs have raised *serious questions* relative to their claim that defendants are in violation of *15 U.S.C. § 1* and that this is the case even though plaintiffs' own arrangement with CBS is not above suspicion on the same ground. An analysis of these questions will require a full trial and thoughtful consideration of the quite fluid state of the relationship between major college football and television broadcasters in the aftermath of the Supreme Court's *NCAA* decision. The court further concludes that the balance of hardships *tilts rather sharply* in favor of the plaintiffs with respect to the subject of this proceeding, which relates only to the airing of two games, Nebraska v. UCLA (Sept. 22) and Notre Dame v. USC (Nov. 24). By issuance of this **[**36]** order ABC and ESPN are not measurably harmed, other than by some perceived diminution of their ability quickly to dispatch CBS from the market for nationwide college football telecasts. The plaintiff universities, however, are clearly harmed in the absence of such order, both monetarily and with respect to the intangibles discussed at length in argument on the motion. The defendant universities will clearly benefit from the order in much the same fashion. The public interest is likewise served by this order. It is a matter of common knowledge that the Rose Bowl is sold out for the Nebraska -- UCLA game, which could well determine the "championship" of college football in 1984. Such is the rich tradition of the USC -- Notre Dame rivalry that sportly passions would be aroused if both teams were 0-9 at game time.

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[7] Our disposition of the defendants' appeal from the district court's preliminary injunction should adequately clarify why we also find no abuse of discretion in the trial court's denial of a stay pending appeal. Under a traditional, *see* *Washington Area Transit Comm'n. v. Holiday Tours, Inc., 182 U.S. App. D.C. 220, 559 F.2d 841 (D.C. Cir. 1977)*, or abbreviated, *Benda v. Grand Lodge of International Association of Machinists & Aerospace Workers, 584 F.2d 308, 315 (9th Cir. 1978)*, *cert. dismissed*, ***441 U.S. 937, 60 L. Ed. 2d 667, 99 S. Ct. 2065 (1979)***, standard for granting such a stay, we find no cause to disturb the trial court's ruling under *Rule 62(c) of the Federal Rules of Civil Procedure*.

(emphasis added). [1]

[37]** B. *Standard of Review*

The grant of a preliminary injunction may be reversed if the district court abused its discretion or based its decision on an erroneous legal standard or clearly erroneous findings of fact. *Sierra On-Line, Inc. v. Phoenix Software, Inc., 739 F.2d 1415, 1421 (9th Cir. 1984)*. A preliminary injunction is proper if the plaintiff shows a combination of: (1) "probable success on the merits" and "the possibility of irreparable injury" or (2) "serious questions" raised on the merits and a balance of hardships that tips "sharply" in the plaintiff's favor. *Id. at 1421* (quoting *Miss Universe, Inc. v. Flesher, 605 F.2d 1130, 1134 (9th Cir. 1979))*. Regardless of which end of the continuum the plaintiff's claim falls on, a showing that the public interest will be served by the injunction is required. *American Motorcyclist Association v. Watt, 714 F.2d 962, 967 (9th Cir. 1983)*.

[*523] The district court based its decision on the second of the two ends of the continuum. The district court found "serious questions" and a balance of hardships that tipped "sharply" in the plaintiffs' favor. **[**38]** It did not find a mere "possibility of irreparable injury" and a "strong likelihood of success on the merits," which is the opposite end of the continuum. *Sierra Club v. Hathaway, 579 F.2d 1162, 1167 (9th Cir. 1978)*.

In general, the decision to grant a preliminary injunction lies within the discretion of the district court. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 526 F.2d 86, 88 (9th Cir. 1975)*. In this case, the district court misapplied the applicable legal standards. As a result, it is not necessary to find an abuse of discretion to reverse the granting of the preliminary injunction. [2]

[39]** II

THE BALANCE OF HARDSHIPS

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[1] *Fed. R. Civ. P. 52(a)* and *65(d)* require specific findings when a preliminary injunction is granted. The district court made only the limited findings quoted above. As a result, we do not have the benefit of the complete and detailed reasoning of the district court.

[2] The defendants urge us to consider the fact that the plaintiffs' contract with CBS contains an exclusivity provision analogous to the provision at issue in this case. *In pari delicto* is rarely, if ever, a defense to an antitrust action. *See* 2 P. Areeda & D. Turner, ***Antitrust Law*** para. 348 (1978). It does not follow, however, that the plaintiffs' actions are irrelevant to the granting of a preliminary injunction. The Second Circuit has stated:

> It is true that the *in pari delicto* doctrine is not a defense on the merits, . . . but the [plaintiff's practices] certainly can be taken into account in determining the equities as a prelude to ruling on a preliminary injunction, at least where a clear showing of "public interest" has not been made out.

Columbia Pictures Industries, Inc. v. American Broadcasting Cos., 501 F.2d 894, 899 (2d Cir. 1974). The Second Circuit's approach is quite logical: a court should consider the actions of the plaintiff in evaluating claims of hardship. Although the plaintiffs argue that the exclusivity provision in the CBS contract is different from the exclusivity provision in the ABC contract, the district court found that it is "not above suspicion." This fact is useful in evaluating the merits of the plaintiffs' claim of hardship.

The plaintiffs seek to distinguish *Columbia Pictures* on the ground that a "clear showing of 'public interest'" has been made in this case. It should be noted that the Second Circuit did not limit its consideration of a party's conduct to cases in which the public interest is not clear. Moreover, this argument misconceives the logic of the Second Circuit's approach. The plaintiffs' conduct is a factor to be considered, not a bar to equitable relief. Although it is conceivable that the public interest in granting a preliminary injunction could be so strong that it would be prudent to ignore the plaintiff's conduct, this case does not present such a situation. As noted below, the public interest only marginally favors the granting of a preliminary injunction in this case.

The first step in analyzing the granting of the preliminary injunction is to review the balance of hardships. The district court found that the balance of hardships tips sharply in favor of the plaintiffs. In reaching that conclusion, the district court relied upon an erroneous legal standard.

A. *Hardship to the Plaintiffs*

The district court found that the plaintiffs would be irreparably injured in the absence of the preliminary injunction. It is well-settled that monetary injuries are not irreparable and may not be considered in determining whether a preliminary injunction is proper. [3] *Sampson v. Murray, 415 U.S. 61, 90, 39 L. Ed. 2d 166, 94 S. Ct. 937 (1974)*; *Los Angeles Memorial Coliseum Commission v. National Football League, 634 F.2d 1197, 1202 (9th Cir. 1980)*; C. Wright & A. Miller, 11 *Federal Practice and Procedure* § 2948, at 434 (1973). This is especially true in an action under the Sherman Act, since a plaintiff can recover treble damages. It is also well-settled that a preliminary injunction cannot be issued to prevent a mere speculative injury. *S.J. Stile Associates Ltd. v. Snyder, 68 C.C.P.A. 27, 646 F.2d 522, 525 (C.C.P.A. 1981)* **[**40]** ("A preliminary injunction will not issue simply to prevent a mere possibility of injury, even where prospective **[*524]** injury is great. A presently existing, actual threat must be shown."); *New York v. Nuclear Regulatory Commission, 550 F.2d 745, 755 (2d Cir. 1977)* (requiring "a showing that the alleged threats of irreparable harm are not remote or speculative but are actual and imminent"); C. Wright & A. Miller, *supra*, § 2948, at 436-38. On application of these principles, the district court's findings do not withstand scrutiny.

[41]** The district court found that the plaintiffs would be harmed "both monetarily and with respect to the intangibles discussed at length in argument on the motion." The district court did not find, and there is no reason to believe, that the monetary harm is not compensable by damages. To the extent that the district court relied on monetary damages, it applied an erroneous legal standard.

The plaintiffs assert three "intangible" harms. [4] First, they argue that the denial of the preliminary injunction would substantially reduce the value of their television contract with CBS. To the extent that the contract loses value, however, the plaintiffs can seek monetary damages. Moreover, any reduction in value would be caused solely by the existence of the ABC-CFA contract. If the plaintiffs prevail at trial, the value of the contract would be fully restored because the ABC-CFA contract would be void. Thus, harm to the CBS contract is not "irreparable" for purposes of a preliminary injunction.

[42]** Second, the plaintiffs argue that the denial of the preliminary injunction would impair their recruiting efforts. This argument is extremely speculative. The record reveals that USC is hardly suffering from a lack of television exposure. The game against Notre Dame would be the third *consecutive* USC game televised nationally on CBS. [5] **[**43]** Any harm suffered by the plaintiffs as a result of lack of exposure would be *de minimis*. [6]

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[3] This rule is subject to an exception for cases in which monetary damages either cannot be measured, *see, e.g., Texas v. Seatrain International, S.A., 518 F.2d 175, 179 (5th Cir. 1975)*, or are otherwise inadequate, *see, e.g., Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970)* (threat to business' existence). *See generally* Note, *Granting Preliminary Injunctions Against Dealership Terminations in Antitrust Actions*, 67 Va. L. Rev. 1395, 1398-1401 (1981).

[4] The plaintiffs also make the following argument:

> If ABC and the CFA succeed in blocking CBS' coverage of the USC-Notre Dame game, as well as other crossover games, CBS may determine that it is unable to continue to televise college football after this season. As a practical matter, the Pac-10/Big Ten will have to join the CFA in order to have their games shown on national network television and ABC will have forced a competitor out of the market for network televising of intercollegiate football games.

Although that argument is imaginative, it is too speculative for purposes of the injunction application. Moreover, if the plaintiffs are correct, they can obtain money damages. The preliminary injunction cannot be upheld on the basis of this argument.

[5] The recruiting efforts of UCLA are not at issue in light of the broadcast of the UCLA-Nebraska game. The Big Ten and the Pac-10 cannot assert a conference-wide harm to recruiting unless they can show that the USC-Notre Dame game has a unique effect on the Conferences' ability to recruit athletes. Such a showing has not been made. Thus, only USC's recruiting efforts are at issue.

Third, the plaintiffs argue that the denial of the preliminary injunction would deprive them of a valuable opportunity to showcase their teams. As noted above, the harm would be *de minimis*. [7] **[**44]** Moreover, the plaintiffs' conduct is highly relevant in **[*525]** evaluating this claim: [8] the value of the right to showcase the teams cannot be very significant if the plaintiffs were willing to sign a contract with an exclusivity clause. [9]

B. *Hardship to the Defendants*

In addition to misapplying the legal standards governing the plaintiffs' claims of irreparable injury, the district court completely ignored the defendants' claims of hardship. The district court found that "ABC and ESPN are not measurably harmed, other than by some perceived diminution of their ability quickly to dispatch CBS from the market for nationwide college football telecasts." The preliminary injunction assures CBS the broadcast rights to the USC-Notre Dame game and forecloses competitive bidding by the networks for broadcast rights to the most popular 1984 crossover game. The district court did not address ABC's contention that the preliminary injunction hampers its efforts to develop product identification and to sell **[**45]** its exclusive package to advertisers. [10]

The district court also stated that "the defendant universities will clearly benefit from the order." The district court evidently did not give any weight to the fact that Notre Dame is contesting a preliminary injunction from which it will "clearly benefit." Nor did it even acknowledge the argument advanced by Notre Dame and the CFA that the preliminary injunction will endanger the relations among the CFA member universities and the viability of the national **[**46]** television package that they are attempting to develop. *Cf.* *FTC v. Warner Communications Inc., 742 F.2d 1156 (9th Cir. 1984)* (per curiam) (in an action for a preliminary injunction under the Federal Trade Commission Act, noting that equities similar to those alleged by ABC and Notre Dame are "entitled to serious consideration"). A full and fair consideration of the parties' claims required the district court to address these hardships specifically in its findings.

C. *The Balance of Hardships*

The plaintiffs have failed to establish a substantial injury that is both irreparable and nonspeculative. The district court's conclusion to the contrary is due to a misapplication of the law. The district court's conclusion that the

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Schedule A to the CBS-Big-10/Pac-10 letter agreement reveals that CBS plans to televise the USC-Washington game on November 10 and the USC-UCLA game on November 17. It has been reported that USC will appear in eight televised games this year. Newman, *Greed and Glut*?, Seattle Times, October 6, 1984, at D1, col. 6.

[6] The plaintiffs also argue that televising the football game would raise the USC football team's national ranking and would improve its chances of appearing in a post-season bowl game. This argument is utterly speculative. Additionally, the plaintiffs note that televising football games makes it possible to operate large coeducational athletic programs. Any such injury caused by the exclusivity provision is monetary.

[7] The Big-10 Conference can claim no harm under this theory because USC is not a Big-10 team. The Pac-10 Conference can claim no harm under this theory because it has no interest in insuring television exposure for USC, rather than another Pac-10 team. The Pac-10 could have insured television coverage for its teams by scheduling an alternative game on the date in question. USC can claim only minimal harm under this theory because, as discussed above, USC receives massive television coverage.

[8] *See supra* note 2.

[9] In addition to the exclusivity provision, the letter agreement provided that no Big-10 or Pac-10 team would appear on national television more than four times during the 1984 season. An analogous provision is contained in article 13 of the Big Ten/Pacific-10 Conference Football Television Plan.

[10] ABC and the CFA claim that the development of a strong national package is necessary in light of the availability of regional and local broadcasts. They note that games of peculiar local or regional interest, such as Brigham Young-Utah in Utah or California-Stanford in Berkeley will attract a much larger market share in those areas than a game of general national interest, such as USC-Notre Dame. Accordingly, they assert that an exclusive national package is necessary to produce maximum advertising revenues.

balance between the hardship to the plaintiffs and the hardship to the defendants, which it ignored, tips "sharply" in favor of the plaintiffs is erroneous. The granting of the preliminary injunction was based on an incorrect legal standard.

III

SERIOUS QUESTIONS AND LIKELIHOOD OF SUCCESS

The second step in evaluating the granting of the preliminary injunction is to determine whether the plaintiffs demonstrated an adequate **[**47]** likelihood of ultimate success on the merits. The district court found that the plaintiffs have raised "serious questions," which is the lower end of the continuum in the standard for granting a preliminary injunction. This finding would have been sufficient if the balance of hardship tipped "sharply" in favor of the plaintiffs. Since the balance of hardships favors the plaintiffs only to a minute degree, if at all, the "serious questions" standard is inappropriate. However, the injunction can **[*526]** be sustained if the record reflects that the plaintiffs have established a "strong likelihood of success on the merits."

A. *Per Se Rule v. Rule of Reason*

The starting point for an analysis under *section 1* of the Sherman Act is the determination of the appropriate test for legality. The plaintiffs argue that the exclusivity provision is a naked restraint that is illegal per se. The defendants argue that the Rule of Reason is appropriate. The district court evidently chose the latter course.

The types of conduct that are treated as illegal per se are those in which "surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified **[**48]** further examination of the challenged conduct." *NCAA v. Board of Regents, 468 U.S. 85, 104 S. Ct. 2948, 2962, 82 L. Ed. 2d 70 (1984)*. The district court did not determine that the exclusivity provisions met that description. On the contrary, the district court found that the resolution of the claims would require "thoughtful consideration of the quite fluid state of the relationship between major college football and television broadcasts." The plaintiffs, however, argue forcefully that the exclusivity is illegal per se as a "naked restraint." *See United States v. Sealy, Inc., 388 U.S. 350, 354-58, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967)*; *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 210-14, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*. The plaintiffs' argument misconceives the nature of "naked" restraints. The exclusivity provision has a purpose other than restraining competition: it allows ABC and the CFA to develop a national college football television package. *Cf. White Motor Co. v. United States, 372 U.S. 253, 263, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963)* (holding that "naked restraints of trade with **[**49]** no purpose except stifling of competition" are illegal per se). As a result, *Sealy* and *Klor's* are not controlling.

It is possible to view this arrangement as either horizontal or vertical. *Cf. Sealy, 388 U.S. at 352* (noting that it is necessary to look at substance, rather than form, to determine whether an arrangement is horizontal or vertical). As a horizontal arrangement, the ABC contract is quite similar to the joint selling arrangement reviewed under the Rule of Reason in *Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*. The Supreme Court recognized in *BMI* that the effect of such an arrangement may be to "make" a market, thus stimulating competition. *Id. at 19-23*; *see NCAA, 104 S. Ct. at 2960-62*. This is precisely the position advanced by ABC and the CFA.

As a vertical arrangement, the ABC contract closely resembles the territorial restrictions reviewed under the Rule of Reason in *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. In *Continental T.V.*, the Supreme **[**50]** Court recognized that vertical nonprice restrictions could stimulate binterbrand competition and held that a per se rule was therefore inappropriate. *Id. at 51-59*. [11] **[**51]** This is precisely the position advanced by the defendants. *See* Baxter, *Separation of Powers Prosecutorial Discretion and*

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[11] Vertical price restraints are still illegal per se. *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 1469* & n.7, *79 L. Ed. 2d 775 (1984)*. *See generally* Liebeler, *The Distinction Between Price and Nonprice Distribution Restrictions*, *31 UCLA L. Rev. 384 (1983)*.

*the "Common Law" Nature of **Antitrust Law***, 60 Texas L. REV. 661, 697 (1982) (noting that "a firm's choice of distributional arrangements, such as granting franchises or grouping goods and services for sale, may simply reflect the firm's judgment about the efficient and effective way to structure its marketing efforts"). The plaintiffs argue that the exclusivity provision is contrary to interbrand competition because crossover games are eliminated. This argument totally misses the point. The "brands" are the competing network television packages, not the teams. Because the exclusivity provision could enhance the marketing of the CFA football **[*527]** package, the Rule of Reason is appropriate. [12]

B. *Application*

It is not necessary to apply the Rule of Reason to the facts of this case, given the procedural setting. It is sufficient to note that close issues are presented which must be resolved at trial. While the district court's finding that "serious questions" are raised by this case is correct, the plaintiff has not shown a sufficiently strong likelihood of success to overcome the virtual absence of irreparable injury. [13]

[52]** IV

THE PUBLIC INTEREST

Even when the evidence supports a finding that the balance of hardships is tipped in favor of the plaintiff, the granting of a preliminary injunction requires a showing that the public interest is served by the injunction. *American Motorcyclist Association, 714 F.2d at 967*. *See generally* Shreve, *Federal Injunctions and the Public Interest*, *51 Geo. Wash. L. Rev. 382 (1983)*. The district court found that televising the games severed the public interest. While that is undoubtedly true, it is irrelevant. Just as the granting of the preliminary injunction did not guarantee the broadcast of the game, the denial of the preliminary injunction would not have barred the broadcast of the game. Both ABC and CBS claim contractual rights with regard to the broadcast of the USC-Notre Dame game. [14] With the preliminary injunction, CBS will have the right to televise the game with Notre Dame's consent. Without the preliminary injunction, CBS would be required to negotiate with ABC and the CFA for the right to televise the game. [15] Thus, the most significant effect of the preliminary injunction is to determine the relative rights **[**53]** of a party and a nonparty. [16] The public interest is not served by such a determination.

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[12] The plaintiffs also resort to arguing by labels, calling the exclusivity provisions a "group boycott" and a "cartel arrangement." It is now well-established that those terms lack inherent meaning. *See* R. Bork, *The Antitrust Paradox* 330-44 (1978). It is the effect of the arrangement, rather than its form, that is relevant. *See generally*, Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 Colum. L. Rev. 685 (1979).

[13] The plaintiffs frequently allude to ABC's alleged plan to drive CBS out of the college television market. Such a motivation does not by itself violate the Sherman Act. Regardless of ABC's intent, the plaintiffs must show that the exclusivity provision had an anticompetitive effect. *NCAA, 104 S. Ct. at 2962* & n.26; *see* Easterbrook, *Is There a Ratchet in **Antitrust Law**?*, 60 Texas L. Rev. 705, 708 (1982) ("Apparently-exclusionary conduct is of legitimate concern only if it works to drive out equally or more efficient rivals."). Although the plaintiffs could bring an action for attempted monopolization, they have not done so. In any event, such an action would fail for lack of a "dangerous probability of success." *See* 2 E. Kintner, *Federal **Antitrust Law*** § 13.4 (1980). It is inconceivable that ABC could monopolize the market in light of the presence of CBS, NBC, and the various cable networks.

[14] The plaintiffs claim that they are entitled to arrange for the broadcast of the game without the consent of Notre Dame, the CFA, or ABC because it will be played on USC's home field. Regardless of the merits of that claim, the CBS contract purports to give CBS the exclusive right to televise the game in question.

[15] Of course, it is also possible that the game would be broadcast on local stations or by syndication. Both contracts permit such broadcasts notwithstanding their exclusivity provisions. Such broadcasts would alleviate any injury to the public interest.

The plaintiffs argue that ABC would refuse to negotiate. If that is the case, however, the plaintiffs' case under *sections 1* and *2* of the Sherman Act might be strengthened considerably.

[54]** The public interest is served by the preliminary injunction only to the extent that it removes an impediment to the broadcast of the game. To the extent that the district court found a greater public interest, it misapplied the legal standards. This error standing alone, however, does not require reversal.

[*528] V

CONCLUSION

In the absence of a balance of hardships tipped sharply in favor of the plaintiffs or a strong likelihood of success, the district court could not properly grant the preliminary injunction. The record reveals that both elements are at the lower end of the continuum: the plaintiff has raised "serious questions" and, arguably, has shown a possibility of irreparable harm. The district court applied incorrect standards in finding that the balance of hardships tipped sharply in favor of the plaintiffs. I would reverse the order of the district court and remand for further proceedings.

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[16] Although the defendants have not yet filed a responsive pleading, it may ultimately be necessary to join CBS as a plaintiff in this case. *See* [*Fed. R. Civ. P. 19*]. As is obvious from this discussion, CBS's rights may be adversely affected by the outcome of this litigation.

![LexisNexis]

Rothery Storage & Van Co. v. Atlas Van Lines, Inc.

United States District Court for the District of Columbia

November 9, 1984

Civil Action No. 83-0450

Reporter
1984 U.S. Dist. LEXIS 22064 *

ROTHERY STORAGE & VAN CO., *et al.,* Plaintiffs, v. ATLAS VAN LINES, INC., Defendant.

Core Terms

carrier-agents, van, shipments, carrier, deregulation, Plaintiffs', independent authority, conspiracy, lines, interstate, board of directors, anti trust law, pooling agreement, Sherman Act, announced, summary judgment, rule of reason, non-carrier, undisputed, immunity, new policy, infrastructure, ownership, entities, terminated, non-Atlas, network, separate company, anticompetitive, affiliated

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Judgments > Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Legal Entitlement

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN1[] **Summary Judgment, Entitlement as Matter of Law**

Under *Fed. R. Civ. P. 56(c)*, a motion for summary judgment may be granted only when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. The undisputed facts and inferences to be drawn from those facts must be viewed in the light most favorable to the party opposing the motion. To support summary judgment, the record must demonstrate that the opponent would not be entitled to prevail under any circumstances.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

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 > Materiality of Facts

HN2[] **Regulated Practices, Private Actions**

Courts are cautioned to be especially careful about premature termination of a cause of action filed under the federal antitrust laws. Nonetheless, summary judgment may well be appropriate even in an antitrust action where a court has permitted extensive discovery and the requirements of *Fed. R. Civ. P. 56(c)* are met.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In order to prevail on a claim under *§ 1* of the Sherman Act, a plaintiff must show both: 1) the existence of a contract, combination, or conspiracy, and 2) an unreasonable restraint of trade under either the per se rule or the rule of reason, as appropriate. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Antitrust & Trade Law, Sherman Act**

The actions of a corporation's board of directors do not constitute a conspiracy within the meaning of *§ 1* of the Sherman Act. A corporation, which can only function pursuant to the group decisions of the members of its board of directors, cannot in this fashion be found to have conspired with itself. An exception to this rule may exist, however, where individual members of the board of directors possess an independent personal stake in a particular action of the board, that is, where the act on their own behalf.

Antitrust & Trade Law > Regulated Industries > General Overview

Business & Corporate Compliance > ... > Transportation Law > Air & Space Transportation > Charters

Transportation Law > Carrier Duties & Liabilities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > General Overview

HN5[] **Antitrust & Trade Law, Regulated Industries**

Title *49 U.S.C.S. § 10934 (d)(4)* provides that the antitrust laws do not apply to discussions or agreements between a motor common carrier and its agents (whether or not an agent is also a carrier) related solely to ownership of a motor common carrier by an agent or membership on the board of directors of any such motor common carrier by an agent.

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

The antitrust laws look to substance, not to form. Some courts observe that as long as employees or officers of a corporation have acted in accordance with their responsibility and authority to advance the interests of the corporation they serve -- and where plaintiffs have failed to proffer specific facts to the contrary -- no conspiracy within the meaning of the Sherman Act can be found.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN7[] **Regulated Practices, Price Fixing & Restraints of Trade**

Under ***antitrust law***, 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 > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN8[] **Practices Governed by Per Se Rule, Boycotts**

Boycotts and price-fixing schemes, when proven, are often considered unreasonable restraints of trade per se. Nonetheless, the United States Court of Appeals for the District of Columbia Circuit warns that a per se rule is a judicial shortcut; it represents the considered judgment of courts, after considerable experience with a particular type of restraint, that the rule of reason -- with normal mode of analysis -- can be dispensed with. There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. A court will not indulge in this conclusive presumption lightly. Invocation of a per se rule always risks sweeping reasonable, pro-competitive activity within a general condemnation, and a court will run this risk only when it can say, on the strength of unambiguous experience, that the challenged action is a naked restraint of trade with no purpose except stifling of competition.

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**

Under the rule of reason in ***antitrust law***, a restraint must be evaluated to determine whether it is significantly anticompetitive in purpose or effect. In making this evaluation, a court generally will be required to analyze the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the "anticompetitive evils" of the challenged practice must be carefully balanced against its "procompetitive virtues" to ascertain whether the former outweigh the latter. A restraint is unreasonable if it has the "net effect" of substantially impeding competition.

Business & Corporate Law > Agency Relationships > Authority to Act

Business & Corporate Law > Agency Relationships > General Overview

HN10[] **Agency Relationships, Authority to Act**

Classic agency law gives a principal the prerogative of withdrawing the permission of an agent to use the principal's infrastructure to compete with the principal itself if convenient to protect the principal's interests.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

One of the basic tenets of the federal antitrust laws, including the Sherman Act, is that they are intended to protect competition, not competitors.

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Opinion by: OBERDORFER

Opinion

REVISED MEMORANDUM

This is a private antitrust action brought pursuant to *Section 1* of the Sherman Act, *15 U.S.C. § 1 (1982)*, against Atlas Van Lines, Inc. ("Atlas"), a nationwide van line company. [1] Plaintiffs are ten present and former agents of Atlas. They challenge an Atlas policy -- made effective in August, 1983 -- under which Atlas announced that it would terminate its agency relationship with any agent that maintained independent operations in the interstate moving business unless the agent transferred its independent authority to do so to a separate and distinct (albeit affiliated) company. The case is presently before the Court both on defendant's motion for summary judgment and on plaintiffs' motion for partial summary judgment as to liability. **[*2]** After careful consideration of undisputed facts developed after extensive discovery and set out pursuant to *Fed. R. Civ. P. 56* and Local Rule 1-9)h), as well as the arguments advanced by the parties in the memoranda and at oral argument, the Court concludes that, for the

[1] In their complaint, filed February 17, 1983, plaintiffs also named the Interstate Commerce Commission ("ICC") as a party-defendant. Plaintiffs requested -- as a predicate to certain further relief against the ICC -- that the Court compel the ICC to reach a decision on a related matter pending before the agency. In light of intervening developments and upon motion by the ICC, the Court on May 26, 1983 dismissed the action against the ICC as moot. See Order of May 26, 1983. The ICC is thus no longer a defendant in this suit.

reasons set forth below, plaintiffs' motion for partial summary judgment as to liability must be denied, and defendant's motion for summary judgment must be granted.

I.

This lawsuit involves, in essence, the legality of Atlas's response to the regulatory and commercial changes resulting from the deregulation of the household goods moving industry in 1980. A brief overview of Atlas's **[*3]** methods of operation and of the recent changes in the industry is necessary to an understanding of the nature of the claims at issue.

Defendant Atlas Van Lines holds authority from the Interstate Commerce Commission ("ICC") to transport goods from state to state on a nationwide basis. Statement of Material Undisputed Facts in Support of Plaintiffs' Motion for Partial Summary Judgment As To Liability PII-A (hereinafter "PSF" ["Plaintiffs' Statement of Facts"]); Defendant's Response to Plaintiffs' Statement of Material Undisputed Facts PII-A (hereinafter "DRPF" ["Defendant's Response to Plaintiffs' Facts"]); Defendant's Statement of Material Facts As To Which There Is No Genuine Issue P1 (hereinafter "DSF" ["Defendant's Statement of Facts"]); Plaintiffs' Statement of Genuine Issues P1 (hereinafter "PSGI"). [2] As has been typical of the operation of other national van lines, Atlas exercises this authority primarily through a group of "agent" moving companies around the country. These "agent" companies are independent entities that have entered into standardized "Agency Agreement" with Atlas to carry out interstate shipments under Atlas's authority, PSF PPII-C, V-P, **[*4]** DRSF PPII-C, V-P, Plaintiffs' Appendix I (hereinafter "Plaintiffs' App."), and that agree -- in making Atlas shipments -- to abide by the operating procedures, painting and maintenance standards, and uniform rates, inter alia, provided for by the Agency Agreement. See PSF PPV-O - V-X; DRPF PPV-O - V-X; DSF PP2-13; PSGI P2-13. In addition, representatives of some of Atlas's agent companies sit on the Atlas board of directors, PSF PII-K, V-A; DRPF PPII-K, V-A -- a practice that has been typical in the industry during many years of ICC oversight, see S. Rep. No. 497, 96th Cong., 1st Sess. 8 (1979); H. Rep. No. 1372, 96th Cong., 1st Sess. 10 (1979), and that won express legislative immunity from the federal antitrust laws -- as described below -- with the enactment of *49 U.S.C. § 10934(d)* in 1980. [3] Nonetheless, the agent companies in the field remain

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[2] Plaintiffs' "Statement of Genuine Issues" purports to dispute a number of material facts asserted by defendant. Close comparison of plaintiffs' assertions discloses that while many of them challenge the implications or characterizations of defendant's statements, they do not effectively traverse them so as to put material facts into genuine dispute. For example, plaintiffs state that they cannot "accept[] as undisputed" the statement by defendant that "Atlas headquarters directs and coordinates [certain] agent activities." PSGI P4, at 10-11. Plaintiffs, thus, object that Atlas does not ""direct" the performance of origin or destination services, in any direct supervisory sense." Id. (emphasis added). As suggested by the qualification at the end of the quotation, though, plaintiffs fail to dispute that Atlas does indeed have the authority to set the general terms according to which Atlas agents perform these functions for Atlas. And indeed, plaintiffs concede that "Atlas does coordinate the movement of trucks, to a substantial degree." Id. at 11. Throughout this memorandum, in citing to corresponding portions of plaintiffs and defendant's factual pleadings, the Court relies on the assertions therein to the extent that they reveal areas of agreement as described above, while disregarding any specific facts as to which the parties have succeeded in raising a genuine issue.

[3] The validity of the Atlas policy at issue in this case involves condiration of two separate statutory immunity provisions: *49 U.S.C. §§ 11341-11342 (1982)*, and *49 U.S.C. § 10934(d) (1982)*. The first of these provisions, *49 U.S.C. §§ 11341-11342*, has relevance to the van line practice, described infra at pages 5-9, of allowing some agents (referred to as "carrier-agents") to possess and exercise their own independent interstate ICC authority in addition to acting as agents for the van line. Coordination between a van line and its carrier-agents has, under 49 U.S.C. § 11341-11342, long been immune from the federal antitrust laws provided that the van line and its carrier-agents enter into a "pooling agreement" meeting ICC approval. See infra at page 7. There is no dispute in this case as to the immunity provided by this provision.

The second provision, *49 U.S.C. § 10934(d)*, was enacted in 1980 as part of Congress's deregulation of the household goods moving industry, see Pub. L. 96-454, § 5(a)(1), 94 Stat. 2013 (1980), and it is this provision that addresses, inter alia, the membership on a van line's board of directors of the van line's own agents. Plaintiffs' do not dispute that, under the statute, the fact of such membership is immune from antitrust challenge. See Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment at 18. Yet the further scope of this immunity provision is disputed, and is discussed in detail infra at pages 19-23, 27. The provision reads, in its entirety:

wholly independent from Atlas itself and interact with Atlas in accordance with standard contractual arrangements. PSF PV-P, DRPF PV-P.

[*5] It has also been common in the industry, in addition, for many agent companies to hold their own, separate interstate authority from the ICC. E.g., PSF PPI-E, I-G; DRPF PPI-E, I-G; see Practices of Motor Common Carriers of Household Goods (Agency Relationships), 115 M.C.C. 628, 629 (1972) (hereinafter referred to as "Practices"). Agent companies that hold such independent authority in their own right are termed "carrier-agents"; agents that hold no such independent authority are termed "non-carrier" agents. Practices, supra, at 629. While a non-carrier agent accepts shipments solely as an agent for the principal van line that it serves, a carrier-agent has more flexibility. It may, like a non-carrier agent, accept shipments for carriage on the account of its principal carrier. But a carrier-agent may also accept certain shipments for carriage on its own account -- rather than that of the principal carrier for which it serves as an agent -- when the distance of the shipment does not exceed the geographic range of its independent authority and when other factors render it profitable for the carrier-agent to do so. E.g. PSF PPV-H - V-J; DRPF PPV-H - V-J; see Practices, **[*6]** supra, at 629. A carrier-agent, in this fashion, simultaneously functions both as an agent of the principal van line that it serves, and, on certain shipments, as one of the van line's competitors, in that it may shift to its independent account certain shipments that might otherwise have been carried on the van line's account. E.g. PSF PPV-G, V-I; DSF P22; PSGI P22; see Practices, supra, at 629. Some carrier-agents, moreover, enjoy the distinct benefit of using van line personnel, van line uniforms and equipment (with van line insignia), and van line origin and destination services even on shipments carried out on their own, independent authority, e.g., DSF PP24-29; PSGI PP24-29; see Plaintiffs' App. G, and thus can avoid the costs of building the business infrastructure necessary to exercising their independent carrier authority effectively. See DSF P27; PSGI P27. Atlas carrier-agents, for example, enjoyed this latter benefit prior to the events at issue in this lawsuit.DSF PP24-29; PSGI PP24-29.

Federal law has long given special immunity from the anti-trust laws to carrier-agent relationships, but only if 1) the van line and its carrier-agents enter into a "pooling **[*7]** agreement" that spells out the division of business, sharing of facilities, and other terms according to which the van line will allow its "agents" to compete with it, and 2) the pooling agreement meets ICC approval. See *49 U.S.C. §§ 11341-11342 (1982)*; Practices, supra, at 633. Significantly, a pooling agreement may be terminable unilaterally by either the national van line or its carrier-agents, and the exercise of this option eliminates the automatic antitrust immunity that a carrier-agent relationship otherwise enjoys. See DSF P24; PSGI P24. Atlas entered into a pooling agreement in 1957, which set the terms according to which, thereafter, it allowed its agents to acquire and operate their own independent ICC authority.DSF P24; PSGI P24. Other van lines, by contrast, have declined to enter into pooling agreements at all, and indeed have traditionally chosen to employ only non-carrier agents. E.g., PSF § III-I; DRSF PIII-I. Representatives of carrier-agents -- where the van line uses them -- may sit on a van line's board of directors just as do representatives of non-carrier agents, both pursuant to prior practice, e.g., PSF PV-A; DRPF PV-A, and under the more recently **[*8]** enacted federal antitrust exemption contained in *49 U.S.C. § 10934(d) (1982)*. [4]

Finally, it is a central feature of the van line industry that agents within a van line's infrastructure often must agree to provide their services only to that particular van line and to other agent companies within the van line's network.

The antitrust laws, as defined in the first section of the Clayton Act (*15 U.S.C. 12*), do not apply to discussions or agreements between a motor common carrier providing transportation of household goods subject to the jurisdiction of the [Interstate Commerce] Commission under subchapter II of chapter 105 of this title and its agents (whether or not an agent is also a carrier) related solely to (1) rates for the transportation of household goods under the authority of the principal carrier, (2) accessorial, terminal, storage, or other charges for services incidental to the transportation of household goods transported under the authority of the principal carrier, (3) allowances relating to transportation of household goods under the authority of the principal carrier, and (4) ownership of a motor common carrier providing transportation of household goods subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title by an agent or membership on board of directors of any such motor common carrier by an agent.

49 U.S.C. § 10934(d) (1982).

[4] See supra note 3.

See, e.g., PSF PV-Q; DRPF PV-Q; Plaintiffs' App. G. As in many other industries, "exclusive dealing" is a common method of operation. See Plaintiffs' App. G, at 1-3. For van lines that have exclusive dealing arrangements and that utilize only non-carrier agents, thus, only shipments on the van line's own account are carried within the van line's infrastructure. For van lines that have exclusive dealing arrangements and that use carrier-agents as well as non-carrier agents, however, non-van line shipments originating from the carrier-agents' independent operations may be carried within the van line's infrastructure as well. The establishment of such arrangements for the benefit of a van line's carrier-agents is a matter of voluntary accommodation on the part of the van line -- though once established, it may be governed by the van **[*9]** line's ICC-certified pooling agreement. See, e.g., DSF P24; PSGI P24; see Practices, supra, at 633. Nonetheless, almost no van line, apparently, allows the agents within its network regularly to handle the traffic of any company that is not also one of the van lines' agents. E.g., DSF P22; PSGI P22; see Plaintiffs' App. G. [5]

Prior to the deregulation of the moving industry beginning around 1979, the extent to which agents could and did make use of independent ICC authority -- if their van lines allowed them to do so at all -- was limited. DSF P23; PSGI P23. First, then-existing **[*10]** ICC regulations made it very difficult for non-carrier agents to obtain, or for existing carrier-agents to augment, their own interstate authority. DSF P35; PSGI P35. Second, even for agents that did possess such authority, it was usually -- due to ICC regulations -- of limited geographic scope. DSF P35; PSGI P35. Most important, the ICC required that carrier-agents use the same rates for their "independent carrier" shipments as for their "agency" shipments -- that is, price competition between van lines and the independent operations of their carrier-agents was expressly barred. DSF P36; PSGI P36.

The advent of deregulation in the moving industry represented a dramatic change in these business circumstances. With deregulation, agents could obtain independent interstate authority or expand existing interstate authority quite easily. DSF P35; PSGI P35. By the same token, independent carriers and local moving companies wishing to offer interstate service could readily obtain their own interstate authority rather than associating with a national van line in order to do so. Also, the ICC no longer imposed narrow geographic limits on the scope of such new authority. **[*11]** Agents, as well as independent carriers, could obtain authority allowing them to carry goods on their own account not only locally, but regionally or even nationally as well. See DSF P35; PSGI P35. Moreover, and perhaps most significantly, the ICC abandoned the rule that carrier-agents were required to charge identical rates on their agency and non-agency shipments. DSF P36; PSGI P36.

Thus, as a result of deregulation, Atlas faced the prospect of potential Atlas shipments being shifted to independent carrier-agent accounts 1) by many more agents than before, 2) on long distance hauls as well as local hauls, and 3) with greater frequency due to newly authorized price competition from its carrier-agents in their independent capacities. See PSF PPVI-V - VI-X; DRPF PPVI-V - VI-X. Atlas carrier-agents, nevertheless, continued to reap a substantial benefit from the use of the Atlas infrastructure -- including Atlas-leased trucks, Atlas-trained personnel, Atlas uniforms, and the extremely valuable Atlas origin and destination network -- on their own, independent, non-Atlas hauls. See DSF PP24-29; PSGI PP24-29. After deregulation, moreover, this practice threatened to **[*12]** saddle Atlas with significant liability problems: as part of the deregulation of the industry, Congress made national van lines expressly liable for actions committed by an agent when the agent is operating "within the actual or apparent authority" of its principal van line. *49 U.S.C. § 10934(a) (1982)*. Thus, to the extent that the independent shipments of Atlas's carrier-agents were often carried out with many of the trappings of an official Atlas shipment, the new liability provision placed Atlas at an enhanced, statutory risk of being held legally responsible for those non-Atlas shipments. See DSF PP31-34; PSGI PP31-34.

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[5] Agent operations for handling government or military traffic or exercising freight forwarding authority as referred to at PSGI P22 constitute separate categories of business carried out under separate ICC authorities. See Atlas Van Line, Inc., et al. -- Pooling Application, ICC Docket No. MC-F-15004 at 1-5 (July 15, 1983) (Defendant's Evidentiary and Other Materials 17). While such shipments may also be carried within a van line's infrastructure, operations under these ancillary authorities are not affected by the Atlas policy being challenged in this suit and thus are not at issue.

Atlas initiated several policies in anticipation of and in response to the changes accompanying deregulation, though it aborted each of these initiatives in turn until it finally settled on the policy at issue on this suit. [6] On February 11, 1982, Atlas announced that it planned to exercise its right to cancel its pooling agreement, and that it would terminate its relationship with any agent company [7] that continued to operate an independent, interstate authority for its own account in addition to serving as an Atlas agent. PSF PPVI-K - VI-P; DRPF **[*13]** PPVI-K - VI-P. In effect, the policy meant that Atlas would thenceforth deal only with "non-carrier" agents. PSF PVI-N; DRPF PVI-N. Atlas indicated that its existing carrier-agents could retain their independent authority without being terminated as Atlas agents only if they transferred that authority to a separate corporation to be operated under a new and distinct name. PSF PPVI-N - VI-P; DRPF PPVI-N - VI-P; DSF PP52-53; PSGI PP52-53. Under the policy, the separate company could remain legally "affiliated" with the agency company -- that is, both companies could remain under common ownership. However, the separate company would be outside the Atlas network: it would generally not have access to Atlas origin and destination services provided by other Atlas agent companies around the country, PSF PVI-M; DRPF PVI-M, in that Atlas agent companies were contractually barred from providing such services for the shipments of non-Atlas companies to the extent that doing so would "infringe upon the exclusivity of representation which is a part of the agency agreement." PSF PVI-N; DRPF PVI-N.

[*14] Announcement of the new Atlas policy and its imminent implementation predictably triggered a challenge before the Interstate Commerce Commission. On August 16, 1982, in response to this challenge, the ICC inter alia affirmed Atlas's right to withdraw from its pooling agreement, holding that "nothing in [the] existing modified pooling agreement precludes withdrawal by any party from the agreement." Atlas Van Lines, Inc. - Pooling, ICC Docket No. MC-F-14784, Finance Docket No. 29972 at 3 (August 16, 1982) (Appendix A to Second Amended Complaint). On February 17, 1983, moreover, the ICC announced that the new arrangement proposed by Atlas did not require a new pooling agreement: [8] the ICC held that because the independent authority to be retained by the agents would be transferred to an entirely separate competitive entity outside of the Atlas network, no "pooling" between competitive carriers would be taking place and thus no pooling agreement was necessary. Atlas Van Lines, Inc. - Pooling, ICC Docket No. MC-F-14784, Finance Docket No. 29972 at 8-11 (February 17, 1983) (Appendix B to Answer to Second Amended Complaint. [9]

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[6] See infra note 22. The successive initiates were:

a) January 27, 1979. Atlas began to require that carrier-agents pay to Atlas one percent of their revenues from the use of their independent authorities, in compensation for the benefits they received from Atlas in aid of their independent operations. This requirement remained in effect until the last quarter of 1979. PSF PPVI-A - VI-B; DRPF PPVI-A - VI-B.

b) January 27, 1979. Atlas announced a policy -- effective immediately -- prohibiting an agent from acquiring any new interstate authority or applying to add to his present interstate authority. Atlas states that despite its threats, it never enforced this policy, and publicly abandoned the policy by November, 1980.PSF PPVI-A, VI-C - VI-D; DRPF PPVI-A, VI-C - VI-D; DSF P45; PSGI P45.

c) November 1, 1980. Atlas approved a tentative plan to purchase the independent authorities of its carrier-agents. The plan was soon abandoned without implementation. PSF PPVI-F - VI-G, DRPF PPVI-F - VI-G.

d) March 20, 1981. Atlas announced a plan that allowed agents freely to hold, increase, and use independent authority (without necessarily setting up a separate carrier company), but that banned any use of Atlas agents for origin and destination services in connection with shipments under such independent authority. The plan was implemented on May 1, 1981. After ICC objection that the plan require a new pooling agreement, the plan was abandoned on May 21, 1981. PSF PPVI-H - VI-J; DRPF PPVI-H - VI-J.

[7] Atlas's Agency Agreements state that they are terminable by either party upon thirty days notice "without cause." PSF PV-Q; DRPF V-Q; Plaintiffs' App. I.

[8] Compare supra note 6, paragraph (d), where the ICC required a new pooling agreement.

[9] Plaintiffs sought to have this determination reviewed in the Court of Appeals for this Circuit, but the appeal was dismissed by agreement without the Court of Appeals having ever reached the merits.See Rothery Storage & Van Co. v. Interstate Commerce Commission, Agreement That Proceedings Be Dismissed (D.C. Cir. Nos. 83-1210, 83-1361) (filed February 6, 1984).

[*15] Soon after Atlas announced its new policy, it contacted all of its agents by mail and asked them to respond by signing a form indicating whether or not they would comply with the new requirements for Atlas agency. PSF PPVI-S, VI-U; DRPF PPVI-S, VI-U.Most if not all of Atlas's agent eventually did respond, and the policy went into effect on August 18, 1983. At the time the policy was announced, Atlas had approximately 490 agents, 91 of whom were carrier-agents. Following implementation of the new policy, 48 of the carrier-agents shifted their independent authority to separate corporations, 20 gave up their authority entirely but remained as Atlas agents, 12 were terminated by Atlas for failure to comply with the policy, and 11 chose to leave Atlas either to operate their own or to become carrier-agents for one of the other national carriers. DSF P82; PSGI P82. In February, 1984, Atlas imposed on its reconstituted agents an enhanced system of fines to enforce its prohibition against shipment of non-Atlas hauls on Atlas-leased trucks, given that under the new arrangement, as noted, the use of Atlas's service and equipment infrastructure was intended to become restricted **[*16]** to Atlas shipments alone. See PSF PVI-AA; DRPF PVI-AA; Plaintiff's Motion to Further Supplement Summary Judgement Pleadings, Attachment A (February 24, 1984).

Plaintiffs argue that the institution of the new Atlas policy represents a "boycott" of those Atlas agent companies that failed to comply, and that the Atlas policy constitutes price-fixing because it is aimed at preventing price-cutting by carrier agents in their independent capacities. As such, plaintiffs argue that Atlas's policy should be treated as a per se violation of the antitrust laws, and that even if the policy does not merit per se treatment, it nevertheless should be condemned under the rule of reason. Defendant responds by arguing that undisputed facts establish that 1) the institution of the policy is statutorily immune from the antitrust laws under *49 U.S.C. 10934(d)*, 2) per se treatment, as urged by the plaintiffs, is inappropriate, and 3) no violation under the rule of reason can be shown.

II.

It is necessary at the outset to determine whether undisputed material facts make it possible to resolve this matter on the pending cross-motions for summary judgment. ***HN1***[] Under *Fed. R. Civ. P. 56(c)*, a motion for **[*17]** summary judgment may be granted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." It is well established that the undisputed facts and "inferences to be drawn" from those facts "must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)* (per curiam). To support summary judgment, the record "must demonstrate that [the] opponent "would not be entitled to [prevail] under any circumstances."" *National Ass'n of Governmental Employees v. Campbell, 593 F.2d 1023, 1027 (D.C. Cir. 1978)* (quoting *Semaan v. Mumford, 335 F.2d 704, 705 n.2 (D.C. Cir. 1964)*.

HN2[] Courts have been cautioned to be especially careful about premature termination of a cause of action filed under the federal antitrust laws. *Poller v. C.B.S., Inc., 368 U.S. 464, 473 (1962)*. Nonetheless, summary judgment may well be appropriate even in an antitrust action where a court has permitted extensive discovery and the requirements of *Fed. R. Civ. P. 56(c)* have been met. See *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289-90 (1968)*. **[*18]** In this case, both parties have moved for summary judgment, and their respective statements of undisputed material fact demonstrate that plaintiffs and defendant are in substantial agreement on the essential facts making up the core of this case. [10] On the basis of these facts, the Court concludes that the motions for summary judgment are ripe for dispostion.

III.

HN3[] In order to prevail on a claim under *Section 1* of the Sherman Act, a plaintiff must show both 1) the existence of a "contract, combination . . . or conspiracy," and 2) an unreasonable restraint of trade under either the per se rule or the rule of reason, as appropriate. Title *15 U.S.C. § 1 (1982)*; see ABA ***Antitrust Law*** Developments at 2 (2d ed. 1984). The undisputed facts demonstrate that plaintiffs in this action cannot meet either of these criteria.

A. Conspiracy

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[10] See supra note 2.

Plaintiffs argue that a conspiracy to effectuate the Atlas policy in question existed 1) among the members of the Atlas board of directors, who voted to institute the policy, and 2) between Atlas and its agents in the field, who responded to Atlas's request for an indication of whether the agents would comply **[*19]** with Atlas's demands.

As to the alleged conspiracy among the members of the Atlas board of directors, it is firmly established that ***HN4***[] the actions of a corporation's board of directors do not constitute a conspiracy within the meaning of Sherman Act *§ 1*. See *Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2741 & n.15 (1984)*; *Harvey v. Fearless Farris Wholesale, 589 F.2d 451, 455 n.7 (9th Cir. 1979)*. A corporation, which can only function pursuant to the group decisions of the members of its board of directors, cannot in this fashion be found to have conspired with itself. See *Nelson Radio & Supply, Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952)*, cert. denied, *345 U.S. 925 (1953)*.An exception to this rule may exist, however, where individual members of the board of directors possess an independent personal stake in a particular action of the board, that is, where the act "on their own behalf." *Copperweld, supra*, at n.15; accord *Smith v. Northern Michgan Hospitals, Inc., 703 F.2d 942, 950 (6th Cir. 1983)*. Plaintiffs attempt to invoke this exception on the ground that Atlas's board of directors included the executives of some of Atlas's own agents and **[*20]** carrier-agents, which are separate corporate entities, independent from Atlas and from each other; plaintiffs argue that the new Atlas policies would necessarily affect both the Atlas and non-Atlas business potential of these separate companies in some fashion and thus give the agent companies on the board an independent stake in whether the policy was adopted.

In an effort to illustrate and substantiate this claim, plaintiffs allege more specifically that one non-carrier agent represented on the board received a 2% royalty from Atlas for every shipment carried on Atlas's account within a certain geographic area, and thus stood to benefit individually from the adoption of the new policy because the new policy would predictably cause tonnage previously carried on the independent accounts of Atlas's carrier-agents to be shifted to Atlas's own account. Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, at 10-12. Plaintiffs also observe that at least one carrier-agent represented on the board subsequently sought to benefit from the policy by competing more vigorously for the business of an agent that was experiencing difficulty complying with **[*21]** the new Atlas policy. Id. at 8-10. Thus, plaintiffs argue that in voting for the Atlas policy at issue, the executives of Atlas's agents and carrier-agents who served on Atlas's board had a sufficiently independent stake to render their participation in the decision a conspiracy within the meaning of the Sherman Act.

There exist two, independently sufficient grounds for rejecting plaintiff's claim. The first is that even if the allegedly conflicting interests of some directors sufficed to trigger the "personal stake" exception, Congress has provided a special exemption from the antitrust laws that would preclude liability on account of the alleged treatment in question. ***HN5***[] Title *49 U.S.C. § 10934* provides, in pertinent part, that

d) The antitrust laws . . . do not apply to discussions or agreements between a motor common carrier . . . and its agents (whether or not an agent is also a carrier) related solely to . . . (4) ownership of a motor common carrier . . . by an agent or membership on the board of directors of any such motor common carrier by an agent.

(emphasis added). Defendant acknowledges that the agent companies represented on the board are separate entities from **[*22]** each other and from Atlas. Thus, the non-carrier and carrier-agents alike presumably possess at least some degree of interest in the success of their own companies, which on occasion may diverge from those of Atlas in general and other Atlas agents and carrier-agents individually. However, 49 U.S.C. 109349d) does not retain any "personal stake" exception. Rather it expressly allows agents and carrier-agents of a van line to serve on the van line's board of directors, participate in its deliberations and decisions, and exercise responsibility for the affairs of the principle free of the risk of antitrust liability for doing so, despite their obvious status as independent entities with at least these basic independent interests. See infra note 11. The state, moreover, specifically immunizes "discussions and agreements" regarding the "ownership of motor common carriers" by a van line's agents. The legislative history of this provision clarifies that it was intended to "immunize carriers and their agents from the antitrust laws with respect to certain dealings between them." S. Rep. No. 497, 96th Cong., 1st Sess. 8 (1979). [11] Congress's aim, in particular, was to **[*23]** assure[] that discussions between a principal carrier and its

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[11] The relevant Senate Report language reads in full:

agents related solely to [inter alia] . . . pooling or divisions between the principal carrier and its agents . . . and ownership of a principal carrier by an agent . . . are not discussions that would be in violation of the antitrust laws."

[*24] S. Rep. No. 497, 96th Cong., 1st Sess. 17 (1979). Discussion, voting, and agreement within the board on a policy announcing the terms that are to govern such ownership as well as the policy's implementation -- as, it is undisputed, occurred in this case -- seem to fall squarely within the language and intent of this statutory exemption.The exemption provision, it must be noted, was enacted into law as an explicit component of Congress's deregulation package.Thus, Congress may fairly be understood as anticipating discussions and agreements after deregulation which addressed adjustments of the pre-existing relationships to the new business environment. The material discussions and agreements at issue in this case related solely to whether "pooling" between Atlas and its agents would continue after deregulation, and, if not, to how the ownership of a pricipal carrier by an agent could be accomplished. Thus, the claim that the actions of the Atlas board of directs in this matter constitute a conspiracy within the meaning of the Sherman Act must be rejected. Congress appears to have expressly exempted the participation of agents and carrier-agents in the membership, deliberations, **[*25]** or agreements of a van-line's board of directors from the application of the antitrust laws where, as here, the subject matter of the discussions and agreements relates to the van line's policy with respect to the ownership of independent interstate authority by the van line's agents, including policies requiring change because of the business consequences of deregulation.

Plaintiffs argue that the statutory immunity works only in one direction: i.e., that *§ 10934(d)* immunizes decisions allowing agents to acquire independent authority and become carrier-agents, but that it does not immunize a decision abolishing an existing carrier-agent arrangement. Statement of Points and Authorities in Support of Plaintiffs' Motion for Partial Summary Judgment As To Liability at 12-14. The court is well aware that Congress sought to ensure that carrier-agent arrangements would not be prohibited as a result of deregulation. However, Congress did not command that they be preserved, nor prohibit their abandonment. Under plaintiffs' view of *§ 10934(d)*, national van lines that prior to deregulation had permitted their agents to operate as carrier-agents would essentially be locked **[*26]** into that arrangement, while those that had not allowed their agents to obtain independent authority from the ICC would presumably be free to continue that policy. Yet there is nothing in the legislative history to support such an arbitrary result; indeed, the legislative history appears, if anything, to reaffirm the right of a van line to enforce traditional agency standards of loyalty and fiduciary duty upon its agents, as discussed below, and thus plaintiffs' argument must be rejected. See infra at pages 34-35 & note 17.

There is also a provision in the act that immunizes carriers and their agents from the antitrust laws with respect to certain dealings between them. This section is needed in order to permit the continued relationships developed and approved over the years of certain van line companies. In some cases, van line companies are composed and owned by agents who themselves are carriers within limited geographical areas. In some cases, the agents, as carriers themselves, have independent authority to operate in areas in which the principal carrier also be operate. Accordingly, in the absence of immunity, there could be some problems concerning immunity from the antitrust laws. The bill merely permits existing relationships to continue. . . .

S. Rep. 497, 96th Cong., 1st Sess. 8 (1979) (emphasis supplied).

Analagous language in the House Report on this legislation reads:

New *section 10934* also contains a provision which immunizes from the antitrust laws certain discussions exercise [sic] agreements between carriers and their agents related to rates, charges, and allowances for transportation provided under the authority of the carriers. Further, such discussions and agreements related to the ownership of a carrier by an agent or membership on the carrier's board of directors by an agent are immune. The purpose of this provision is to allow the continuation of certain relationships between carriers and agents which have been established over the years. In some cases, the carriers are composed and owned by agents who themselves are carriers within limited geographical areas. In other cases, the agents, as carriers themselves, have independent authority to operate in areas in which the principal carrier operates. These relationships could be jeopardized in the absence of antitrust immunity. It is important to note that these exemptions are narrow ones. Specifically, the immunity provided by subsections (d) (1)-(3) applies only to discussions or agreements related to rates, charges, and allowances offered on traffic carried under the authority of the principal carrier. Similarly, subsection (d)(4) provides only a limited exemption. It does not exempt from the antitrust laws such things as anticompetitive mergers.

H. Rep. 1372, 96th Congress, 1st Sess. at 10 (1979) (emphasis added).

Alternatively, plaintiffs' effort to establish that the actions of the Atlas board of directors constituted a conspiracy within the meaning and scope of the Sherman Act must also fail in that -- even apart from the availability of statutory immunity -- plaintiffs do not proffer evidence or demonstrate a reasonable prospect that they could proffer or prove specific facts sufficient to invoke the "personal stake" exception.

HN6[] The antitrust laws look to substance, not to form. As noted, it may be inferred that each agent on the Atlas board of directors may well possess some independent interest in its own success apart from that of Atlas or its fellow **[*27]** agents, and that the benefits and detriments of the new policy may well accrue to each of them in a possibly distinct way. Yet other courts have observed that as long as employees or officers of a corporation have acted in accordance with their responsibility and authority to advance the interests of the corporation they serve -- and where plaintiffs have failed to proffer specific facts to the contrary -- no conspiracy within the meaning of the Sherman Act can be found. See *Green v. Associated Milk Producers, Inc., 692 F.2d 1153, 1156-57 (8th Cir. 1982)*; *Nelson Radio & Supply Co. v. Motorola, supra, at 914*. In the leading case supporting the existence of a "personal stake" exception, the personal interest in question was divergent from and possibly inconsistent with the corporate officer's responsibilities toward the corporation that the officer served. See *Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391, 399-400 (4th Cir. 1974)* (cited in *Copperweld, supra, at 2741 n.15*). In Greenville, the plaintiff alleged the existence of a conspiracy between a newspaper and the newpaper's own president to eliminate the plaintiff from the local newspaper advertising **[*28]** market. The Court held that a sufficient "personal stake" was alleged in that the president held a direct financial interest in yet another local newspaper that would benefit from the increased advertising that it too would gain as a result of the plaintiff's elimination. A newspaper president's interest in a completely unrelated paper is, on its face, wholly divergent from and possibly inconsistent with the president's presumed responsibilities toward the newspaper of which he is president. In the instant case, by contrast, the separate agent companies are part and parcel of Atlas's own network. Atlas's success is to a large extent dependent upon -- rather than divergent from or inconsistent with -- the success of its agent companies, either individually or as a group. And after voluminous discovery, plaintiffs have failed to proffer any facts showing that the agent and carrier-agent votes on the Atlas policy were grounded in interests that were inconsistent with or divergent from the overall best interests of Atlas itself. [12] The "personal benefits" alleged -- increased royalties due to increased Atlas traffic, and increased bases for competition with other Atlas **[*29]** agents -- are wholly consistent with the unitary interests of Atlas and its agents to build a strong Atlas system. A stockholder/director of a company, for example, does not hold an impermissible personal benefit or act "on his own behalf" simply because his effort to advance the interests of the corporation would increase the value of his stock interest and the dividends paid to him. Here, similarly, careful evaluation of the facts proffered by plaintiff shows only that any advantage to

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[12] The instance on such a showing is further supported by principles recently set forth by the Supreme Court's decisions in *Monsanto Co. v. Spray-Rite Service Corp., 104 S. Ct. 1464 (1984)*, and *Copperweld, supra.* In Monsanto, the Court indicated that a finding of conspiracy could not be sustained on the basis of evidence merely "consistent" with illegal coordination between a manufacturer and its independent distributors. Rather, a plaintiff must proffer specific evidence "inconsistent" with the defense of unilaterality. *Monsanto, supra, at 1473*. An analagous distinction provided the basis of the decision in Copperweld, where the Court rejected the proposition that a corporation can conspire with its separately incorporated but wholly owned subsidiary. *Copperweld, supra, at 2742-45*. The court observed that "Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition," *id. at 2741*, or, in other words, that the challenged behavior was, by itself, just as "consistent" with the "effort to compete," legitimately, as it was with the "effort to stifle competition." The Court thus seems to suggest that in such circumstances, the antitrust laws can only be triggered by proffering evidence of behavior "inconsistent" with otherwise legitimate purposes.

In the instant case, thus, the mere showing of a "personal benefit" traceable to an agent on the Atlas board of directors should not suffice to trigger the "independent stake" exception -- assuming one exists -- unless plaintiffs also proffer evidence showing that the personal benefit in question was inconsistent with or divergent from Atlas's own competitive interests. There is a longstanding presumption that the members of a corporation's board of directors are incapable of conspiring with themselves under the Sherman Act in that there is no other way that a corporation can advance its competitive interests, see *Nelson Radio, supra*, and, thus, the Court is reluctant to find that the plaintiffs have demonstrated the existence of "the plurality of actors imperative for a *§ 1* conspiracy," *Copperweld, supra, at 2741*, without a proffer of evidence suggesting that the personal benefits derived from the board's actions were inconsistent with or divergent from the interests of Atlas itself.

the stockholder/director/agent was merely incidental to the advantage to the corporation, rather that inconsistent with or divergent from Atlas interests or with the Atlas agent/directors' responsibilities toward Atlas. See also *Card v. National Life Insurance, 603 F.2d 828, 834 (10th Cir. 1979)*. After considerable discovery, plaintiffs have not shown any reasonable possibility of proving otherwise. Plaintiffs, therefore, have failed to demonstrate any likelihood of proving the existence of a conspiracy within the Atlas board of directors or between the board and Atlas itself, for this reason as well as for the statutory immunity ground noted previously.

[*30] As to the alleged conspiracy between Atlas and its agents in the field, plaintiffs rely heavily on the fact that, soon after announcing its new policy, Atlas requested that its agents respond by indicating whether they would comply with the policy's terms. Plaintiffs contend that this communication represents negotiation or agreement, and as such satisfies the "conspiracy" requirement of their Sherman Act *§ 1* claim.

Again, there are two reasons for rejecting plaintiffs' claim. First, even if Atlas's communication with its agents did constitute an "agreement," such activity appears also to be immunized from the antitrust laws under *49 U.S.C. § 10934(d)*. As noted, that provision expressly immunizes "discussions and agreements" between a van line and its agents relating to "ownership of a carrier by an agent." Atlas's effort to determine the intentions of its agents in response to the announcement of its change in policy regarding the ownership of independent carrier authority by its agents falls squarely within the language and intent of the statutory exemption. See supra pages 19-23.

Alternatively, even apart from the availability of such statutory immunity, plaintiffs **[*31]** have not proffered facts sufficient to establish a vertical conspiracy. Plaintiffs have not demonstrated, nor does it appear that they can demonstrate, that Atlas's actions amounted to anything other than the unilateral announcement of a policy change and its subsequent implementation. The Supreme Court, in its last term, reaffirmed that ***HN7***[] "[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." *Monsanto Co. v. Spray-Rite Service Corp., 104 S.Ct. 1464, 1469 (1984)*. The same principle applies in a case such as this one. [13] As the analysis in Spray-Rite makes clear, plaintiffs here can only succeed in showing a conspiracy by offering specific, direct evidence inconsistent with the defense of unilaterality and indicating that Atlas and its agents had a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Id. at 1473*. While plaintiffs demonstrate that Atlas kept in regular touch with its agents -- informing them of the substance of the policy and seeking to elicit responses -- such actions are wholly consistent with good management and planning. Cf. *id. at 1470*. **[*32]** Despite extensive discovery, on the other hand, plaintiffs offer no evidence inconsistent with the proposition that the policy announcement and implementation was a unilateral act on Atlas's behalf.

Plaintiffs, thus, have failed to demonstrate that the actions of the agents on Atlas's board of directors or in the field can in any way be deemed to constitute a conspiracy within the meaning or scope of *Section 1* of the Sherman Act.

B. Unreasonable Restraint of Trade.

Even if plaintiffs were able to satisfy the "conspiracy" requirement necessary to establish a Sherman Act *§ 1* violation, plaintiffs would still have to establish that Atlas's policy constituted an **[*33]** "unreasonable restraint of trade." Plaintiffs stress that the immunity granted by Congress with the enactment of *49 U.S.C. § 10934 (d)* was meant to be a "limited" one and was not intended to protect "such things as anticompetitive mergers," H. Rep. 1372, 96th Cong., 1st Sess. 10 (1979). Plaintiffs argue that the competitive restraint imposed by the Atlas policy must

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[13] In *Spray-Rite, supra*, the Supreme Court confirmed the vitality of *United States v. Colgate & Co., 250 U.S. 300 (1919)*. As the Court explained:

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.

Spray-Rite, supra, at 1469. The Colgate/Spray-Rite doctrine applies to non-price terms of dealing -- such as those in this case -- as well.

therefore be evaluated in any event to determine whether it might fall outside of the immunity provision's intended scope.

Assuming, arguendo, that a conspiracy has been demonstrated and that no statutory immunity applies, the Court would next have to determine whether to apply "per se" treatment to the evaluation of the practice in question, as urged by plaintiffs, or whether to apply the "Rule of Reason," as urged by defendant.

1) Per se treatment.

Plaintiffs contend, as indicated above, that the institution of the new Atlas policy represents a "boycott" of those Atlas agents who refused to comply with the policy, and that it also represents a "price-fixing" scheme, in that it is allegedly aimed at preventing price-cutting by carrier-agents in their independent capacities. [14]

[*34] ***HN8***[]

Boycotts and price-fixing schemes, when proven, have often been accorded per se treatment. [15] Nonetheless, the Court of Appeals of this Circuit has warned that

A per se rule is a judicial shortcut; it represents the considered judgment of courts, after considerable experience with a particular type of restraint, that the rule of reason -- with normal mode of analysis -- can be dispensed with. As the Supreme Court explained in Northern Pacific Railway Co. v. United States, "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." A court will not indulge in this conclusive presumption lightly. Invocation of a per se rule always risks sweeping reasonable, pro-competitive activity within a general condemnation, and a court will run this risk only when it can say, on the strength of unambiguous experience, that the challenged action is a "naked restraint[] of trade with no purpose except stifling of competition."

[*35] The Supreme Court emphasized the "demanding standards" of Northern Pacific Railway last term in Continental T.V., Inc. v. GTE Sylvania Inc. Reiterating that "[p]er se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive," the Court overruled Arnold, Schwinn & Co., which had held certain vertical restraints illegal per se. The Continental Court noted that the vertical restrictions in question possessed "redeeming virtues" in their stimulation of inter-brand competition; that the restrictions were "widely used in our free market economy"; and that there existed "substantial scholarly and judicial authority supporting their economic utility." For these reasons, the Court held that the restraints at issue were to be analyzed not under a per se rule, but under the rule of reason.

Smith v. Pro-Football, 593 F.2d 1173, 1181 (D.C. Cir. 1978) (footnotes omitted).

In Smith v. Pro-Football, the Court of Appeals refused to apply the per se rule in its evaluation of the NFL player draft. In this case, the Court similarly declines to apply the per se rule in evaluating Atlas's response to the changes accompanying deregulation **[*36]** of the household goods moving industry.Deregulation abruptly re-organized the rules at the foundation of the moving industry. Analysts are still examining the impact of these changes. See Plaintiffs' App. P, Q. No court has apparently yet closely analyzed the unique nature of the business relationship

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[14] Plaintiffs theorize that the new policy tended to cause either of two outcomes: 1) agents abandoned or failed to seek independent authority under which they might have charged lower prices for moving services comparable to those that they were providing as Atlas agents, or 2) agents transferred their independent authority to separate corporations, and the additional cost of doing so dampened their ability to charge lower rates on the independent shipments.

[15] As noted, it is typical in the moving industry for the agents of a van line to enter into exclusive dealing agreements with the van line; i.e., they agree not to provide van line services to any company that is not also an agent of the van line that they serve. Plaintiffs argue that this practice should in this case be treated as an antitrust violation because it is an integral part of Atlas's alleged boycott and price maintenance schemes. Though exclusive dealing arrangements are traditionally treated under the Rule of Reason, plaintiffs contend that here they should be treated as part of Atlas's other per se violations.

between van lines and their carrier-agents, at least as the relationship affects the carrier-agents' exercise of their independent authority. [16] "Considerable" and "unambiguous" experience with the practice at issue is a necessary prerequisite for application of per se treatment, and the Court finds that -- given the unusual nature of the van line/carrier-agent relationship, and given the general confusion following deregulation -- such experience is simply absent in the present case. Moreover, the Atlas policy allows agents the option of retaining their independent authority in separate companies, or becoming carrier-agents of a different van line, and thus the Court is reluctant to term the policy as "pernicious." Also, it simply cannot be accepted that the new Atlas policy has "no purpose except the stifling of competition" or that is it without "any redeeming virtue." **[*37]** Plaintiffs cannot reasonably dispute that Atlas was fully within its rights when it terminated its pooling agreement, or that Atlas's new policy will enhance inter-carrier competition among the national van lines, as explained below. Finally, it is worth noting that the new Atlas policy represents nothing more than the adoption of a method of operation -- exclusive agency -- that is "widely used" not only in the van line industry, but throughout commerce. In sum, the Court finds that the "demanding standards" for application of per se treatment have simply not been met. Rather, "the courts have had too little experience with this type of restraint, and know too little of the "economic and business stuff" from which it issues, confidently to declare it illegal without undertaking the analysis enjoined by the rule of reason." *Id. at 1182* (footnote omitted).

[*38] 2) Rule of Reason.

Plaintiffs argue that the initiation of Atlas's new policy can be condemned even under the rule of reason. Guidance may once again be taken from the opinion of the Court of Appeals of this *Circuit in Smith v. Pro Football, supra*, where the Court of Appeals stated that:

HN9[] Under the rule of reason, a restraint must be evaluated to determine whether it is significantly anticompetitive in purpose or effect. In making this evaluation, a court generally will be required to analyze "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the "anticompetitive evils" of the challenged practice must be carefully balanced against its "procompetitive virtues" to ascertain whether the former outweigh the latter. A restraint is unreasonable if it has the "net effect" of substantially impeding competition.

Id. at 1183.

This memorandum has already described the "facts peculiar to" the van line and moving industry, and the recent legislative and regulatory changes leading to the new Atlas **[*39]** policy. Prior to deregulation, Atlas had given its carrier-agent companies permission to use the Atlas infrastructure to compete with Atlas itself, for their own accounts, within the boundaries set by federal regulations and ICC oversight. ***HN10***[] Classic agency law, however, gives a principal the prerogative of withdrawing such permission if convenient to protect the principal's interests. See *Restatement of Agency, Second §§ 1(1)*, *14N*, *393-394*. Nothing in the legislative history of Congress's deregulation of the household moving goods industry suggests that when Congress removed the regulatory restrictions on carrier-agent independent operations, it added a restriction barring van lines from exercising this prerogative. Indeed, the legislative history of the measure shows just the opposite: that Congress had no intention of disturbing the ability of a van line to reach agreements enforcing "the fiduciary duty of loyalty of an agent not to compete with its principal concerning the subject matter of the agency." S. Rep. 497, 96th Cong., 1st Sess. 8. [17] Congress may well have speculated that by widening the regulatory boundaries on carrier-agent

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[16] Cf. *North American Van Lines, Inc., v. I.C.C., 666 F.2d 1087, 1094-96 (7th Cir. 1981)* (van line challenge against ICC regulations implemented after deregulation) ("There was no evidence before us regarding the customary arrangements . . . between national carriers and their agents."); *Clemmer v. North American Van Lines, Inc., 1969 Trade Cases P72,936, at 87609 (E.D. Pa. 1969)* (van line's allocation of exclusive territories between agents deemed not in violation of the antitrust laws) (policy in question did not affect carrier-agents' independent shipments).

[17] The Senate Report discussion of this matter reads in full:

independent operations, it would **[*40]** have triggered more independent operation of that sort. However, when it lifted those restrictions, it did so -- consistent with the free market philosophy supporting deregulation in general -- to create an option, not a mandate. [18] Congress, thus, left each individual van line free to fashion its own response to deregulation -- or, in Atlas's case, to the prospect of wide-scale price competition from its own agents using the van line's own infrastructure. Atlas's choice was to protect against the further diversion of its own business infrastructure in this fashion, and instead to strengthen its competitive position by returning to a traditional agency arrangement whereby its agent companies serve Atlas alone. As such, the new Atlas policy plainly had a legitimate business purpose, and is consistent with policies chosen by Congress with respect to the choice between regulation and competition in this industry.

[*41] In an effort to identify the "anticompetitive evil" of the challenged practice, plaintiffs stress that, upon the implementation of the new Atlas policy and the resultant withdrawal of access to Atlas services and equipment for use on independent shipments, several carrier-agents ceased their independent operations entirely. Others adapted by shifting their independent authorities to separate corporations or abandoning Atlas to become carrier-agents for some other major van line, and plaintiffs adduce facts showing that these latter groups of agents incurred significant expense in doing so.***HN11***[]

One of the basic tenets of the federal antitrust laws, however, is that they are intended to protect competition, not competitors. Copperweld, supra, at 2740 n.14. The Court must look not to whether individual agents incurred losses as a result of the new policy, but rather to the extent to which the Atlas policy somehow impeded the opportunity of Atlas agents to utilize their independent authority in the market for moving services. On this score, it is necessary to reiterate that the new Atlas policy does not absolutely bar an Atlas agent from exercising independent interstate **[*42]** authority.The agent company itself must serve Atlas alone, but agents may exercise independent authority if that authority is placed in an affiliated but commercially separate company. Because the separate company must develop its own service and equipment infrastructure, the true effect of the Atlas policy is, in essence, only to prevent agents who do exercise independent authority from appropriating to themselves any aspect of the Atlas network for the support services and overhead equipment necessary to operate that interstate authority beyond any great distance. The new arrangement essentially terminates a subsidy previously available to an Atlas carrier-agent at the expense of Atlas. At the same time, agents who wish to continue to operate as "carrier-agents" are not barred from seeking to join one of the other van lines that do subsidize carrier-agents in this way. Thus, the only enduring anticompetitive harm demonstrated by the plaintiff is the loss of the opportunity to continue to operate in a traditional carrier-agent relationship with Atlas itself.

During the Course of its deliberations, the Committee considered a proposal to include within the immunity section language that would grant immunity to agreements concerning exclusive agency representation, or the fiduciary duty of loyalty of an agent not to compete with the principal concerning the subject matter of the agency. The Committee determined that this type of relationship is not a violation of the antitrust laws and is standard agency law as expressed in section 393 of the Restatement of the Law of Agencies section. The Committee felt that inclusion of such language could imply that such relationships are a violation of the antitrust laws in the absence of immunity. Thus, the Committee determined not to include such language in the bill.

S. Rep. 497, 96th Cong., 1st Sess. 8 (1979). Neither party makes any issue of the portion of this passage explaining that "the Committee determined not to include" language in the bill that might have immunized exclusive agency or fiduciary duty agreements directly. Thus, it is not necessary to resolve any questions that might arise from the fact that such language was consciously excluded. However, the Court is inclined to agree with the observation of the Senate Committee that "this type of relationship is not a violation of the antitrust laws," id. Cf. Delta Data Systems Corp. v. Webster, No. 84-5356, slip op. at 8-9 (D.C.Cir. Sept. 21, 1984) (valid to consider GAO report as persuasive even if not binding).

[18] The House Report on the legislation states, under the heading "Section 2. Declaration of Policy," that:

Section 2 sets forth congressional policy with respect to the household goods moving industry. The emphasis in the policy statement is threefold -- the reduction of unnecessary regulation, the strengthening of consumer remedies and protections, and the establishment of maximum carrier flexibility in pricing their services and meeting the needs of their shippers.

H. Rep. 1372, 96th Cong., 1st Sess. 5 (1979) (emphasis added). See also S. Rep. 497, 96th Cong., 1st Sess. 8 (1979) ("The bill merely permits existing carrier-agent relationship to continue." (emphasis added)).

In reaching this conclusion, the Court has not overlooked the fact that Atlas has also required its carrier-agents **[*43]** to refrain from transferring their established names as Atlas agents to the corresponding non-Atlas affiliate companies created as a result of the carrier-agents' compliance with the Atlas policy. In any given case, this requirement bars the new, non-Atlas entity from access to the goodwill -- as it is represented in the carrier-agent's established name -- that has been built up as a result of the carrier-agent's Atlas relationship. At the same time, though, it also deprives the independent entity of any goodwill that might have been fairly allocable to it due to the carrier-agent's own independent operations. See DSF P58; PSG1 P58. The reasonableness of this feature of the Atlas policy may be viewed differently by different courts. It passes muster here because plaintiffs have not proffered evidence that would indicate the relative burden that Atlas would have borne had it permitted its carrier-agents to transfer their established names to the new, non-Atlas entities, if the agents had so wished, as opposed to requiring its carrier-agents to give the new entities different names instead. [19] Indeed, even if there were such evidence, it would necessarily be speculative. **[*44]** And in addition, each carrier-agent, as noted, had the clear option of operating completely independently, or of seeking to associate with another van line that would permit carrier-agent or independent operations under that name.

In judging the reasonableness of the Atlas policy, it should be noted that plaintiffs appear to have conceded that a van line is fully entitled to abandon its agency network altogether, or choose to operate exclusively with agents that have no independent interstate authority at all -- i.e., no independent interstate authority either within the agency company or within a separate, affiliated company. See Transcript of Hearing, August 6, 1984, at 19 - 23. At least one major van line other than Atlas does indeed operate in such a **[*45]** manner. [20] The arrangement now being enforced by Atlas, however, is one that is less extreme. Agents are expressly permitted to continue to operate their own, independent authority as long as it is located within an "affiliated" but separately incorporated company. The Court of Appeals for this Circuit faced an analagous situation in *United States v. Studiengesellschaft Kohle, 670 F.2d 1122 (D.C. Cir. 1981)*. That case involved the holder of a process patent who had granted licenses to several manufacturers, allowing all of them to use the process to produce products for their own use but allowing only only one of them to sell the resultant product in the open market. The plaintiff manufacturers challenged this "restraint." The Court of Appeals, however, noted that the patent-holder was legally entitled to grant an exclusive manufacturing and sales license to a single licensee if he so desired, and that therefore, the patent-holder could not be deemed to have acted "unreasonably" under the antitrust laws for having taken the less extreme step of licensing additional manufacturers subject to the condition that the resultant product be restricted to their own use. *Id.* ***[*46]*** *at 1128* - 31, 1135. Similary, if Atlas would be entitled to choose to continue doing business only with agents that possess no interstate authority whatsoever, then Atlas would presumably be entitled -- without being found to have acted unreasonably -- to take the less extreme step represented by the Atlas policy in question. [21] See also *Red Diamond Supply, Inc. v. Liquid Carbonic Corp., 637 F.2d 1001, 1006-07* (5th Cir.), cert. denied, *454 U.S. 827 (1981)*.Rather than choosing to do business ony with agents who have no independent authority whatsoever, Atlas allows its agents to possess independent authority as long as they place it in a separate

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[19] It is worth noting, in this regard, that one other major van line has determined to accept the costs of permitting its carrier-agents to shift their established names to such newly created separate entities. See DSF P79.Counsel for the defendant may themselves yet decide, out of an abundance of caution and in anticipation of a possible appeal, to recommend to Atlas the adoption of this more conservative approach.

[20] Plaintiffs themselves report that "Allied Van Lines, the largest van line, allows no firm affiliated with it to have or to use authority to conduct interstate operations competitive with its own. This arrangement was approved and immunized from the antitrust laws by the Interstate Commerce Commission in 1946, following an antitrust action suit brought by the Justice Department. Evanston Fireproof Warehouse, et al., - Control - Allied Van Lines, 46 M.C.C. 557 (1946)." PSF PIII-I.

[21] The court does not itself face the question, nor intimate any ruling, on whether indeed it would be valid under the antitrust laws for a van line to take the more extreme step of banning its agents even from having separate affiliates exercise independent carrier authority. Suffice it to note that plaintiffs, having conceded that a van line is entitled to take such extreme action, see Transcript of Hearing, August 6, 1984, at 19-23, are in no position to argue that Atlas's less extreme action is unreasonable. Given that Atlas bars only the exercise of independent authority by the agency companies themselves, the policy goes no farther than is necessary to enforce traditional agency standards upon the agent companies alone. The discussion above demonstrates the reasonableness of a policy that is limited in this fashion.

company and look elsewhere than to Atlas for the support and overhead services necessary to utilize that authority. It is difficult to regard this tempered action as "unreasonable" within the meaning of the Sherman Act, or to see what other proof plaintiffs could muster to change this conclusion.

[*47] Finally, to the extent that Atlas's policy has any legally cognizable anticompetitive effect, there stands balanced against it the plain and significant procompetitive impact on competition among the national van lines. Plaintiffs do not dispute in any material way that enforcing traditional agent loyalty upon Atlas agents will strengthen Atlas's competitive position vis-a-vis the other national van lines, particularly those that already require their agents to work with them alone. Plaintiffs concede that carrier-agency reduced the amount of traffic carried on Atlas's account, PSGI P22, and cannot plausibly argue that carrier-agency did not or would not expose Atlas to increased liability -- at least to some extent -- for shipments carried out under Atlas's actual or apparent authority. See PSGI PP31-34. Atlas's new policy eliminated these competitive vulnerabilities, and thus, as shown above, had a legitimate business purpose with a plain procompetitive effect. Therefore, considering the nature and overall competitive effect of the announcement and implementation the new Atlas policy, the Court finds from undisputed facts that plaintiffs are unable to show that Atlas's **[*48]** actions violated the rule of reason. [22]

IV.

For the foregoing reasons, the court concludes as a matter of law from undisputed material facts that defendant's actions in requiring its agents to refrain from independent carrier operations, except through separate corporate affiliates, does not violate *Section 1* of the Sherman Act. Accordingly, an accompanying order will deny plaintiff's motion for partial summary judgment as to liability, and will grant defendant's motion for summary judgment.

End of Document

[22] To the extent that plaintiffs' claims also challenge Atlas's earlier, aborted efforts to cope with the advent of deregulation, see supra note 6, the Court similarly finds that no violation of the rule of reason can be demonstrated. Even apart from whether the "conspiracy" requirement can be met as to these earlier Atlas actions, the Court finds that their short duration, the prerogative of Atlas to impose traditional agency standards upon its agents, and the procompetitive aim of the actions establish that they cannot be deemed "unreasonable" under the Sherman Act.

[Out Front Productions, Inc. v. Magid](#)

United States Court of Appeals for the Third Circuit

April 6, 1984, Argued ; November 19, 1984, Decided

No. 83-1672

Reporter

748 F.2d 166 *; 1984 U.S. App. LEXIS 16599 **; 1984-2 Trade Cas. (CCH) P66,291

OUT FRONT PRODUCTIONS, INC., Appellant v. LARRY MAGID, JOSEPH SPIVAK, HERBERT SPIVAK, and ALLEN SPIVAK, Individually and trading as ELECTRIC FACTORY CONCERTS and TOWER THEATRE, INC.

Prior History: [1]** Appeal from the United States District Court for the Eastern District of Pennsylvania.

Core Terms

concerts, promoters, summary judgment, antitrust, rock, performers, defendants', anti trust law, lease, causation, Addendum, antitrust violation, white-oriented, causal, cases

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Collectives & Cooperatives > Clayton Act

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

[*HN1*](#)[] **Collectives & Cooperatives, Clayton Act**

Businesses that are hindered from forming or from entering a new market come within the zone of interests protected by the antitrust laws and may maintain suit for damages and for injunctive relief.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

Healthcare Law > Healthcare Litigation > Antitrust Actions > Facilities

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 > Clayton Act > Remedies > Injunctions

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

HN2[] **Entitlement as Matter of Law, Genuine Disputes**

A private antitrust plaintiff must demonstrate (1) a violation of the antitrust laws and (2) a right either to the treble damage remedy under § 4 of the Clayton Act, codified at *15 U.S.C.S. § 15*, or to injunctive relief under § 16 of the Clayton Act.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN3[] **Private Actions, Remedies**

Plaintiff also bears the burden of showing causation, i.e., that defendants' alleged unlawful conduct was a material cause of injury to its business or property. Although the burden is not a heavy one, since a plaintiff need not exhaust all possible alternative sources of injury, if plaintiff fails to establish a causal relationship between its financial difficulties and defendants' antitrust violations, its case must fail.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

HN4[] **Private Actions, Remedies**

To the extent that demand to use facilities is an immutable requirement to demonstrate antitrust injury caused by denial, it runs counter to the caution that courts should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Torts > ... > Elements > Causation > General Overview

HN5[] **Private Actions, Remedies**

Causation could be shown by evidence other than a refusal to a demand, such as defendants' interference with independent sources of supply relied upon by plaintiff. The question presented under the antitrust laws was whether there was sufficient evidence for a jury to infer the necessary causal connection between respondents' antitrust violations and petitioners' injury.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN6[] **Private Actions, Remedies**

A refused demand is often the best evidence of causation, and the absence of a demand in the circumstances of the particular case may, indeed, be fatal to plaintiff's ability to show causation.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN7[] **Private Actions, Remedies**

A company expanding either into a new geographic territory or product line or beginning business altogether must show not only that it had the background, experience, and financial ability to make a viable entrance, but even more important, that it took affirmative actions to pursue the new line of business. Proof of a demand will generally be the best evidence to show that a plaintiff was poised and ready to enter the market. Otherwise there is unlikely to be any plausible evidence to show that defendants impeded this effort. Certainly, the law will not countenance a dormant plaintiff who springs into action only when it is time to file suit.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN8[] **Private Actions, Remedies**

An antitrust plaintiff who sues claiming it was excluded from the market, whether by a conspiracy or monopolistic conduct, must produce sufficient evidence from which the trier of fact can find a causal connection between the violation and the injury. Although summary judgment should be used only sparingly in antitrust cases, there are patently justifiable reasons why a trial court should ascertain, before embarking on a lengthy antitrust trial, whether plaintiff will be able to present some evidence that the injury of which it complains can be attributable to the alleged antitrust violation.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Regulated Practices > Private Actions > Prioritizing Resources & Organization for Intellectual Property Act

HN9[] **Remedies, Damages**

See *15 U.S.C.S. § 15b*.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN10[] **Summary Judgment, Burdens of Proof**

See *Fed. R. Civ. P. 56(e)*.

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

HN11[] **Summary Judgment, Burdens of Proof**

The court interprets *Fed R. Civ. P. 56* to signify that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment. Under this rule, a party resisting the motion cannot expect to rely merely on bare assertions, conclusory allegations or suspicions.

Counsel: Mitchell A. Kramer, Alice G. Burt, Richard M. Abrams, Kramer, Kapustin & Schatz, Philadelphia, Pennsylvania, for Appellant.

Richard P. McElroy, Blank, Rome, Comisky & McCauley, Philadelphia, Pennsylvania, for Appellees.

Judges: Gibbons, Sloviter, Circuit Judges, and Mencer, District Judge. *

Opinion by: SLOVITER

Opinion

[*167] OPINION OF THE COURT

SLOVITER, Circuit Judge.

I.

A.

Plaintiff Out Front Productions, Inc., a former promoter of rock concerts, appeals from the grant of summary judgment against it in its antitrust action against defendant concert promoters, Larry Magid, Joseph Spivak, Herbert Spivak, and Allen Spivak, individually and trading as Electric Factory Concerts and Tower Theatre (hereafter collectively referred to as EFC).

Out Front contends that EFC prevented it from successfully promoting large-scale white-oriented rock concerts in Philadelphia because EFC, which had a contractual exclusive arrangement from January 1, 1972 to **[**2]** December 31, 1976 to promote rock concerts at the Spectrum, the largest indoor facility and apparently the most attractive to rock performers, maintained its exclusivity beyond that date and unreasonably denied it access to that facility. It also contends that from at least 1972 until April 1980 EFC attached to the contracts with the performers it promoted a "Standard Addendum", which gave EFC certain exclusive rights to those performers in the Philadelphia area for a 75 day period, provided a six months' right of first refusal of the performer's services, and imposed certain advertising restrictions. It contends that EFC's use of the Standard Addendum was a predatory practice to maintain and bolster the monopoly power it acquired **[*168]** through its exclusive access to the Spectrum for rock concert promotion. Out Front alleged that EFC unlawfully conspired to eliminate competition and restrain trade in violation of *section 1* of the Sherman Act, *15 U.S.C. § 1*, and monopolized or attempted to monopolize the promotion of white-oriented rock music concerts in the Philadelphia metropolitan area in violation of *section 2* of the Sherman Act, *15 U.S.C. § 2*.

[3]** B.

* Hon. Glenn E. Mencer, United States District Court for the Western District of Pennsylvania, sitting by designation.

Out Front was formed in 1977 by Richard Fuller, its sole shareholder and general manager. Between September and November of that year it produced 12 concerts, ten at the Trenton War Memorial, a medium-size facility, and two in Philadelphia, one at the Civic Center and the other at the Tower Theatre, a smaller facility owned by defendants. Fuller had promoted a number of rock concerts in Trenton in 1974 and 1975, when he did business under the name Hollow Moon. Nearly all of Out Front's concerts were unprofitable. Apart from one unsuccessful effort to promote a concert in Trenton in 1979, it appears to have ceased operations soon after its last concert in November 1977.

Out Front raises no claim that defendants interfered with its business in Trenton. Its claim in this suit is based on the theory that it would have become a successful promoter of white-oriented rock concerts in Philadelphia had defendants made the Spectrum available for its concerts. *See* Brief for Appellant at 4.

At the close of discovery, defendants moved for summary judgment, claiming Out Front could not show it had been "prevented from presenting concerts" in the absence of evidence that it sought **[**4]** and was refused access to the Spectrum and that it sought the services of rock performers for such concerts. The district court granted summary judgment, stating that the record was "devoid of evidence suggesting that [Out Front] demanded access to the Spectrum", App. at 751a, that Out Front "failed to meet its justifiably rigorous burden of proving that a demand for access to Philadelphia-area concert facilities would have been futile", App. at 754a, and that Out Front failed to produce evidence that "the standard addendum was a feature of any contract defendants may have had with any [performer] to whom plaintiff claims to have been denied access." App. at 756a. The court later denied Out Front's motion to alter or amend judgment based on further submissions, reaffirming its original opinion.

II.

A.

We consider first the district court's conclusion that Out Front's "failure to demand access to Philadelphia concert venues deprives it of the standing needed to challenge the alleged exclusion." App. at 756a. The issue in this case is not one of standing in the sense of plaintiff's power to bring suit. Out Front claims a direct economic injury traceable to defendants' actions **[**5]** that allegedly violated the antitrust laws. This was enough to confer standing as required by Article III of the Constitution, *see, e.g., Association of Data Processing Service Organizations v. Camp, 397 U.S. 150, 152, 25 L. Ed. 2d 184, 90 S. Ct. 827 (1970)*, and under section 4 of the Clayton Act, *15 U.S.C. § 15*, which entitles "any person . . . injured in his business or property" by an antitrust violation to recover damages. Moreover, it is clear that ***HN1***[] businesses that are hindered from forming or from entering a new market come within the zone of interests protected by the antitrust laws and may maintain suit for damages and for injunctive relief. *See generally* ABA Antitrust Section. ***Antitrust Law*** Developments 393 (2d ed. 1984). Thus Out Front had adequate standing to maintain this suit.

B.

As this court recently set forth in *Weiss v. York Hospital, 745 F.2d 786 (3d Cir. 1984)*, ***HN2***[] a private antitrust plaintiff must demonstrate (1) a violation of the antitrust **[*169]** laws and (2) a right either to the treble damage remedy under section 4 of the Clayton Act or to injunctive relief under section 16 of the Clayton **[**6]** Act. Slip Op. at 35-36. In this case, neither the motion for summary judgment nor the court's opinion granting it were predicated on plaintiff's failure to establish a genuine issue of material fact as to defendants' violation of the antitrust laws. Therefore, for purposes of this appeal we assume that EFC violated *sections 1* and *2* of the Sherman Act, as alleged, through an unlawful monopoly of large-scale white-oriented rock concerts in Philadelphia, furthered by predatory and conspiratorial practices including unreasonable exclusive dealing arrangements with the owners of Spectrum and the use of the Standard Addendum in contracts EFC signed with certain rock performers.

However, ***HN3***[] plaintiff also bears the burden of showing causation, i.e., that defendants' alleged unlawful conduct was a material cause of injury to its business or property. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n.9, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*. *See Danny Kresky Enterprises Corp. v. Magid, 716 F.2d 206, 209-10, 211-12 (3d Cir. 1983)*. Although the burden is not a heavy one, since "a plaintiff need not exhaust all possible alternative sources **[**7]** of injury", *Zenith Radio Corp., 395 U.S. at 114 n.9*, if plaintiff fails to establish a causal relationship between its financial difficulties and defendants' antitrust violations, its case must fail. *Van Dyk Research Corp. v. Xerox Corp., 631 F.2d 251 (3d Cir. 1980)*, *cert. denied*, *452 U.S. 905, 69 L. Ed. 2d 405, 101 S. Ct. 3029 (1981)*.

In concluding that summary judgment for EFC was appropriate, the district court stated, "In antitrust cases in which the defendants allegedly refuse to deal, the plaintiff must make a demand for access to the market from which it is allegedly excluded", or prove that the situation falls within the "very narrow" futility exception. App. at 750a, 751a. ***HN4***[] To the extent that this suggests that demand is an immutable requirement, it runs counter to the Supreme Court's caution that courts "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws." *Radovich v. National Football League, 352 U.S. 445, 454, 1 L. Ed. 2d 456, 77 S. Ct. 390 (1957)*; *see also* *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660, 5 L. Ed. 2d 358, 81 S. Ct. 365 (1961)*. **[**8]**

Antitrust suits are subject to no prerequisite, such as that imposed by *Fed. R. Civ. P. 23.1* for shareholder derivative suits, requiring that the complaint allege a demand or show futility. Demand is a prerequisite in derivative litigation so that the corporation on whose behalf suit is brought has the opportunity to apply its business judgment to the claims raised, a rationale patently inapplicable to a private antitrust plaintiff. Treating a "demand" by an antitrust plaintiff as if it were a condition precedent to maintenance of the suit misdirects the relevant focus, which should be on whether plaintiff has adduced the requisite proof of causation. No persuasive reason has been suggested why evidence of a demand is the only way to prove causation. In fact, in three cases where the defendants' exclusionary practices impeded the business or expansion of an established participant, the Supreme Court rejected the contention that suit was barred by plaintiffs' failure to make a demand.

In *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*, the Supreme Court stated, "We do not believe that respondents' **[**9]** liability under the antitrust laws can be measured by any rigid or mechanical formula requiring [a plaintiff] both to demand materials from respondents and to exhaust all other sources of supply." The Court held that ***HN5***[] causation could be shown by other evidence, such as defendants' interference with independent sources of supply relied upon by plaintiff. *Id.* The Court stated that the question presented under the antitrust laws was whether there was "sufficient evidence for a jury to infer **[*170]** the necessary causal connection between respondents' antitrust violations and petitioners' injury." *Id. at 700*. In *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*, the Court held that a shoe manufacturer was entitled to damages against the manufacturer and distributor of shoe machinery who would only lease, but not sell, the equipment. Although plaintiff apparently produced no evidence to show that it had demanded to buy the equipment, the district court found that plaintiff would have bought rather than leased had it been given the opportunity to do so. The Supreme Court stated that, "in **[**10]** the circumstances of this case it was unnecessary for [plaintiff] to prove an explicit demand during the damage period." *Id. at 487 n.5* (citing *Continental Ore*). In the third case, *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 120 n.15, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*, the Court held that an antitrust plaintiff's failure to make a formal request for a patent license from a patent pool was not fatal to its case because the pool had made its position entirely clear.

It is apparent from these cases that there is no rigid formula calling for a demand in order for plaintiff to show the requisite causality. [1] On the other hand, ***HN6***[] a refused demand is often the best evidence of causation, and the absence of a demand in the circumstances of the particular case may, indeed, be fatal to plaintiff's ability to show causation. In the three Supreme Court cases holding demand was not a prerequisite there had been a course of

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[1] To the extent that dictum in *Lawlor v. National Screen Service Corp., 270 F.2d 146, 154 (3d Cir. 1959)*, *cert. denied*, *362 U.S. 922, 4 L. Ed. 2d 742, 80 S. Ct. 676 (1960)*, on which the district court relied, suggested that the lack of a demand could be an alternative basis for affirming a district court conclusion that no injury had been sustained by plaintiffs, it has been undermined by the later Supreme Court cases. In any event, in that case there was a general lack of evidence that defendants frustrated what might have been a successful business venture and caused any damage. *See* *id. at 153*. The question of the necessity of a demand under section 4 of the Clayton Act was reserved by the court in *Weiss v. York Hospital, supra*, Slip Op. at 40 n.32, where it held that a demand was not a prerequisite under section 16. *Id.* at 40.

dealing and participation in the market from which the Court permitted the fact finder to infer the causal nexus between the antitrust violation and plaintiff's injury. However, in the absence of such circumstances, **[**11]** a similar inference will ordinarily be unavailable. Thus, ***HN7***[] a company expanding either into a new geographic territory or product line or beginning business altogether must show not only that it had the background, experience, and financial ability to make a viable entrance, but even more important, that it took affirmative actions to pursue the new line of business. *See* *Hecht v. Pro-Football, Inc., 187 U.S. App. D.C. 73, 570 F.2d 982, 994 (D.C. Cir. 1977)*, *cert. denied*, *436 U.S. 956, 57 L. Ed. 2d 1121, 98 S. Ct. 3069 (1978)*; *Triangle Conduit & Cable Co. v. National Electric Products Corp., 152 F.2d 398, 399-400 (3d Cir. 1945)*. *See generally* 2 P. Areeda & D. Turner, ***Antitrust Law*** § 335c (1978); ABA Antitrust Section, ***Antitrust Law*** Developments 393 & nn.73-74 (2d ed. 1984). Proof of a demand will generally be the best evidence to show that a plaintiff was poised and ready to enter the market. Otherwise there is unlikely to be any plausible evidence to show that defendants impeded this effort. Certainly, the law will not countenance a dormant plaintiff who springs into action only when it is time to file suit.

[12]** To recapitulate, ***HN8***[] an antitrust plaintiff who sues claiming it was excluded from the market, whether by a conspiracy or monopolistic conduct, must produce sufficient evidence from which the trier of fact can find a causal connection between the violation and the injury. Although summary judgment should be used only sparingly in antitrust cases, *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*, "there are patently justifiable reasons why a trial court should ascertain, before embarking on a lengthy antitrust trial, whether plaintiff will be able to present some **[*171]** evidence that the injury of which it complains can be attributable to the alleged antitrust violation." *Van Dyk Research, 631 F.2d at 258* (Sloviter, J., concurring). Thus we turn to examine whether the district court was justified in giving summary judgment against plaintiff on the record before it.

C.

EFC filed its motion for summary judgment supported by specific affidavits and deposition testimony stating that plaintiff never sought to lease the Spectrum and that qualified promoters' demands for concert dates were accepted. **[**13]** It filed the affidavit of Allen B. Flexer, Vice-President of the Spectrum's parent corporation, who had the responsibility of negotiating with persons desiring to lease the Spectrum. Flexer's affidavit stated that before suit was filed, he had never heard of Out Front or Richard Fuller, and averred that "during the period 1977 to date, neither Out Front Productions, Inc. nor Richard Fuller ever contacted me or any other Spectrum official responsible for leasing for the purpose of seeking available dates for presentation at the Spectrum of any music concerts." App. at 486a. This was supported by the affidavit of his assistant, Stephen Greenberg. App. at 693a. Flexer's affidavit set forth a list of promoters to whom the Spectrum was leased during the relevant period.

In response to the motion for summary judgment, plaintiff presented an affidavit by Richard Fuller, its general manager, which asserts in relevant part:

> 2. Some time during the last half of 1977 or the first half of 1978, I went to the Spectrum to try to obtain a list of available dates, in order to book musical acts on those dates.
>
> 3. At the Spectrum, I was told that Larry Magid had it "tied up," that **[**14]** only he "plays there," and that I should "forget it."
>
> . . .
>
> 6. My company and I were ready, willing and able to promote and present such groups [listed in para. 5] in the Philadelphia-Trenton area. I had money in the bank, houses which were not subject to mortgages and other property which could be used as collateral for financing. There were also people who were able and willing to supply me with financial backing . . . . My company and I promoted 12 concerts in 1977 . . . As a principal of Hollow Moon, a promoter of such concerts, I promoted 7 concerts in 1974 and 11 concerts in 1975 . . . and co-promoted 3 concerts in 1975 with EFC, a defendant herein.
>
> 7. Because of defendants' exclusionary practices, my company was forced out of business after its last concert on November 17, 1977.

The portion of the Fuller affidavit dealing with the demand for the Spectrum, the issue on summary judgment, contrasts sharply with the defendants' submissions. It is vague as to the timing and content of the request for access; it does not state that Fuller provided EFC with a definite request or proposal; it fails to state to whom the inquiry was made; and it fails to state **[**15]** *for whom* the inquiry was made. There is no written evidence to back up Fuller's assertion of a frustrated attempt to lease the Spectrum, and plaintiff makes no assertion that any follow-up effort was made. Fuller's earlier deposition testimony had suggested that the inquiry he made regarding availability of the Spectrum was made by him on behalf of Hollow Moon, an entity unrelated to plaintiff Out Front, and occurred before the beginning of the four-year damage period. App. at 1125a-27a, 1153a-59a. [2] Even if plaintiff could rehabilitate Fuller's own deposition with his subsequent affidavit, an issue we do not reach, that affidavit is insufficient to withstand summary judgment.

HN10[]

[*172] *Fed. R. Civ. P. 56(e)* provides, **[**16]** in part, "When a motion for summary judgment is made and supported as provided in this rule, 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 there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." (emphasis added).

HN11[] We have interpreted *Rule 56* to signify that "mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment." *Robin Construction Co. v. United States, 345 F.2d 610, 613 (3d Cir. 1965)* (quoting *Engl v. Aetna Life Ins. Co., 139 F.2d 469, 473 (2d Cir. 1943))*. Under this rule, "a party resisting the motion *cannot expect to rely merely on bare assertions*, conclusory allegations or suspicions." *Ness v. Marshall, 660 F.2d 517, 519 (3d Cir. 1981)* (emphasis added). *See* *Fireman's Insurance Co. of Newark, N.J. v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982)*. Even accepting Fuller's affidavit assertions **[**17]** as true, they fail to show any serious effort on behalf of Out Front to secure access to the Spectrum during the 1977 to 1981 period.

Nor does the record support Out Front's alternative argument, unsupported by any affidavit, that Fuller, an established promoter in Trenton, knew from his past unsuccessful efforts for Hollow Moon that it would have been futile to negotiate for a concert date for the Spectrum. The record is clear that after EFC's contractual exclusive right to the Spectrum ended in December, 1976 and during the damage period, 1977 to 1981, other promoters were in fact given access to the Spectrum. Plaintiff contends that these other promoters were only granted access on highly unfavorable terms, were required to co-promote with EFC, or did not threaten EFC's alleged monopoly over large-scale white-oriented rock concerts. If true, these facts might support viable claims against EFC by the other promoters, but they do not provide the missing link in this plaintiff's proof. In short, there is no probative, objective evidence that plaintiff's intentions vis-a-vis the Spectrum went beyond a pessimistic belief that it was not worth gearing up to use the facility and to **[**18]** compete with Electric Factory. Fuller's affidavit fails to tie defendants' conduct to Out Front's lack of success on its concert venture.

D.

Plaintiff's additional claim, that it was injured because defendants exercised control over performers and agents through unreasonably restrictive contracts, suffers from a similar defect. A jury may find that coercion or control over performers may injure other firms who are unable to use the performers' services. *See* *Danny Kresky Enterprises v. Magid, 716 F.2d 206, 210-12 (3d Cir. 1983)*. However, this plaintiff presented no evidence that it ever sought to contract for the services of any performers covered by the Standard Addendum and that such performers refused to perform for it as a result. In the absence of any such evidence, there is no basis on which plaintiff would be entitled to damages arising from EFC's use of the Standard Addendum.

III.

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[2] ***HN9***[] *15 U.S.C. § 15b* establishes a four-year limitation from the date of alleged injury on private claims for damages under § 4 of the Clayton Act. *See generally* L. Sullivan. Handbook of the Law of Antitrust § 248 (1977). Out Front's suit was filed July 23, 1981.

Because plaintiff failed to establish the existence of a genuine issue of fact that EFC's alleged actions caused it damage, the district court's order granting summary judgment for defendants will be affirmed.

End of Document

Stearns v. Genrad, Inc.

United States Court of Appeals for the Fourth Circuit

March 7, 1984, Argued ; November 20, 1984, Decided

No. 83-1611

Reporter

752 F.2d 942 *; 1984 U.S. App. LEXIS 16572 **; 1984-2 Trade Cas. (CCH) P66,294

Richard M. Stearns, Trustee in Bankruptcy for Carolina Acoustics Co., Inc., Appellant, v. Genrad, Inc., Appellee

Prior History: **[**1]** Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Richard C. Erwin, District Judge.

Disposition: Affirmed

Core Terms

distributors, products, sales, manufacturer, documents, territory, distribution contract, termination, district court, monopolization, counterclaim, compete, antitrust, deceptive, customer, monopoly

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN1[] **Private Actions, Standing**

A violation of the antitrust laws is not compensible unless the violation has occasioned an antitrust injury.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Private Actions, Remedies**

Any injury occasioned by monopolization, no matter how minute or insubstantial, is not the kind of injury contemplated by the Clayton Act § 3, *15 U.S.C.S. § 14*.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN3[] Regulated Practices, Market Definition

When determining whether a party has attempted to monopolize a market, if there is cross elasticity of demand or interchangeability of products, one must deal with a much larger market than if there is none.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > Assignments

Trademark Law > Conveyances > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN4[] Ownership & Transfer of Rights, Assignments

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.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

HN5[] Monopolies & Monopolization, Attempts to Monopolize

An attempt to monopolize within the prohibition of the statute is not made out unless it is shown that there was a dangerous probability that the conduct would have achieved a monopoly had it been successful. An attempt is not made out unless the conduct, if successful, would constitute the crime.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN6[] Regulated Practices, Trade Practices & Unfair Competition

Under *N.C. Gen. Stat. § 75-1.1(a)*, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce are prohibited.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN7[] Regulated Practices, Trade Practices & Unfair Competition

N.C. Gen. Stat. § 75-1.1(a) is intended for the protection of consumers. As such, the debt collection activities of a major retailer are not within the reach of the statute, for they were insufficiently related to the sale of goods.

Counsel: Noel Lee Allen, (William D. Harazin, R. Bradley Miller, Frank M. Parker, Jr., Barringer, Allen and Pinnix), for Appellant.

George L. Little, Jr., (F. Joseph Treacy, Jr., Petree, Stockton, Robinson, Vaughn, Glaze & Maready), for Appellee.

Judges: Hall and Murnaghan, Circuit Judges, and Haynsworth, Senior Circuit Judge.

Opinion by: HAYNSWORTH

Opinion

[*944] HAYNSWORTH, Senior Circuit Judge;

This is primarily an antitrust case commenced by Carolina Acoustics Company, a former regional distributor of sound-measurement devices manufactured by the defendant Genrad, Inc. Prosecution of the case was continued by Carolina's trustee in bankruptcy.

Until 1979, Genrad utilized regional distributors who, collectively, were responsible for approximately 30% of Genrad's sales. The distribution agreement permitted Genrad to compete with its distributors, and approximately 70% of its sales were direct sales. In that year, however, a decision was made by Genrad's officials to terminate all of their distributors and, thereafter, to **[**2]** sell only directly.

In its complaint, Carolina alleged (1) restraints of trade in violation of *§ 1* of the Sherman Act, *15 U.S.C. § 1*, an § 3 of the Clayton Act, *15 U.S.C. § 14*; (2) attempted monopoly in violation of *§ 2* of the Sherman Act, *15 U.S.C. § 2*; (3) breach of the distributorship agreement; and (4) unfair or deceptive trade practices in violation of *N.C.Gen.Stat. § 75-1.1(a)*.

In response to the complaint, Genrad counterclaimed for $48,448.31 due it upon a promissory note executed and delivered by Carolina.

The district court granted summary judgment for Genrad on all claims, including its counterclaim. [1] *564 F. Supp. 1309*. **[*945]** We conclude that summary judgment was properly entered for Genrad on all of Carolina's claims and on its counterclaim.

[3]** I.

In answer to an interrogatory, Genrad identified twenty-one documents that it had withheld from production on the basis of a claim of attorney-client privilege. Carolina asked the district court to inspect the documents *in camera*, but the motion was denied after argument. Carolina then filed a motion to reconsider as to only two of the original nineteen documents. Genrad submitted those two documents to the court. After an *in camera* inspection of those two documents, Genrad's claim of privilege was upheld, and the defendant's motion to compel was denied.

On appeal, Carolina complains of the failure to compel production of the two documents reviewed *in camera* and other documents as well. None of them were made a part of the record, however, and Carolina sought no order placing them unde seal and making them part of the record. All we have is Genrad's very general description consisting principally of identification of the author, addressee and recipients of copies. We do know that the district court, after inspecting two of them, upheld the claimed privilege, but we cannot examine any of the documents and thus are unable to review the rulings of the district **[**4]** court which kept them from being seen by Carolina.

II.

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[1] After announcing its intention to grant partial summary judgment, the district judge requested counsel for Genrad to prepare and submit a proposed opinion. They submitted a proposed opinion addressing all of Carolina's claims, and that was adopted by the district judge with little change. We do not encourage that practice. *See* *Cuthbertson v. Biggers Bros., 702 F.2d 454 (4th Cir. 1983)*.

In its trade restraint claims, Carolina contended that Genrad unlawfully fixed prices, imposed unreasonable territorial and customer restrictions and required Carolina to deal exclusively in Genrad products.

Whatever other infirmities there may be in those claims, recovery upon any of them is foreclosed by the absence of any evidence of injury to Carolina. ***HN1***[] A violation of the antitrust laws is not compensible unless the violation has occasioned an antitrust injury. *J.T. Gibbons, Inc. v. Crawford Fitting Co., 704 F.2d 787, 792 (5th Cir. 1982)*; *Windham v. American Brands, Inc., 565 F.2d 59, 65 (4th Cir. 1977)*; *see also* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*.

A.

The price fixing claim arose from the fact that Genrad limited discounts to state agencies to 5% below retail. However, Carolina conceded that Genrad never quoted less than list prices to state agencies. In price competition Genrad was always higher than its distributors **[**5]** in sales to state agencies. There was testimony that another of Genrad's distributors once underbid Carolina, but this suggests only that Genrad was not aggressively enforcing the discount limitation. There was also testimony that one state agency made one purchase directly from Genrad because of considerations other than price, but that agency returned to Carolina for its subsequent purchases. There was nothing else to indicate any injury from the alleged resale price maintenance scheme.

B.

In the original distributorship agreement, Genrad agreed to provide Carolina with support personnel and sales assistance in a territory consisting of North Carolina, South Carolina, Georgia, Alabama and eastern Tennessee. The 1976 revision contains no reference to Carolina's territory, and both distributorship agreements expressly conferred upon Carolina a right to sell Genrad products outside of its designated territory. Nevertheless, Carolina claimed that it had been informally told not to sell outside **[*946]** its territory, and the right of cancellation was an effective enforcement tool.

Carolina's salesman, Tenpenny, testified that he was not aware of any territorial restriction, **[**6]** and there was evidence of sales by Carolina outside its territory aggregating approximately $100,000. The only suggestion of a lost sale is the loss of a sale in California to a competing Genrad distributor. It was unexplained, however, how Carolina might effectively compete with west coast distributors in making sales in California. Nor is that lost sale related to the alleged territorial restriction.

C.

Without corroboration, Carolina's former president testified that it was forbidden to bid against Genrad for sales to the General Services Administration of the United States. GSA was the largest single customer for sound-measurement products in the country.

There was no evidence, however, that Carolina could have effectively competed with Genrad in making sales to GSA. There was evidence that GAS insisted that bidders offer to it their lowest prices only, which, for Genrad, were the prices at which it sold to the distributors. If there were an informal restriction upon bidding, it occasioned a loss of no sale upon which a profit might have been made.

D.

There was testimony that Carolina was required to deal exclusively in Genrad products. The evidence is equivocal, **[**7]** however, for there is evidence that Carolina dealt rather extensively in the products of another manufacturer, Columbia. Nevertheless, if there were such a restriction, there is no evidence of any injury to Carolina. There was no evidence of any opportunity to represent any other manufacturer which was declined because of the restriction. Carolina's economist seems to have believed that the exclusivity requirement enhanced Genrad's monopoly position, impairing Carolina's ability to compete effectively against Genrad. However, ***HN2***[] any injury occasioned by monopolization is not the kind of injury contemplated by § 3 of the Clayton Act.

III.

The district court rejected Carolina's attempt to monopolize claim under *§ 2* of the Sherman Act upon the ground that Carolina had not sufficiently defined the relevant market because it had submitted no evidence of the absence of cross elasticity of demand.

HN3[] If there is cross elasticity of demand or interchangeability of products, as in *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1965)*, **[**8]** one must deal with a much larger market than if there is none. In this case, however, there is no suggestion of the presence of cross elasticity of demand or interchangeability of products. However, Carolina's definition of the relevant market is fatally deficient for another reason.

Carolina defined the relevant product market as "portable acoustic measurement and analysis equipment and accessories . . ." It never specifically said that the market as thus defined was the manufacture of such products, but in discussing Genrad's market share, it consistently referred to Genrad's share of the manufacturing market. Of course, Carolina did not compete in that market. It competed with Genrad and other manufacturers and distributors of such products in the distribution market.

"It ***HN4***[] 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." *Spectrofuge Corp. v. Beckman Instruments, Inc., 575 F.2d 256 (5th Cir. 1978)*. *See also* *Bushie v. Stenocord Corp., 460 F.2d 116 (9th Cir. 1972)*; **[**9]** *A.L.W., Inc. v. United Air Lines Inc., 510 F.2d 52 (9th Cir. 1975)*. The behavior of Genrad within the distribution market was not the kind of conduct to give rise to a charge of **[*947]** attempted monopoly. It simply moved to control the distribution of its own products.

There is another reason this claim must fail. There was no showing of a dangerous probability of monopolization.

HN5[] An attempt to monopolize within the prohibition of the statute is not made out unless it is shown that there was a dangerous probability that the conduct would have achieved a monopoly had it been successful. *White Bag v. International Paper Co., 579 F.2d 1384 (4th Cir. 1974)*; *McElhenny Co. v. Western Auto Supply Co., 269 F.2d 332 (4th Cir. 1959)*. *See also* ABA Antitrust Section ***Antitrust Law*** *Development* 140-44 (2 ed. 1985). "An attempt is not made out unless the conduct, if successful, would constitute the crime." *Bowen v. New York News, Inc., 366 F. Supp. 651, 673 (S.D.N.Y. 1973)* aff'd in part and rev'd in part, *522 F.2d 1242 (2d Cir. 1975)* **[**10]** *cert. denied 425 U.S. 936, 48 L. Ed. 2d 177, 96 S. Ct. 1667 (1976)*.

Genrad was shown to have had 49% of the manufacturing market for its products. As distributor, however, it had handled only approximately 38% of the total distribution market; Genrad's distributors were responsible for the remaining 11%.

When Genrad terminated its distributors, it unquestionably sought to gain for itself the 11% of the distribution market its distributors theretofore had had. Whether or not it completely succeeded is unclear on this record, but we may assume that it substantially enhanced its 38% share of the distribution market. Nevertheless, there is nothing to suggest that Genrad's share of the market was so great as to give it the power to destroy competition or that its termination of its own distributors posed a dangerous probability of monopolization. Indeed, what was done was not directed at its competitors except insofar as its own distributors had been competing with it in the distribution market. In short, Genrad did what it had a right to do when it terminated its own distributors, and its conduct created no dangerous probability of monopolization in any market.

[11]** IV.

The breach of contract claim is not referable directly to Carolina's distribution contract. It is based upon a claimed violation of a Statement of Policy, which, under the distribution contract, was binding upon Carolina but subject to change by Genrad.

The Statement of Policy provided that Genrad's district offices would refer orders for small quantities of standard catalog items to the nearest distributor, provided it was known that the distributor had those items in stock.

The Statement of Policy also provided that "sales leads" obtained from national advertising and trade shows would be referred to the distributors.

Several months before termination of the distributors, Genrad began to experiment with direct mail and telephonic solicitation of orders. Apparently, most orders and leads developed in that program were not referred to distributors. It does not appear to what extent, if any, those leads were influenced by national advertising or trade shows, though it was asserted by Genrad that a substantial proportion of them were with potential customers who had never received any of Genrad's literature from its distributors.

That experimental program did lead to **[**12]** the conclusion that Genrad's distributors were not doing as well as they might, and to the conclusion that Genrad should terminate its distributors and undertake to sell of its products directly. In this, however, we can find no violation of the distribution contract.

We have already observed that Genrad, from the outset, was selling directly in competition with its distributors. The distribution contract provided that Genrad reserved "the right to set up other marketing channels at any time and to sell products directly or indirectly to any customer without compensation to the Distributor." One of Genrad's obligations under the contract was to help build user and industry acceptance of its products "by appropriate direct **[*948]** mail selling activity." Finally, the contract bound the distributor to adhere to the Statements of Policy" as well as subsequent changes in such policies."

The introduction of the direct solicitation program was clearly authorized by the distribution contract. Genrad had the contractual right to set up other marketing channels at any time and to effect direct sales to any customer. Indeed, direct mail selling activity was said to have been among **[**13]** Genrad's obligations, while Genrad had the unilateral right to change its announced policies.

The only hint of substance in the claim lies in the fact that Genrad did not give advance information to its distributors of the experimental sales program it was undertaking. The contract, however, gave Genrad the right to undertake the program, and nothing in the contract suggests that Genrad was obligated to give its distributors notice in advance of any experimental resort to some other marketing channel. In short, we find no promises by Genrad which Genrad may be said to have broken.

V.

We also find no basis for recovery against Genrad under ***HN6***[] *N.C.G.S. § 75-1.1(a)*, which prohibits "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

This statute has been construed as directed against deception in connection with the sale of goods. An illustrative list of prohibited conduct was contained in an article written by the then Attorney General of North Carolina, Robert Morgan. "The People's Advocate in the Marketplace **[**14]** -- the Role of North Carolina's Attorney General in the Field of Consumer Protection" 6 Wake Forest Intra L. Rev. 1, 18 (1969). The construction was substantially adopted by the Supreme Court of North Carolina in *State Ex Rel Edmisten v. J.C. Penney Co., 292 N.C. 311, 233 S.E.2d 895, 898 (1977)*, by a district court in North Carolina, *C.F. Industries v. Transcontinental Gas Pipeline, 448 F. Supp. 475 (W.D.N.C. 1978)*, and by this court, *United Roasters v. Colgate-Palmolive Co., 649 F.2d 985 (4th Cir. 1981)*.

In *J.C. Penney*, the North Carolina Supreme Court held that ***HN7***[] debt collection activities of a major retailer were not within the reach of the statute, for they were insufficiently related to the sale of goods. *See also* *Marshall v. Miller, 302 N.C. 539, 276 S.E.2d 397 (1981)* (describing act as intended for the protection of consumers).

The complaint in this case alleged no deceptive practice except insofar as it alleges that Genrad undertook its new experimental sales program without informing its distributors. If **[**15]** that might be regarded as a deceptive practice, it was at least as unrelated to a sale or to a formation of a contract as was J.C. Penney's debt collection practices. Even if there had been an intentional breach of the distribution contract by Genrad, that would not have been a violation of the North Carolina statute. *United Roasters v. Colgate-Palmolive Co., 649 F.2d 985 (4th Cir. 1981)*.

VI.

At the time of termination of the distribution contract, Carolina owed Genrad approximately $50,000 for goods received but for which payment had not been **[*949]** made. Carolina gave Genrad a note for the balance due, and made several payments on the note before it disclaimed any further obligation. The disclaimer and the defense to the counterclaim were based upon Carolina's charges of antitrust and contract violations by Genrad. Since no such violations existed and there was no other proffered defense to the counterclaim, summary judgment properly went for Genrad on its counterclaim.

VII.

We conclude that summary judgment on all claims was properly entered for Genrad.

AFFIRMED.

Manego v. Orleans Bd. of Trade

United States District Court for the District of Massachusetts

November 27, 1984

Civ. A. No. 83-0045-C

Reporter

598 F. Supp. 231 *; 1984 U.S. Dist. LEXIS 21723 **; 1985-1 Trade Cas. (CCH) P66,406

Isaac MANEGO, Plaintiff, v. The ORLEANS BOARD OF TRADE, et al., Defendants

Core Terms

conspiracy, license, summary judgment, disco, sham, preclusion, allegations, antitrust, member of the board, entertainment, arena, deposition, genuine, president of the board, license application, alleged conspiracy, court of appeals, attended, parties, cases, competitor, traffic

LexisNexis® Headnotes

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

HN1[] **Preclusion of Judgments, Res Judicata**

Under the doctrine of res judicata a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Res judicata is a bar only where the subsequent case concerns the same cause of action or claim. With the adoption of the Federal Rules of Civil Procedure the concept of "cause of action" has broadened beyond that of a single legal issue narrowly drawn in a writ. The scope of preclusion has necessarily expanded with the definition of "claim" or "cause of action."

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN2[] **Preclusion of Judgments, Res Judicata**

A judgment bars all claims prior to its entry.

Administrative Law > Agency Adjudication > Decisions > Collateral Estoppel

Civil Procedure > ... > Preclusion of Judgments > Estoppel > Collateral Estoppel

Administrative Law > Agency Adjudication > Decisions > Res Judicata

Civil Procedure > Judgments > Preclusion of Judgments > General Overview

Civil Procedure > ... > Preclusion of Judgments > Estoppel > General Overview

Civil Procedure > Judgments > Preclusion of Judgments > Res Judicata

HN3[] **Decisions, Collateral Estoppel**

Issue preclusion may bar relitigation of issues actually litigated and necessary to a prior judgment in a different cause of action, and may be asserted defensively by a stranger to the original action.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Regulated Industries > Transportation > Railroads

HN4[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Generally stated, the Noerr-Pennington doctrine exempts, with certain exceptions, concerted attempts to influence the passage or enforcement of laws from the sweep of antitrust legislation regardless of anticompetitive intent.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Right to Petition Immunity

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN5[] **Noerr-Pennington Doctrine, Right to Petition Immunity**

The "sham" exception to the Noerr-Pennington doctrine applies where a party seeks not to influence public officials, but to bar their competitors from meaningful access to adjudicatory tribunals and so to usurp the decisionmaking process. Subsequent developments have held that this exception also applies to a single suit filed for an improper purpose, such as generating publicity unfavorable to a competitor. Activity disguised as petitioning which is simply an effort to interfere directly with a competitor is not protected under Noerr-Pennington. Other types of activity which fall within the "sham" exception are misrepresentation, and threats or coercive measures to influence state officials. In order for the "sham" exception to apply: What is needed is proof that the lobbyists subverted the integrity of the governmental process, that they effectively barred plaintiffs access to these processes, or that the nature of these processes made their invocation something other than the "political activity" that is recognized by the Noerr-Pennington line of cases to be beyond the scope of the Sherman Act.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN6[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Conduct genuinely intended to influence governmental action is immune from the sweep of ***antitrust law*** and whether the effort is genuine or a sham is an issue of fact.

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 > Genuine Disputes

HN7[] **Summary Judgment, Opposing Materials**

A party opposing a motion for summary judgment may not rest on mere allegations, but must set forth specific facts showing that there is a genuine issue for trial. *Fed. R. Civ. P. 56(e)*.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

HN8[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The "conspiracy" exception to Noerr-Pennington applies where government officials participate with private individuals in a scheme to restrain trade.

Civil Procedure > ... > Summary Judgment > Opposing Materials > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > 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

Evidence > Inferences & Presumptions > General Overview

HN9[] **Summary Judgment, Opposing Materials**

Generally, summary judgment is inappropriate in cases involving conspiracy claims because the existence or nonexistence of a conspiracy is essentially a factual issue to be decided by the jury. Summary judgment may also be inappropriate in antitrust cases where "motive and intent play leading roles." There are, however, exceptions to the general rule. Where a moving party in an antitrust conspiracy case has shown that the facts relied upon in the opposing party's allegations are not susceptible to the interpretation which he sought to give them, *Fed. R. Civ. P. 56(e)*, puts the burden on the opposing party to produce evidence in support of his allegations. Furthermore, a plaintiff may not rely upon the promise of evidence of conspiracy to be developed by cross-examination at trial.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN10[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The type of conspiracy, which the plaintiff must show to escape the Noerr-Pennington doctrine, differs from that normally associated with antitrust litigation. Where the alleged conspirators are potential competitors or other market participants, conspiracy may be inferred from their market behavior, a situation that renders the determination particularly unsuitable for summary judgment.

Counsel: **[**1]** Charles Ray Weidman, Chatman, Massachusetts, for Plaintiff.

Samuel Hoar, Laura L. Carroll, Goodwin, Procter & Hoar, Boston, Massachusetts, for Cape Cod 5 Cent Savings Bank and David B. Willard.

Albert P. Zabin, Schneider, Reilly, Zabin, Connolly & Costello, Boston, Massachusetts, for Orleans Bd. of Trade & 90 other Persons as Members.

Judges: Caffrey, Chief Judge.

Opinion by: CAFFREY

Opinion

[*233] MEMORANDUM

CAFFREY, Chief Judge.

This is a civil action brought pursuant to antitrust statutes, *15 U.S.C. §§ 1-15*, which includes a pendent state law claim for unfair business practices. M.G.L. c. 93A. The plaintiff, Isaac Manego, alleges that the defendants conspired to orchestrate the denial of license applications, thereby producing an adverse anticompetitive effect. The defendants are David Willard, The Cape Cod Five Cents Savings Bank ("Bank"), the Orleans Board of Trade ("Board of Trade"), and its members. At times relevant to the events complained of, defendant Willard was both the President of the Board of Trade and an officer of the Bank. The case is now before the court on defendants' motions for summary judgment. *Fed.R.Civ.P. 56(b)*.

This case is the third round of litigation **[**2]** initiated by plaintiff relating to the denial of his application for entertainment and liquor licenses in the Town of Orleans, Massachusetts. In the first case, *Manego v. Board of Selectmen of the Town of Orleans*, C.A. No. 38824 ("*Manego I*"), the plaintiff sought a writ of mandamus from the Massachusetts Superior Court. Upon dismissal of that action, plaintiff instituted his second case, a civil rights action in this Court, *Manego v. Cape Cod Five Cents Savings Bank, et al*., C.A. No. 80-1406-MC (D.Mass. April 13, 1982) ("*Manego II*") which terminated in summary judgment for the defendants. The Court of Appeals affirmed. *Manego v. Cape Cod Five Cents Savings Bank, 692 F.2d 174 (1st Cir.1982)*.

In substance, the plaintiff's present complaint is based on and addresses the same events that were the subject of both the earlier cases. In early 1979, the Orleans Board of Selectmen denied the plaintiff's applications for the liquor and entertainment licenses necessary to operate a proposed disco. The plaintiff alleges that his application was denied as a result of a conspiracy among the defendants, including the Board of Trade, the Bank, and David Willard. The alleged purpose **[**3]** of the conspiracy was to allow the Bank, through **[*234]** a sham transaction, to offer similar entertainment at the nearby Lower Cape Sports Arena ("Arena") free of competition from Mr. Manego. Indeed, it is undisputed that an entertainment license was issued to the Arena after the denial of plaintiff's application.

Defendants Cape Cod Five Cents Savings Bank and David Willard were also defendants in Manego II. The Orleans Board of Trade was not named as a defendant in the earlier actions, and a reference to Willard's status as president of the Board was stricken from the complaint on defendant Bank's motion.

DEFENDANTS CAPE COD FIVE CENTS SAVINGS BANK AND DAVID WILLARD

Defendants Willard and the Bank move for summary judgment on grounds that the plaintiff's action is barred under the doctrine of *res judicata* and on the grounds that the alleged conspiratorial acts are protected by the *First Amendment*.

HN1[] Under the doctrine of *res judicata* [1] "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308* ***[**4]*** *(1980)*. *Res judicata* is a bar only where the subsequent case concerns the same cause of action or claim. *E.g.* , *Cromwell v. County of Sac, 94 U.S. 351, 4 Otto 351, 24 L. Ed. 195 (1876)*. With the adoption of the Federal Rules of Civil Procedure the concept of "cause of action" has broadened beyond that of a single legal issue narrowly drawn in a writ. *See* 18 J. Wright, Miller & Cooper, Federal Practice and Procedure § 4407 n. 20. The scope of preclusion has necessarily expanded with the definition of "claim" or "cause of action." *Id*.

[5]** The exact contours of claim preclusion are a subject of much discussion and disagreement. *See Id*., 18 J. Moore, Moore's Federal Practice para. 0.410[1]. The Restatement (Second) of Judgments (1982) adopts a "transactional" definition of the scope of issue preclusion:

> The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis the litigative unit and may not be split.

Restatement (Second) § 24 Comment a.

A number of other approaches to the preclusive scope of an earlier action have evolved in the case law. These include:

-- Whether the actions are based on identical grounds.
-- Whether the factual basis of both claims is the same.
-- Whether the essential facts and issues have been similarly presented in both cases.
-- Whether the same right is infringed by the same wrong.

-- **[**6]** Whether the wrong for which redress is sought is the same in both actions.
-- Whether the two actions are so similar that a different judgment in the second would destroy or impair rights or interests established in the first.

21 Federal Procedure Lawyers Edition § 51:201.

The Court of Appeals for the First Circuit has articulated a position closer to the broad restatement view. [2] *Isaac v.* ***[*235]*** *Schwartz, 706 F.2d 15 (1st Cir.1983)*, *Lovely v. Laliberte, 498 F.2d 1261 (1st Cir.1974)*. In *Lovely*, the Court of Appeals held that a state court action for possession barred a subsequent § 1983 action because the parties were the same and concerned the same "operative nucleus of fact." *Id. at 1263*. In *Isaac* the Court went further in its analysis:

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[1] In this area of law both courts and commentators have been inconsistent in their use of terminology. For purposes of clarity, I use the term "claim preclusion" to describe the preclusive effect of a judgment on the merits between parties or their privies in the same cause of action. "Issue preclusion" or "collateral estoppel" describes the preclusive effect of a prior judgment on an issue of law or fact in a different cause of action involving a party. "*Res judicata*" is a general term which applies to both types of preclusion.

[2] Because the prior actions in *Schwartz, Roy* and *Lovely* took place in state courts, state *Res Judicata* principles were applied. In *Schwartz* the Circuit court described the Massachusetts approach as "perfectly traditional," *Id*. at *706 F.2d at 17*, citing *Angel v. Bullington, 330 U.S. 183, 67 S. Ct. 657, 91 L. Ed. 832 (1947)*.

> Given the initial dismissal, the issue before us is simply whether the new complaint grows out of the same transaction or series of connected transactions (*Restatement (Second) of Judgments § 24*) as the old complaint. If so, the fact that appellant now asserts new legal theories . . . does not help him.

Supra at 17. Recently the Court of Appeals reaffirmed this approach in *Casagrande v. **[**7]** Agoritsas, 748 F.2d 47 (1st Cir.1984)*.

I note that plaintiff Manego alleges facts in this antitrust action which are strikingly similar to those in *Manego II*. The present complaint differs only in that it names additional defendants (the Board of Trade), and alleges that the Bank planned to offer entertainment at its facility similar to that which plaintiff Manego would have provided at his disco.

The plaintiff argues that because he did not learn of the Bank's plans until three days before summary judgment was granted, his action, based upon this new knowledge, is not barred. The plaintiff further argues that because a reference to Mr. Willard's status as president **[**8]** of the Board of Trade was stricken from the *Manego II* pleading on defendant Bank's motion, the antitrust issues could not have been raised in the earlier proceeding.

Despite the plaintiff's contentions it is apparent that the present case concerns the same transaction or nucleus of fact that was adjudicated in *Manego II*. The mere fact that plaintiff failed to discover the Bank's plans until shortly before a final judgment does not affect its preclusive effect. [3] ***HN2***[] A judgment bars all claims prior to its entry. *Lawlor v. National Screen Service, 349 U.S. 322, 328, 75 S. Ct. 865, 868, 99 L. Ed. 1122 (1955)*. Given the discovery and amendment provisions of the Federal Rules of Civil Procedure, plaintiff certainly could have obtained the necessary evidence to litigate his alternate theory in the first proceeding. Finally, the addition of new defendants in a subsequent action does not affect the preclusive effect of the judgment as to the original parties. *E.g. Scarpa v. Fair*, C.A. No. 82-2333, slip op. at 7 (D.Mass. April 11, 1983).

[9]** Accordingly, I rule that plaintiff's action against defendants Cape Cod Five Cents Savings Bank and David Willard is barred, and also rule that those defendants are therefore entitled to summary judgment.

DEFENDANT ORLEANS BOARD OF TRADE

The Board of Trade moves for summary judgment on the following grounds: that the doctrine of *res judicata* bars the present action, that there is no genuine issue of material fact relating to the allegations of conspiracy, and that the alleged conduct had no adverse effect on interstate commerce.

Because the Board of Trade was not a party to *Manego II*, claim preclusion principles do not bar the present action. Furthermore, those members of the Board of Trade who were parties to the prior action may not rely on claim preclusion insofar as they are presently named as defendants in a different capacity. 1B J. Moore, Moore's Federal Practice para. 01411[3]. ***HN3***[] **[*236]** Issue preclusion, on the other hand, may bar relitigation of issues actually litigated and necessary to a prior judgment in a different cause of action, and may be asserted defensively by a stranger to the original action. *Parklane Hosiery v. Shore, 439 U.S. 322, 99 S. Ct. **[**10]** 645, 58 L. Ed. 2d 552 (1979)*. Accordingly, the Board of Trade argues that the plaintiff should be estopped from relitigating the issue of conspiracy, claiming that it was resolved in favor of the defendants in *Manego II*.

Even an express finding that there was no conspiracy among the defendants in *Manego II* would not bar the present case. Because the Board of Trade was not a party to the earlier action the existence of a conspiracy involving the Board was not before the Court. I rule, therefore, that the prior judgment has no preclusive effect on this aspect of the present case.

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[3] The complaints in *Manego I* and *Manego II* both allege that an entertainment license was issued to the Bank after the denial of Mr. Manego's application. Plaintiff claims only that he did not know what the Bank's plans were for the licensed premises. Moreover, the events which plaintiff complained of took place primarily in the summer of 1979, years before judgment was entered.

The defendant's claim that there is no genuine issue of material fact is inexorably tied to what is commonly known as the *Noerr-Pennington* doctrine. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*; *United Mine Workers of America v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*. ***HN4***[] Generally stated, this doctrine exempts, with certain exceptions, concerted attempts to influence the passage or enforcement of laws from the sweep of antitrust legislation regardless of anticompetitive intent.

On the **[**11]** face of plaintiff's complaint, it is apparent that the allegations which relate to the Board of Trade involve attempts to influence governmental entities. Therefore, *Noerr-Pennington* applies unless the activity falls within one of the exceptions to the doctrine.

The complaint sets forth the following allegations. David Willard, an employee of the Bank and President of the Board of Trade, enlisted the "conspiratorial aid and assistance" of the members of the Board to "conduct sham opposition" to Manego's applications. He was assisted in so doing by a majority of the Board of Selectmen acting as members of the Board of Trade, who also exerted pressure on members of the Board to block the plaintiff's plan to operate a disco in Orleans. The purpose of this plan was to assure that the plaintiff's proposed disco would not be in a position to compete with the Bank, which planned to offer similar entertainment at the arena near plaintiff's site. In January 1979, the Board of Trade, at a meeting chaired by Willard and attended by two of the three Orleans selectmen, unanimously voted to oppose the plaintiff's license applications. Subsequently, Willard reported this vote to the full Board **[**12]** of Selectmen during the January 11 hearing on plaintiff's license applications. Approximately 100 persons attended the meeting, many as a result of the defendants plan to oppose the applications.

The Board of Selectmen denied plaintiff's application for a liquor license on February 8, 1979, and on February 14, 1979 held a hearing on the amusement license application. After conducting a traffic study which was intended only as a spurious excuse for denying the application, the selectmen denied the amusement license application, unlawfully, on the basis "of noise and traffic considerations." The subsequent development of some twenty-five businesses in the area, plus the issuance of an entertainment license to the Bank's arena, attest to the spurious nature of the selectmen's reasons for denial. Furthermore, intersections in the area have been improved and upgraded to handle this increased traffic.

In support of motions for summary judgment, defendants have resubmitted the affidavits of Herbert Wilcox, chairman of the Board of Selectmen, David Willard, and Charles Darling, a salesman at Nickerson Lumber Company, as well as excerpts from depositions of Willard, the plaintiff, and Paul **[**13]** Thiebert. Although several of the affidavits were presented for the earlier litigation in *Manego I* and *Manego II*, they are nevertheless pertinent to the issues in this case.

[*237] Herbert Wilcox states in his affidavit that he voted against the issuance of license because of the "likelihood of increased traffic hazards and noise pollution" and "gave some weight to the overwhelming sentiment of the citizens who [opposed the disco] and to the traffic committees report." As to the issuance of a similar license to the arena, Wilcox stated that the rink held a similar license previously which had not been renewed because of an oversight. He voted for issuance because of the rinks proven "benefits to the community" and because it had never caused inconvenience or concern.

Mr. Willard's affidavit states unequivocally that "I have never had, and, to my knowledge, no other Bank employee has had private conversations with any of the Selectmen concerning the proposed disco while Mr. Manego's applications . . . were under consideration," and "Nor did I . . . or the Bank conspire with Orleans officials to deny Mr. Manego the requested licenses [for] improper reasons."

Mr. Willard **[**14]** testified at deposition that two of the Selectmen were members of the Board of Trade, but did not recall if they were present at the meeting when the disco was discussed. He further testified that he did not urge members to attend the license hearing, and that he was, at the time, an officer of the Bank. A discussion was held as to the desirability of the disco, and all but two of the 70-75 persons present opposed the project. The next day, Willard attended the license hearing, and, as president of the Board of Trade, informed the selectmen of the vote.

Paul Thibert, who managed the rink for the Bank, testified at deposition that there was never any "discussion of any threat of competition [from Mr. Manego]" among the Bank or Board of Trade.

The substance of the materials offered by the defendants is that the selectmen denied the plaintiff's license applications for permissible reasons, that there were no private conversations between Willard and the Selectmen, and that there was no discussion between the Bank and the Board of Trade regarding Mr. Manego's disco as a potential competitor. These are denials of conspiracy from a selectman, the President of the Board of Trade, and **[**15]** an Officer and an employee of the Bank.

In support of his allegations, the plaintiff has produced several affidavits, extracts from depositions, and other evidence. The supplementary affidavit of Roger Hurlich, a builder reaffirms his earlier affidavit to the effect that the Bank had pressured Nickerson Lumber Company not to sell building supplies to Manego for the proposed disco. Even if taken as true, this evidence is not probative as to any conspiracy involving the Board of Trade. In response to an interrogatory requesting facts to support the allegations of conspiracy, the plaintiff answered, "The meetings of the Board of Trade with David Willard as President held in January, February and subsequently in 1979, as set forth in the minutes of said meetings, and as testified to in deposition by David Willard." These materials reveal only that meetings were held, that two selectmen may have attended, and that the disco project was discussed and voted upon. When asked at deposition for the basis of his allegations of a conspiracy involving the selectmen, the plaintiff responded that "any time the selectmen attend a meeting and they were a member of the board of trade, that was illegal. **[**16]** That's conspiracy." The plaintiff did testify that an unidentified person had told him that officials of the Bank, Board of Trade and Board of Selectmen had met to oppose the disco, but he does not know the mans name. When asked what the Board of Trade did that was wrong, he said, "it was wrong for them to come out against me in opening a business."

The materials under consideration must be evaluated in light of the particular requirements of the substantive law in this area, i.e. whether there is a genuine issue of material facts which would allow the plaintiff to recover under an exception to the *Noerr-Pennington* doctrine. The plaintiff contends that two exceptions apply: the so-called "sham" and "conspiracy" **[*238]** exceptions. ***HN5***[] The former, developed in a line of cases beginning with *California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*, applies where a party seeks not to influence public officials, but to "bar their competitors from meaningful access to adjudicatory tribunals and so to usurp the decisionmaking process." *Id. at 512, 92 S. Ct. at 612*. *Trucking Unlimited* concerned a series of "baseless repetitive **[**17]** claims" designed "to discourage and ultimately to prevent the [plaintiffs] from invoking the processes of the administrative agencies and courts," *Id. at 512, 92 S. Ct. at 612*. Subsequent developments have held that this exception also applies to a single suit filed for an improper purpose, such as generating publicity unfavorable to a competitor. *E.g., Energy Conservation v. Heliodyne, 698 F.2d 386 (9th Cir.1982)*. Activity disguised as petitioning which is simply an effort to interfere directly with a competitor is not protected under Noerr-Pennington. *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, 690 F.2d 1240 (9th Cir.1982)*, *cert. denied*, *459 U.S. 1227, 103 S. Ct. 1234, 75 L. Ed. 2d 468*. Other types of activity which fall within the "sham" exception are misrepresentation, *Israel v. Baxter Laboratories, Inc., 151 U.S. App. D.C. 101, 466 F.2d 272, 275-79 (D.C.Cir.1972)*; and threats or coercive measures to influence state officials, *Sacramento Coca-Cola Bottling Co. v. Teamsters Local 150, 440 F.2d 1096* (9th Cir.), cert. denied, *404 U.S. 826, 92 S. Ct. 57, 30 L. Ed. 2d 54 (1971)*. In order for the "sham" exception to apply:

> What is needed **[**18]** . . . is proof that the lobbyists subverted the integrity of the governmental process, that they effectively barred [the plaintiffs] access to these processes, or that the nature of these processes made their invocation something other than the "political activity" that was recognized by the *Noerr-Pennington-Trucking Unlimited* line of cases to be beyond the scope of the Sherman Act.

Federal Prescription Service v. American Pharmaceutical Ass'n, 214 U.S. App. D.C. 76, 663 F.2d 253, 262-63, (D.C.Cir.1981), *cert. denied*, *455 U.S. 928, 102 S. Ct. 1293, 71 L. Ed. 2d 472 (1982)*.

The plaintiff points to a suit filed by the Bank in opposition to the Selectmen's grant of a Building permit to Mr. Monego as such a "sham" abuse of process. He offers no evidence, or even the promise of evidence, that this suit was anything other than protected activity. Even with all inferences drawn most favorably to the plaintiff, there is no indication of misconduct which would rise to the level necessary to invoke the "sham" exception to *Noerr-Pennington*. At the core of this deficiency is the plaintiff's failure to produce any evidence that the lawsuit was instituted for an unlawful **[**19]** purpose. The fact that the suit was subsequently, withdrawn after the Bank's purported sale of the arena does not support an inference that the object of the suit was unlawful. Moreover, the "sham" was allegedly perpetrated by the Bank, and not the Board of Trade. Therefore, absent evidence that the Board of Trade conspired with the Bank as to this allegedly "sham" suit, it is irrelevant to the issue of the Board's immunity under Noerr-Pennington. The plaintiff has not offered such evidence, nor has he even alleged that a conspiracy existed with regard to the suit.

The plaintiff further contends that this case falls into the "sham" exception because he was deprived of "meaningful access" to governmental entities because his experience with those entities has "been replete with animosity and conflicts of interest." In his argument, plaintiff relies heavily upon *Clipper Exxpress v. Rocky Mountain Motor Tariff, 690 F.2d 1240 (9th Cir.1980)*, where summary judgment for defendants was reversed on appeal. That case is distinguishable from the present action in that the *Clipper* defendants admitted, for the purpose of summary judgment, that they had engaged in a conspiracy to file **[**20]** baseless protests for the sole purpose of eliminating competition. *Id. at 1250-51*. The Board of Trade has made no such admissions. Rather, its president has testified that the Board of Trade merely sponsored a discussion of the project and **[*239]** reported this discussion to the licensing authority at a public hearing. All that the plaintiff is able to show as to his experience with the Board of Selectmen is that he was unsuccessful in his repeated attempts to obtain the necessary licenses.

It is clearly established that ***HN6***[] conduct genuinely intended to influence governmental action is immune from the sweep of ***antitrust law*** and that whether the effort is genuine or a sham is an issue of fact. *Id. at 1253*. Here, the plaintiff has produced no evidence in opposition to the defendants' affidavits and deposition testimony to show, or to raise an inference, that the Board of Trade engaged in anything other than protected petitioning before the Board of Selectmen. ***HN7***[] A party opposing a motion for summary judgment may not rest on mere allegations, but must set forth specific facts showing that there is a genuine issue for trial. *Fed.R.Civ.P. 56(e)*. I rule that the plaintiff has failed **[**21]** to do so.

Alternatively, the plaintiff invokes ***HN8***[] the "conspiracy" exception to *Noerr-Pennington* which applies where government officials participate with private individuals in a scheme to restrain trade. *E.G.* *Duke & Co. v. Foerster, 521 F.2d 1277 (3rd Cir.1975)*. In support of this contention, the plaintiff relies upon the fact that two of the three members of the Board of Selectmen were also members of the Board of Trade, and that they were present at the Board of Trade meeting when Mr. Manego's proposal was discussed, and that other businesses were subsequently licensed in the same area.

HN9[] Generally, summary judgment is inappropriate in cases involving conspiracy claims because the existence or nonexistence of a conspiracy is essentially a factual issue to be decided by the jury. *Adickes v. S.H.* *Kress, 398 U.S. 144, 176, 90 S. Ct. 1598, 1618, 26 L. Ed. 2d 142 (1970)*. Summary judgment may also be inappropriate in antitrust cases where "motive and intent play leading roles." *Poller v. Columbia Broadcasting System, 368 U.S. 464, 472, 82 S. Ct. 486, 490, 7 L. Ed. 2d 458 (1962)*. There are, however, exceptions to the general rule. Where a moving party in an antitrust conspiracy **[**22]** case has shown that the facts relied upon in the opposing party's allegations are not susceptible to the interpretation which he sought to give them, *Rule 56(e)* puts the burden on the opposing party to produce evidence in support of his allegations. *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289-90, 88 S. Ct. 1575, 1592-93, 20 L. Ed. 2d 569 (1957)*. Furthermore, a plaintiff may not rely upon the promise of evidence of conspiracy to be developed by cross-examination at trial. *Manego v. Cape Cod Five Cents Savings Bank, et al, 692 F.2d 174 (1st Cir.1982)*, *Hahn v. Sargent, 523 F.2d 461 (1st Cir.1975)*, *cert. denied*, *425 U.S. 904, 96 S. Ct. 1495, 47 L. Ed. 2d 754 (1976)*.

Without express evidence of a conspiracy involving the Orleans Selectmen, the plaintiff must rely on inferences which may be drawn from their presence at the Board of Trade meeting and their subsequent actions. In an analogous situation, the Court of Appeals for the District of Columbia found that membership in an association was not evidence that regulatory officials were parties to an anticompetitive conspiracy. *Federal Prescription Service v. American Pharmaceutical Ass'n **[**23]** , 214 U.S. App. D.C. 76, 663 F.2d 253 (D.C.Cir.1981)*, *cert. denied*, *455 U.S. 928, 102 S. Ct. 1293, 71 L. Ed. 2d 472 (1982)*. The regulatory officials in *Federal Prescription* were members of the state pharmacy boards, and also members of a national pharmacists association which was engaged in a program of lobbying before the state boards to oppose licensing of mail-order pharmacies. The court of appeals reversed the district court finding of conspiracy as "clearly erroneous" and ruled that the defendants were entitled to judgment as a matter of law under the *Noerr-Pennington* doctrine. *Id*.

Therefore, I find that the Selectmen's membership in the Board of Trade is not probative of conspiracy. In addition, the subsequent grant of an entertainment license to the arena has been explained as a legitimate exercise of licensing authority. The plaintiff has failed to introduce any evidence to contradict this assertion.

[*240] Finally, I note that ***HN10***[] the type of conspiracy which the plaintiff must show to escape the *Noerr-Pennington* Doctrine differs from that normally associated with antitrust litigation. Where the alleged conspirators are potential competitors or other **[**24]** market participants, conspiracy may be inferred from their market behavior, a situation which renders the determination particularly unsuitable for summary judgment. In this case the plaintiff alleges a conspiracy including governmental officials. Consequently, there is no market behavior to draw inferences from. Those facts which the plaintiff has submitted are either not probative as a matter of law or are explained by the unrebutted denials of parties to the alleged conspiracy.

I rule accordingly that even with all inferences drawn most favorably to the plaintiff, there is no genuine issue of material fact which, if proven by the plaintiff, would constitute an exception to the *Noerr-Pennington* Doctrine. Therefore, I rule that the defendants are entitled to judgment as a matter of law on the antitrust count. Because this disposes of the federal question portion of the case, the state law claims are dismissed.

Order accordingly.

Information Resources, Inc. v. A.C. Nielsen Co.

United States District Court for the Northern District of Illinois, Eastern Division

November 28, 1984

No. 84 C 6704

Reporter

615 F. Supp. 125 *; 1984 U.S. Dist. LEXIS 21676 **; 1985-2 Trade Cas. (CCH) P66,897

INFORMATION RESOURCES, INC., Plaintiff, v. A. C. NIELSEN COMPANY, Defendant

Core Terms

marketing, products, manufacturers, customers, consumer, scanner, injunction, preliminary injunction, raw data, gathered, scanning, counting, packaged, retailer, audit, marketing research, selling, sales, consumer goods, data gathering, database, technology, antitrust, manual, merits, Food

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > Claims

Civil Procedure > ... > Justiciability > Standing > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN1[] **Clayton Act, Claims**

To establish standing under § 16 of the Clayton Act, the plaintiff must show a threatened loss or damage by a violation of the antitrust laws. Unless the products are competitive or potentially competitive, there can be no threatened loss or damage.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Public Interest

HN2[] Injunctions, Preliminary & Temporary Injunctions

When a district court is asked to issue a preliminary injunction it should consider four factors: (1) whether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; (2) whether the threatened injury to the plaintiff outweighs the threatened harm the injunction may inflict on the defendant; (3) whether the plaintiff has a reasonable likelihood of success on the merits; and (4) whether the issuance of the injunction will serve the public interest. The first factor boils down to whether damages can be ascertained in monetary terms.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN3[] Price Fixing & Restraints of Trade, Tying Arrangements

The elements of a tying violation which the plaintiff must show are: (1) two separate products or services; (2) substantial market power in the tying product; (3) use of the defendant's market power in the tying product to coerce sales of the tied product and; (4) foreclosure of sales by competitors in the tied product market.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN4[] Price Fixing & Restraints of Trade, Tying Arrangements

Products are separate for tie-in purposes if there are separate markets for each product.

Judges: [1]** James B. Parsons, United States District Court Judge.

Opinion by: PARSONS

Opinion

[*126] JAMES B. PARSONS, UNITED STATES DISTRICT COURT JUDGE

MEMORANDUM OPINION AND ORDER

Marketing research service is the furnishing of usable statistical information to the manufacturers of various goods about the movement of consumer goods through the retailers to the consumer. The raw data from which this information is processed is obtained by counting. Counting here involves the use of sampling traditional to the concept of survey research. Counting can be done at several points along the path taken by the goods from the manufacturer to the consumer; at the manufacturer's shipping dock, at the entrance and exit docks of the distributors or warehousemen, at the entrance doors and in the store rooms of the retailer, at the place of the shelving or deshelving of the goods in the store of the retailer, at the check-out counter of the retailer, and indeed, at the shelving or deshelving of the goods in the consumer's house.

The statistics that can be developed from the raw data, and the uses to which they can be put, vary in meaning, in reliability and in usefulness to the producer, both **[**2]** in his production planning and his advertising planning, according to the point or combination of points at which the raw data is gathered, the frequency with which it is gathered, and the selectivity of the sampling used in the system.

The defendant in this case, one of the old and experienced firms in the field of sampling survey research has devoted one of its departments to the selling of marketing research services to consumer goods manufacturers (principally manufacturers in the food industry) for over thirty years. With a wide spectrum sampling base, its research statistics were relatively predictable nationally. It concentrated on using raw material gathered from storage room and shelf counts in the retailer's stores. It did not use the manufacturer or warehousemen's storage racks or docks for raw data, and it did not use data gathered from the consumer. For purposes of counting it used human beings; its own employees going into the stores, counting from their shelves and store rooms, equipped with pencils and pads. Its product delivered to its manufacturing customer has been a substantial bi-monthly publication and interim advisories called the Nielsen Food Index.

Recently, **[**3]** an innovation called scanning developed in the grocery store business, and particularly in the chain supermarkets for helping to speed along the long lines at the checkout counters, and for improving accuracy in cash register totalling. Now there has developed among manufacturers universal product codes which they place on packaged products at the time their products are packaged. Then at the checkout counter these codes are picked up by an electric reading lamp when the package of goods are scraped across a glass screen. The process is called scanning.

Scanning has revolutionized the whole field of retail-exit counting and is particularly adaptable to the field of marketing research of consumer goods. Now scanners not only can make computer read-outs **[*127]** for the store itself but the information can be transferred to the computers of businesses engaged in marketing research of consumer goods.

The plaintiff in this case was founded seven years ago for the express purpose of selling a research service to manufacturers, using the process of scanning. It has several research products, the most important of which are BehaviorScan and the Marketing Fact Book. Its founder and Chief **[**4]** Executive Officer described his business in these words:

> "IRI began selling BehaviorScan its first product, in 1979. BehaviorScan is a test marketing service. IRI has installed scanning equipment which is able to read the Universal Product Codes (UPC) on packaged grocery products at the checkout facilities in supermarkets representing approximately 90% of the total supermarket sales volume in each of eight markets. IRI also has assembled consumer panels consisting of approximately 2,500 households in each market. By using this scanning equipment and IRI's computerized data collection system, IRI gathers household-by-household data on the purchasing behavior of its consumer panels, as well as data on the total sales of all UPC coded packaged goods made by the participating supermarkets. These data are used to analyze consumer response to new products, advertising, pricing strategies and other marketing techniques employed by manufacturers and distributors of packaged consumer goods.
>
> "Each of IRI's eight markets has cable television. IRI is able to direct alternate television advertising to its consumer panel households. Together with IRI's scanning data collection capability, **[**5]** this permits the measurement of direct consumer response to television advertising. IRI also administers, supervises and performs product test marketing and various other merchandising activities on behalf of its clients in each of the eight markets.
>
> "IRI developed and in 1981 began selling its second major product, the Marketing Fact Book (MFB). The MFB constitutes a separate and distinct application of IRI's scanning data base. Whereas BehaviorScan is essentially a test marketing service, the MFB tracks weekly sales results together with reports on ad features, store displays, shelf price reductions, coupons and other "causal" marketing information. These data enable packaged goods manufacturers to measure the effect of price changes and promotions on sales. The MFB data base also contains demographic data which permit manufacturers to determine the types of customers who are buying their products.
>
> "The MFB is issued in hard copy quarterly and annually, but its real value lies in the fact the the MFB data base is directly accessible by computer. IRI's clients can therefore use the vast MFB data base to perform frequent and timely analyses of product sales performance and **[**6]** measure the effect of price changes and promotions on sales. "

There are several other market research service companies which have been coming into this business during the last few years, using one type or another data base in an effort to produce a distinctive service product, but none of them including the plaintiff here has developed anything near the size of the defendant. One of them appeared by witness to testify on behalf of the plaintiff in this first case testing the products of marketing research in the scanner computer age. Several years ago, even Nielsen began experimenting with the use of scanner data in place of manual audit procedures, and set up two programs; one called Local Markets and one called National Markets.

What ignited this case, which, incidentally began with a Petition for a Temporary Restraining Order that enlarged to a Petition for a Preliminary Injunction, was the announcement in June of this year by Nielsen of its intention to dive full force into the use of scanners and scanner data while retaining as long as necessary its now antiquated **[*128]** system of manual audit, providing as the system developed more custom tailored research information **[**7]** for the manufacturer, standardizing research information output on a two week or semi-monthly basis instead of a bi-monthly basis, and providing in due course of time feed back information directly to the retailer. The defendant calls the program which was scheduled to get underway on November 1, 1984, an Enhanced Nielsen Food Index, and outlines what it calls a Transition Period of two to four years, beginning on November 1st.

Because of the alleged threat this poses to the business growth plans of the plaintiff, plaintiff has asked this court to stop Nielsen forthwith, and uses as the basis for the position it takes the "tying concept" of the Anti-Trust Laws. Plaintiff says that defendant is tying its new product to the old product over which it has exercised extensive economic power for many years and that this action is in Restraint of Competition, conduct proscribed by Section I of the Sherman Act. The language plaintiff seeks in the injunction describes distinctly the nature of this case:

> ". . . that Nielsen, its officers, agents, servants, employees and persons acting under its direction and authority or in concert with it are hereby enjoined and restrained from selling **[**8]** Nielsen Food Index (NFI) audit data, information generated from such data and/or consulting services relating thereto . . . on condition that purchasers also buy from Nielsen scanner data, information generated from scanner data and/or consulting services relating thereto. Nothing herein shall prevent Nielsen from selling scanner data separate and apart from audit data."

The key to this case is the answer in each instance to the question "when in this new and still developing industry is a product a new one or merely an improvement of an older one?" This question must first be answered because of the defendant's Motion to Dismiss based on the ground that the plaintiff lacks standing to sue; i.e., that the plaintiff is not in competition with the defendant. Defendant urges that plaintiff's product deals with consumer behavior whereas defendant's product deals exclusively with the movement of grocery items across the facilities of the retailer store. As has been stated before, the products we are dealing with are not the raw data nor the method of collecting it. The products are refined residuum of such raw data, refined by computer and programmed analysis, with reasoned explanations **[**9]** and projections made available periodically to the manufacturers of the food items we all of us eventually purchase in the stores.

It appears from the evidence that some part of plaintiff's distributed product includes information that is unique because plaintiff is in a position to translate for its customers facts about the purchasing and consuming practices and habits of consumers and their behavior patterns that can be processed or inferred from sales data supplied by consumers who agree to serve as "guinea pigs" for the plaintiff. At the same time, plaintiff is engaged in gathering and processing data from the stores themselves.

The statutory provision relevant to the issue of standing is section 16 of the Clayton Act, *15 U.S.C. § 26*. ***HN1***[] To establish standing under section 16, the plaintiff must show a "threatened loss or damage by a violation of the antitrust laws." Unless the products are competitive or potentially competitive, there can be no threatened loss or damage. In this relatively new and rapidly expanding industry, the concept of the product must not be drawn too narrowly. Simply because one company might measure only eight markets and another might measure hundreds **[**10]** of markets does not mean that the two companies do not compete now or will not compete in the future as the smaller company grows. Similarly, just because one company uses its raw data to provide a certain type of marketing information, say consumer behavior information, and another company uses its raw data to provide a different type of marketing information, say market share information, does not mean that **[*129]** those companies would not be potential competitors as their products grow and change with advances in technology. The concept of the product here must be painted with a broad brush. Both IRI and A.C. Nielsen provide information to manufacturers on product movement. The details of market share, market size, consumer profiles, etc. are merely small components of an overall picture given to a manufacturer to assess how its product is being received in the market place. To draw the line based on these details seems to be asking too much. Therefore, I find that on the issue of standing there is potential competition. Even at this time there is some actual competitive overlap in the area of pricing and promotional analysis, even though the analysis in those areas is reached **[**11]** by different procedures. As the products and data gathering techniques advance technologically there will continue to be potential competition in other areas as well. For these reasons, the case cannot be dismissed for lack of standing to sue.

I turn now to the plaintiff's request for a preliminary injunction. ***HN2***[] When a district court is asked to issue a preliminary injunction it should consider four factors: (1) whether the plaintiff will have an adequate remedy at law or will be irreparably harmed if the injunction does not issue; (2) whether the threatened injury to the plaintiff outweighs the threatened harm the injunction may inflict on the defendant; (3) whether the plaintiff has a reasonable likelihood of success on the merits; and (4) whether the issuance of the injunction will serve the public interest. *Libertarian Party v. Packard, 741 F.2d 981, 984 (7th Cir. 1984)*.

The first factor boils down to whether damages can be ascertained in monetary terms. I am unconvinced by plaintiff's assertion that damages would be unreasonably difficult to calculate. If necessary IRI can survey any customer which leaves them and see if they went to A.C. Nielsen for marketing research analysis. **[**12]** Alternatively, IRI could poll every new customer or even each existing customer of Nielsen and see if these customers would have used the services of IRI were it not for the enhancement in Nielsen's product. In short, damages are ascertainable.

The second factor also favors Nielsen. If a preliminary injunction were to issue at this time, it would cause Nielsen's $25 million in improvements to be held in abeyance. Customers would have to be apprised of the injunction and contracts would have to be halted or rewritten. If on the other hand, an injunction were not issued and this were later found to have been erroneous, the harm to IRI could be calculated in damages and any long-term contracts between Nielsen and its customers could be halted at that time. Thus, the injury to the defendant, if an injunction were to issue, would outweigh the injury to the plaintiff if such an injunction were not issued.

The third factor is the critical factor in this case. The plaintiff must prove a reasonable likelihood of success on the merits. In order to prove this likelihood of success, the plaintiff must show the court that there is a reasonable probability that the elements of a tying violation **[**13]** would be established at a trial on the merits. ***HN3***[] The elements of a tying violation which the plaintiff must show are: (1) two separate products or services; (2) substantial market power in the tying product; (3) use of Nielsen's market power in the tying product to coerce sales of the tied product and; (4) foreclosure of sales by competitors in the tied product market. *Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 1556-56, 80 L. Ed. 2d 2 (1984)*.

The basis on which all four factors must rest is whether there are two separate products, for without a "tying" and a "tied" product the last three factors are meaningless. It is this single factor on which plaintiffs have not shown a convincing case at this time. A. C. Nielsen provides its customers with marketing information. The data gathering method it has used for years has involved manual audits. Now, to take advantage of advanced technology, **[*130]** it is using scanners to gather the same data. This advance in technology will allow the data to be gathered more quickly and more economically. Admittedly, because of the increase in speed with which Nielsen is able to receive the data, other types **[**14]** of marketing analysis will be possible. The product must be viewed broadly, as stated earlier. It cannot be broken down into each miniscule type of analysis but rather must be looked at as an overall service. This broad view of the product which allows the plaintiff to have standing works against the plaintiff on the question of whether there are two separate products. This new technique of data gathering is a product improvement. The data generated by scanners and the data generated by manual audits may be used separately and in conjunction with each other during this time of transition.

> "The practice has been to classify a product as a single product if there are obvious economies of joint provision, as in the left-shoe-right-shoe example. " *Jack Walters & Sons v. Morton Building Inc., 737 F.2d 698, 703 (7th Cir. 1984)*.

Here, there are obvious economies of joint provision during this time.

> "Very few products today are produced like a statue that is made by pouring molten bronze into a cast --the ultimate single product. But to hold therefore that every composite product is a tie-in, subject to the hostile scrutiny to which ***antitrust law*** still subjects **[**15]** tie-ins, would place industry under a vast antitrust cloud and has been rejected." *Id*.

A different approach to the question of separate products was taken in the *Jefferson Parish* case where the Supreme Court held that ***HN4***[] products are separate for tie-in purposes if there are separate markets for each product. *104 S. Ct. at 1562-63*. Here, Nielsen has been losing NFI customers apparently because of the outmoded method of data gathering which results in a greater delay from the time of data gathering to the time of the release of the marketing information. It is to keep up with the customer demands for the use of the new technology that Nielsen is attempting to improve its product in this way. Customer demand, whether overt or implied by loss of customers to a scanner-based service such as SAMI, shows that it is the same market demanding the improved service.

> "The answer to the question whether petitioners have utilized a tying arrangement must be based on whether there is a possibility that the economic effect of the arrangement is that condemned by the rule against tying -- that petitioners have foreclosed competition on the merits in a product market distinct from **[**16]** the market for the tying item." *Jefferson Parish v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 1563, 80 L. Ed. 2d 2 (1984)*.

Here, the markets are not clearly distinct. Realistically, the product must not be reduced to its smallest elements merely to create separate markets.

In sum, the plaintiff has not yet shown a convincing case that there is a reasonable likelihood of success on the merits because it has not been able to show that the enhanced NFI is a product or service separate from the NFI as it had existed through the use of manual audits only.

I turn now to the final factor to be considered in the issuance of a preliminary injunction: whether the issuance of such an injunction will serve the public interest. IRI is currently the leader in scanning-generated market research information. IRI is expanding into larger market areas and I have some concern that this request for a preliminary injunction is to "buy time" so that that expansion can proceed without interference. This, of course, would not be a proper use of the antitrust laws. For these reasons and because it appears unlikely that a tying case can be made out at this time, I find that the issuance of a preliminary **[**17]** injunction would not serve the public interest.

The plaintiff's request for a preliminary injunction is denied at this time. The parties may choose to request the court to certify this case before proceeding with further discovery and preparation for trial.

[Kartell v. Blue Shield](#)

United States Court of Appeals for the First Circuit

November 28, 1984, Decided

Nos. 84-1241, 84-1290, 84-1303

Reporter
749 F.2d 922 *; 1984 U.S. App. LEXIS 16376 **; 1984-2 Trade Cas. (CCH) P66,300

JAMES P. KARTELL, M.D., ET AL., Plaintiffs, Appellees, v. BLUE SHIELD OF MASSACHUSETTS, INC., Defendant, Appellant; JAMES P. KARTELL, M.D., ET AL., Plaintiffs, Appellees, v. BLUE SHIELD OF MASSACHUSETTS, INC., ET AL., Defendants, Appellees. MASSACHUSETTS MEDICAL SOCIETY, ET AL., Intervenors/Plaintiffs, Appellants; JAMES P. KARTELL, M.D., ET AL., Plaintiffs, Appellees, v. BLUE SHIELD OF MASSACHUSETTS, INC., ET AL., Defendants, Appellees. COMMISSIONER OF INSURANCE, Intervenor/Defendant, Appellant

Prior History: [1]** CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. Andrew A. Caffrey, U.S. District Judge].

Core Terms

prices, buyer, district court, billing, antitrust, market power, ban, anti trust law, subscribers, patients, insurer, buy, seller, competitors, bargain, reimbursement, regulation, charging, percent, courts, cases, predatory, reasons, health insurance, Sherman Act, horizontal, monopolist, suppliers, costs, low price

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

HN1[] **Antitrust & Trade Law, Sherman Act**

To find an unlawful restraint, the court looks at the accused company as if it were a "third force, " intervening in the marketplace in a manner that prevents willing buyers and sellers from independently coming together to strike price/quality bargains.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

HN2[] **Antitrust & Trade Law, Sherman Act**

An insurer may lawfully engage in the buying of goods and services needed to make the insured whole.

Antitrust & Trade Law > Sherman Act > General Overview

HN3[] Antitrust & Trade Law, Sherman Act

Courts forbid an organization from buying a good or service in cases where 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.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Insurance Law > Claim, Contract & Practice Issues > Premiums > Refunds

HN4[] Price Fixing & Restraints of Trade, Horizontal Market Allocation

Courts generally approve of contracts in which those who directly provide goods or services to insureds have agreed to cap or forego completely additional charges to those insureds in return for direct payment by the insurer.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN5[] Actual Monopolization, Anticompetitive & Predatory Practices

Antitrust laws interfere with a firm's freedom to set even uncompetitive prices only in special circumstances, where, for example, a price was below incremental cost. Such a "predatory" price harms competitors, cannot be maintained, and is unlikely to provide consumer benefits.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] Monopolies & Monopolization, Actual Monopolization

Mere monopoly pricing is not a violation of the Sherman Act. *15 U.S.C.S. § 2*. More than monopoly power is necessary to make the charging of a noncompetitive price unlawful.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Evidence > Burdens of Proof > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] Monopolies & Monopolization, Actual Monopolization

Where a monopoly is unlawful, antitrust courts typically seek to change the market's structure, to break up or render impotent the monopoly power that violates the Sherman Act, *15 U.S.C.S. § 2*. Courts only rarely try to supervise the price bargain directly. And, where monopoly power is regulated, the regulator, not the court, bears the burden of determining whether prices are reasonable.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

HN8[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Normally the choice of what to seek to buy and what to offer to pay is the buyer's. And, even if the buyer has monopoly power, an antitrust court (which might, in appropriate circumstances, restructure the market) will not interfere with a buyer's non-predatory determination of price.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN9[] **Monopolies & Monopolization, Actual Monopolization**

A legitimate buyer is entitled to use its market power to keep prices down.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > Employer & Physician Covenants

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN10[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

A horizontal agreement among competitors is typically unlawful because the competitors prevent themselves from making independent decisions about the terms as to which they will bargain.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Horizontal Market Allocation

Healthcare Law > Healthcare Litigation > Antitrust Actions > Physicians

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

HN11[] **Price Fixing & Restraints of Trade, Horizontal Market Allocation**

The unlawfulness of a horizontal agreement does not necessarily depend upon the undesirability of the contractual term as to which competitors agree not to compete.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

HN12[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

A buyer, as well as a seller, can possess significant market power; and courts have held that agreements to fix prices -- whether maximum or minimum -- are unlawful.

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN13[] **Public Enforcement, State Civil Actions**

Strict antitrust scrutiny is less likely to be necessary to prevent the unwarranted exercise of monopoly power where the price system at issue is one supervised by state regulators.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN14[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

A firm generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.

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James vanR. Springer, **[**2]** Dickstein, Shapiro & Morin, Stanley V. Ragalevsky, Christopher E. Nolin, and Warner & Stackpole, for James P. Kartell, M.D., et al.

Judges: Campbell, Chief Judge, Cowen, * Senior Circuit Judge, and Breyer, Circuit Judge.

Opinion by: BREYER

* Of the U.S. Court of Appeals for the Federal Circuit, sitting by designation."

Opinion

[*923] BREYER, Circuit Judge

Blue Shield pays doctors for treating patients who are Blue Shield health insurance subscribers, but only if each doctor promises not to make any additional charge to the subscriber. The basic issue in this case is whether this Blue Shield practice -- called a "ban on balance billing" -- violates either Sherman Act *§ 1* forbidding agreements "in restraint of trade," *15 U.S.C. § 1*, or Sherman Act *§ 2* forbidding "monopolization" and "attempts to monopolize," *id. § 2*. The district court, *582 F. Supp. 734 (D. Mass. 1984)*, held that the practice constituted an unreasonable restraint of trade in violation of *section 1*. We conclude that the practice does not violate either section of the Sherman Act; and we reverse the district court.

As the district court noted, the relevant facts are **[**3]** "not . . . generally . . . disputed." Blue Shield provides health insurance for physician services while its sister, Blue Cross, insures against hospital costs. The consumers of Blue Shield insurance, at least those who buy "full service" prepaid medical benefits, can see any "participating doctor," *i.e.*, a doctor who has entered into a standard Participating Physician's Agreement with Blue Shield. (If a doctor has not signed the Agreement, Blue Shield will reimburse him only if he provides emergency or out-of-state services.) Under the standard agreement, a participating doctor promises to accept as payment in full an amount determined by Blue Shield's "usual and customary charge" method of compensation. The district court found that the method has evolved, through the use of various "capping" devices, towards payment of a "fixed fee, " determined by Blue Shield, for each particular type of service. Blue Shield pays this amount directly to the doctor; the patient pays nothing out of his own pocket and therefore receives no reimbursement.

[*924] The district court also found that Blue Shield provides some form of health insurance to about 56 percent of the Massachusetts **[**4]** population. (About 45 percent has coverage carrying a "balance billing " ban.) If one subtracts from the total population universe those Massachusetts residents who rely on government sponsored health care (*e.g.*, Medicare or Medicaid), then Blue Shield (and Blue Cross) provide insurance coverage for about 74 percent of the rest, namely those Massachusetts residents who *privately* insure against health costs. (About 23 percent of that group have coverage with commercial insurers; and about 4 percent subscribe to Health Maintenance Organizations.) Virtually all practicing doctors agree to take Blue Shield subscribers as patients and to participate in its fee plan. Blue Shield payments made under that plan account for about 13 to 14 percent of all "physician practice revenue."

The district court found that, because of the large number of subscribers, doctors are under "heavy economic pressure" to take them as patients and to agree to Blue Shield's system for charging the cost of their care. The court believed that the effect of this payment system, when combined with Blue Shield's size and buying power, was to produce an unreasonably rigid and unjustifiably low set of prices. **[**5]** In the court's view, the fact that doctors cannot charge Blue Shield subscribers more than the Blue Shield payment-schedule amounts interferes with the doctors' freedom to set higher prices for more expensive services and discourages them from developing and offering patients more expensive (and perhaps qualitatively better) services. For these and related reasons, the district court held that Blue Shield's ban on "balance billing " unreasonably restrains trade, and thereby violates Sherman Act *§ 1*. Blue Shield appeals from this holding. The plaintiff doctors cross-appeal from other rulings of the district court in Blue Shield's favor.

On these appeals, the parties raise a host of issues not directly related to the antitrust merits, including the claim that a recently enacted state law, Mass. St. 1984, ch. 192, *§ 1*, renders the case moot by immunizing Blue Shield's "balance billing ban" from the reach of the antitrust laws. The "mootness" issue, however, is not a simple one. And even if we accepted the mootness claim, the new statute may not immunize the defendants from treble-damage liability for past conduct. In view of these legal and practical problems, and the fact that **[**6]** this case has been pending in the federal courts for more than seven years, we believe it simpler and more appropriate to proceed directly to the antitrust merits, which, on our view of the case, are dispositive.

I

We disagree with the district court because we do not believe that the facts that it found show an unreasonable restraint of trade. We can best explain our reasons by first discussing the basic antitrust issue in general terms, then turning to the specific, detailed arguments advanced by the parties, and finally noting several special reasons here that militate against a finding of liability.

A

We disagree with the district court's finding of "restraint." ***HN1***[] To find an unlawful restraint, one would have to look at Blue Shield as if it were a "third force, " intervening in the marketplace in a manner that prevents willing buyers and sellers from independently coming together to strike price/quality bargains. ***Antitrust law*** typically frowns upon behavior that impedes the striking of such independent bargains. The persuasive power of the district court's analysis disappears, however, **[**7]** once one looks at Blue Shield, not as an inhibitory "third force, " but as itself the purchaser of the doctors' services. *See Group* *Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 214, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979)* (direct reimbursement to participating pharmacies for subscribers' drugs " merely [an] arrangement[] for the purchase of goods and services by Blue **[*925]** Shield"). ***Antitrust law*** rarely stops the buyer of a service from trying to determine the price or characteristics of the product that will be sold. Thus, the more closely Blue Shield's activities resemble, in essence, those of a purchaser, the less likely that they are unlawful.

Several circuits have held in antitrust cases that insurer activity closely analogous to that present here amounts to purchasing, albeit for the account of others. And, they have held that ***HN2***[] an insurer may lawfully engage in such buying of goods and services needed to make the insured whole. The Second **[**8]** Circuit has held lawful a Blue Shield plan requiring pharmacies to accept Blue Shield reimbursement as full payment for drugs they supply to Blue Shield subscribers. *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc., 675 F.2d 502 (2d Cir. 1982)*. The Third Circuit has allowed a hospital cost insurer (Blue Cross) to reimburse hospitals directly (and apparently completely) for services to subscribers. *Travelers Insurance Co. v. Blue Cross of Western Pennsylvania, 481 F.2d 80* (3d Cir.), *cert. denied*, *414 U.S. 1093, 38 L. Ed. 2d 550, 94 S. Ct. 724 (1973)*. The Seventh Circuit has permitted auto insurance companies to furnish direct reimbursement to repair shops as payment for the repair services provided to policyholders. *Quality Auto Body, Inc. v. Allstate Insurance Co., 660 F.2d 1195 (7th Cir. 1981)*, *cert. denied*, *455 U.S. 1020, 72 L. Ed. 2d 138, 102 S. Ct. 1717 (1982)*.

At the same time, the facts before us are unlike those in cases where ***HN3***[] courts have forbidden an "organization" **[**9]** to buy a good or service -- cases in which the buyer was typically a "sham" organization seeking only to combine otherwise independent buyers in order to suppress their otherwise competitive instinct to bid up price. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 92 L. Ed. 1328, 68 S. Ct. 996 (1948)* (horizontal price-fixing by purchasers held *per se* illegal); *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)* (same); *National Macaroni Manufacturers Association v. Federal Trade Commission, 345 F.2d 421 (7th Cir. 1965)* (competitors in trade association fixing quantity of scarce component to be used in macaroni held *per se* illegal). No one here claims that Blue Shield is such a "sham" organization or anything other than a legitimate, independent medical cost insurer. *But cf.* *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, 624 F.2d 476 (4th Cir. 1980)* (Blue Shield found to be a combination, not of policyholders, but of *physicians*), *cert. denied*, *450 U.S. 916, 101 S. Ct. 1360, 67 L. Ed. 2d 342 (1981)*. **[**10]**

Once one accepts the fact that, from a commercial perspective, Blue Shield in essence "buys" medical services for the account of others, the reasoning underlying the Second, Third, and Seventh Circuit views indicates that the ban on balance billing is permissible. To understand that reasoning, consider some highly simplified examples. Suppose a father buys toys for his son -- toys the son picks out. Or suppose a landlord hires a painter to paint his tenant's apartment, to the tenant's specifications. Is it not obviously lawful for the father (the landlord) to make clear to the seller that the father (the landlord) is in charge and will pay the bill? Why can he not then forbid the seller to charge the child (the tenant) anything over and above what the father (the landlord) pays -- at least if the seller wants the buyer's business? To bring the example closer to home, suppose that a large manufacturing company hires doctors to treat its employees. Can it not insist that its doctors not charge those employees an additional sum over and above what the company agrees to pay them to do the job? In each of these instances, to refuse to allow the condition would disable the buyer **[**11]** from holding the seller to the price of the contract. Yet, if it is lawful for the buyer to buy for the third party in the first place, how can it be unlawful to bargain for a price term that will stick?

Given this argument, it is not surprising the courts have unanimously upheld contracts **[*926]** analogous in various degrees to the one at issue here -- ***HN4***[] contracts in which those who directly provide goods or services to insureds have agreed to cap or forego completely additional charges to those insureds in return for direct payment by the insurer. In addition to *Medical Arts* and *Travelers, supra*, see *Royal Drug Co. v. Group Life and Health Ins. Co., 737 F.2d 1433 (5th Cir. 1984)* ($2 cap on balance billing for drugs); *Webster County Memorial Hospital, Inc. v. United Mine Workers, 175 U.S. App. D.C. 392, 536 F.2d 419 (D.C. Cir. 1976)* (hospital agrees to ban on balance billing in exchange for direct payment by union trust fund); *Proctor v. State Farm Mutual Auto Insurance Co., 218 U.S. App. D.C. 289, 675 F.2d 308, 337 (D.C. Cir. 1982)* **[**12]** (auto repair shops agree to provide repairs at rate set by insurance company), *cert. denied*, *459 U.S. 839, 103 S. Ct. 86, 74 L. Ed. 2d 81 (1982)*; *Sausalito Pharmacy, Inc. v. Blue Shield of California, 544 F. Supp. 230 (N.D. Cal. 1981)*, *aff'd per curiam*, *677 F.2d 47* (9th Cir.) (cap on balance billing by participating pharmacies), *cert. denied*, *459 U.S. 1016, 74 L. Ed. 2d 510, 103 S. Ct. 376 (1982)*; *Feldman v. Health Care Service Corp., 562 F. Supp. 941 (N.D. Ill. 1982)* (same); *Pennsylvania Dental Association v. Medical Service Association of Pennsylvania, 574 F. Supp. 457 (M.D. Pa. 1983)*, *aff'd* *745 F.2d 248 (3rd Cir. 1984)* (ban on balance billing for dental services); *Michigan State Podiatry Association v. Blue Cross and Blue Shield of Michigan*, 1982-2 Trade Cas. (CCH) para. 64,801 (E.D. Mich. 1982); *Blue Cross and Blue Shield of Michigan, Inc. v. Michigan Association of Psychotherapy Clinics, Inc.*, 1980-2 Trade Cas. (CCH) para. 63,351 (E.D. Mich. 1980); *Davidowitz v. San Diego County Dental Society*, 1983-1 Trade Cas. (CCH) para. 65,231 (S.D. Cal. 1983). **[**13]** Scholarly commentators believe that these cases were correctly decided. *See, e.g.*, P. Areeda, *Antitrust Analysis* 530-31 (1981) ("It is difficult to see what could make [such an] arrangement anticompetitive"). *See also* Comment, 75 Nw. U.L. Rev. 506 (1980).

Two arguments might be made in an effort to distinguish these cases. First, the doctors may claim that Blue Shield is not, in essence, a buyer. Traditionally, doctors have opposed financial arrangements that involved the "selling" of their services to anyone but the patient. *See* Comment, 63 Yale L.J. 938, 978-80 (1954). And medical associations in the past sometimes have argued that selling services to third parties or related "corporate practice " might interfere with the absolute ethical obligation that a doctor owes to the patient. *Id.*, (citing, *e.g.,* AMA, Principles of Medical Ethics, ch. 3, art. 5, § 4). Medical associations have not, however, opposed reimbursement by third party insurers, such as Blue Shield, a fact that arguably suggests an important distinction between "insurance reimbursement " and "purchasing."

In our view, however, any such distinction is irrelevant **[**14]** for antitrust purposes. The relevant antitrust facts are that Blue Shield pays the bill and seeks to set the amount of the charge. Those facts led other courts in similar circumstances to treat insurers as if they were "buyers." The same facts convince us that Blue Shield's activities here are *like* those of a buyer. Whether for ethical, medical, or related professional purposes Blue Shield is, or is not, considered a buyer is beside the point. We here consider only one specific argued application of the antitrust laws and we do not suggest how Blue Shield ought to be characterized in any other context.

Second, the doctors seek to distinguish these precedents by pointing to an important district court finding either not present or not discussed in depth in these other cases. The district court here found that Blue Shield is a buyer with significant "market power " -- i.e., the power to force prices below the level that a freely competitive market would otherwise set. They argue that Blue Shield's "market power " makes a significant difference. We do not agree.

At the outset, we note that Blue Shield disputes the existence of significant "market power. " It points out that **[**15]** the district court relied heavily upon participation by 99 percent of all Massachusetts doctors in **[*927]** Blue Shield's program, as "prov[ing] . . . Blue Shield's economic power." But, Blue Shield says, this by itself proves little. Participating in Blue Shield's program does not stop doctors from taking other patients or from charging those other patients what they like. As long as Blue Shield's rates are even marginally remunerative, 99 percent of all doctors might sign up with Blue Shield if it had only ten policyholders or ten thousand instead of several million.

Blue Shield adds that the record does not prove the existence of the single harm most likely to accompany the existence of market power on the buying side of the market, namely lower seller output. *See* P. Areeda, *supra* at 343 n. 20; R. Posner, *Antitrust*, 5-14, 91-3 (1974). Indeed, here the district court found that the supply of doctors in Massachusetts has "increased steadily during the past decade." Blue Shield also claims that whatever power it possesses arises from its ability as an "expert" to prevent doctors from charging unknowledgeable patients *more* than a free (and informed) market **[**16]** price. *See generally* Comment, 75 Nw. U.L. Rev., *supra*.

On the other hand, several doctors testified that low prices discouraged them from introducing new highly desirable medical techniques. And, they argue that fully informed patients would have wanted to pay more for those techniques had they been allowed to do so.

To resolve this argument about the existence of market power -- an issue hotly debated by the expert economists who testified at trial -- would force us to evaluate a record that the district court described as "two competing mountains of mostly meaningless papers." Rather than do so, we shall assume that Blue Shield possesses significant market power. We shall also assume, but purely for the sake of argument, that Blue Shield uses that power to obtain "lower than competitive " prices.

We next ask whether Blue Shield's assumed market power makes a significant legal difference. As a matter of pure logic, to distinguish the examples previously mentioned one must accept at least one of the following three propositions: One must believe either (1) that the law forbids a buyer with market power to bargain for "uncompetitive" or "unreasonable" prices, or (2) **[**17]** that such a buyer cannot buy for the account of others, or (3) that there is some relevant difference between obtaining such price for oneself and obtaining that price for others for whom one can lawfully buy. In our view, each of these propositions is false, as a matter either of law or of logic.

First, the ***HN5***[] antitrust laws interfere with a firm's freedom to set even uncompetitive prices only in special circumstances, where, for example, a price was below incremental cost. Such a "predatory" price harms competitors, cannot be maintained, and is unlikely to provide consumer benefits. *Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983)*. *Cf. United States v. Aluminum Co. of America, 148 F.2d 416, 437-438 (2d Cir. 1945)* (vertically-integrated aluminum monopolist cannot both charge an unreasonably high price for ingots *and* set a fabricated product price too low for competing fabricators to survive). Ordinarily, however, even a monopolist is free to exploit whatever market power it may possess when that exploitation takes the form of **[**18]** charging uncompetitive prices. As Professor Areeda puts it, ***HN6***[] "Mere monopoly pricing is not a violation of the Sherman Act." P. Areeda, ***Antitrust Law*** § 710 (Supp. 1982). The Second Circuit has recently held that "more than monopoly power is necessary to make the charging of a noncompetitive price unlawful." *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 297 (2d Cir. 1979)*, *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*. *Cf. Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*.

The reasons underlying this principle include a judicial reluctance to deprive the lawful monopolist (say a patent monopolist) of its lawful rewards, and a judicial recognition of the practical difficulties of determining what is a "reasonable," or "competitive," price. *See* 2 P. Areeda & D. Turner, ***Antitrust Law*** §§ 512-14 (1978); 3 *id.* **[*928]** para. 710; R. Bork, *The Antitrust Paradox*, 125-29 (1978). As the Supreme Court stated in a different context,

> The **[**19]** reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. . . . We should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable -- a determination which can be satisfactorily made only after a complete survey of our economic organizations and a choice between rival philosophies.

United States v. Trenton Potteries Co., 273 U.S. 392, 397-98, 71 L. Ed. 700, 47 S. Ct. 377 (1927). Thus, ***HN7***[] where a monopoly is unlawful, antitrust courts typically seek to change the market's structure, "to break up or render impotent the monopoly power which violates the Act." *United States v. Aluminum Co. of America, 91 F. Supp. 333, 334 (S.D.N.Y. 1950)* (citing *Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 128-29, 92 L. Ed. 1245, 68 S. Ct. 947 (1948))*. *See also* *Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*. **[**20]** Courts only rarely try to supervise the price bargain directly. 3 P. Areeda & D. Turner, *supra*, para. 710 n. 2. *Cf.* *United States v. Glaxo Group Ltd., 410 U.S. 52, 35 L. Ed. 2d 104, 93 S. Ct. 861 (1973)* (ordering compulsory patent licensing "at reasonable charges"). And, where monopoly power is regulated, the regulator, not the court, bears the burden of determining whether prices are reasonable. *See, e.g.*, Mass. Gen. Laws ch. 164, §§ 93-94 (state regulation of gas and electric rates).

The district court did not suggest here that the prices subject to the "balance billing " ban were "predatory." Nor (with one possible exception, see slip op. pp. 30-32) do the parties point to evidence of any price below anyone's "incremental cost. " *Cf.* *Barry Wright Corp. v. ITT Grinnell Corp., supra.* Rather, the district court suggested that Blue Shield's prices were "uncompetitively low, " "unreasonably low, " lower than the doctors might have charged to individual patients lacking market power. That is to say, Blue Shield obtained prices that reflected its market power. For the reasons just mentioned then, if Blue Shield had simply purchased those **[**21]** services for itself, the prices paid, in and of themselves, would not have amounted to a violation of the antitrust laws. *Berkey Photo, Inc. v. Eastman Kodak Co., supra*; 3 P. Areeda & D. Turner, *supra*, para. 710.

Second, as we previously mentioned, there is no law forbidding a legitimate insurance company from itself buying the goods or services needed to make its customer whole. The cases that we have cited are unanimous in allowing such arrangements. The rising costs of medical care, the possibility that patients cannot readily evaluate (as competitive buyers) competing offers of medical service, the desirability of lowering insurance costs and premiums, the availability of state regulation to prevent abuse -- all convince us that we ought not create new potentially far-reaching law on the subject. And, the parties have not seriously argued to the contrary.

Third, to reject the first two propositions is, as a matter of logic, to reject the third. If it is lawful for a monopoly buyer to buy for the account of another, how can it be unlawful for him to insist that no additional charge be made to that other? To hold to the contrary is, in practice, to deny **[**22]** the buyer the right to buy for others, for the seller would then be free to obtain a different price from those others by threatening to withhold the service. This reasoning seems sound whether or not the buyer has "market power. "

In essence, then, the lawfulness of the term in question stems from the fact that it is an essential part of the price bargain between buyer and seller. Whether or not that price bargain is, in fact, reasonable is, legally speaking, beside the point, even in the case of a monopolist. As Blue Shield stresses in its brief, health maintenance organizations, independent practice associations, and preferred provider organizations **[*929]** all routinely agree with doctors that the doctors will accept payment from the plan as payment in full for services rendered to subscribers. We can find no relevant analytical distinction between this type of purchasing decision and the practice before us -- even on the assumption that Blue Shield possesses market power.

B

We now consider more closely the specific arguments raised by the district court and the parties to show that Blue Shield's "balance billing ban " is anticompetitive in practice. The Rodkey plaintiffs' **[**23]** brief sets forth in summary form the following allegedly harmful effects of the ban:

(1) Price competition among physicians for services covered by Blue Shield's service benefit policies is "virtually eliminated."

(2) Doctor's prices have tended to cluster around Blue Shield's "maximum price levels."

(3) Doctors wanting to compete by offering innovative or "premium" services are inhibited from doing so because Blue Shield's pricing structure assumes that physicians' services are fungible and mandates the same price ceilings for virtually all physicians.

(4) Doctors just entering practice are discouraged from doing so by particularly low levels of Blue Shield reimbursement.

(5) Blue Shield's low prices lead doctors to charge higher prices to others.

(6) Blue Shield discourages doctors from charging others low prices by insisting that its subscribers be given the benefit of any such low prices.

(7) Blue Shield's pricing system discourages doctors from trying out more expensive services that could bring about lower total medical costs, *e.g.*, a "colonoscopy with polypectomy," an expensive service that is nonetheless cheaper than the surgery that would otherwise be needed **[**24]** to cure the patient.

(8) Blue Shield, by reason of its pricing practices, has been able to attract more subscribers, extending its "competitive edge" over other health insurers, and increasing its dominance in the health insurance business.

The first seven of these arguments attack the price term in the agreement between Blue Shield and the doctors. To argue that Blue Shield's pricing system is insufficiently sensitive to service differences, or that it encourages high costs, or does not give the patients what they really need, or to claim that the buyer is making a bad decision is like arguing that the buyer of a fleet of taxicabs ought to buy several different models, or allow the seller to vary color or horsepower or gearshift because doing so either will better satisfy those passengers who use the fleet's services, or will in the long run encourage quality and innovation in automobile manufacture. The short -- and conclusive -- answer to these arguments is that ***HN8***[] normally the choice of what to seek to buy and what to offer to pay is the buyer's. And, even if the buyer has monopoly power, **[**25]** an antitrust court (which might, in appropriate circumstances, restructure the market) will not interfere with a buyer's (nonpredatory) determination of price.

Thus, the arguments that Blue Shield's payments for doctors' services are "too low" are disposed of by our discussion at slip op. pp. 16-18, *supra*. ***HN9***[] A legitimate buyer is entitled to use its market power to keep prices down. The claim that Blue Shield's price scheme is "too rigid" because it ignores qualitative differences among physicians is properly addressed to Blue Shield or to a regulator, not to a court. There is no suggestion that Blue Shield's fee schedule reflects, for example, an effort by, say, one group of doctors to stop other doctors from competing with them. *Cf.* *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia, supra.* Here, Blue Shield and the doctors "sit on opposite sides of the bargaining table," *Royal Drug Co. v. Group Life & Health Insurance Co., 737 F.2d at 1438*. And Blue Shield seems simply to be acting **[*930]** "as every rational enterprise **[**26]** does, *i.e.*, [to] get the best deal possible," *Travelers Insurance Co. v. Blue Cross of Western Pennsylvania, 481 F.2d at 84*. The first seven adverse consequences to which appellees point are the result of this unilateral behavior.

Plaintiffs' eighth argument focuses on the health insurance business: Blue Shield's "ban on balance billing, " by attracting more subscribers, augments its share of the health insurance business, thereby enabling it to secure still lower doctor charges. This argument, however, comes down to saying that Blue Shield can attract more subscribers because it can charge them less. If Blue Shield is free to insist upon a lower doctor charge, it should be free to pass those savings along to its subscribers in the form of lower prices. This conclusion does not rest upon a judgment about the reasonableness of the doctor charge. A monopolist who charges his customers a high price is free to pay his suppliers more, thereby attracting higher quality raw materials. Considered in and of itself, higher quality, like lower price, is good -- even if it helps the monopolist maintain his market power through "superior skill, foresight and industry. **[**27]** " *See* *United States v. Aluminum Co. of America, 148 F.2d at 429*.

Finally, the district court rested its decision in large part upon the Supreme Court's recent case, *Arizona v. Maricopa County Medical Society, 457 U.S. 332, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*. *Maricopa*, however, involved a *horizontal* agreement among competing doctors about what to charge. ***HN10***[] A horizontal agreement among competitors is typically unlawful because the competitors prevent themselves from making *independent* decisions about the terms as to which they will bargain. Competitors cannot *agree*, for example, to insist that their contracts with sellers contain arbitration clauses, even though each individual competitor can make up his own mind to insist upon such a term in any, or all, of his contracts. *United States v. First National Pictures, Inc., 282 U.S. 44, 75 L. Ed.*

151, 51 S. Ct. 45 (1930); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 75 L. Ed. 145, 51 S. Ct. 42 (1930). **[**28]** **HN11**[] The unlawfulness of the agreement does not necessarily depend upon the undesirability of the contractual term as to which competitors agree not to compete.

The district court saw a similarity between the horizontal agreement cases and this one in the fact that Blue Shield can extract an "uncompetitive price" from doctors while the *Maricopa* court feared that "price-fixing" by competitors might bring about uncompetitive prices. But, the antitrust problems at issue when a single firm sets a price -- whether, when, and how courts can identify and control an individual exercise of alleged market power -- are very different from those associated with agreements by competitors to limit independent decision-making. A decision about the latter is not strong precedent for a case involving only the former. *Maricopa* is simply not on point. Nor, for similar reasons, is National Collegiate Athletic Association v. Board of Regents, 468 U.S. 85, 82 L. Ed. 2d 70, 104 S. Ct. 2948, 52 U.S.L.W. 4928 (1984), another "horizontal agreement" case cited by the doctors.

C

Three additional circumstances militate strongly here against any effort by an antitrust court to supervise **[**29]** the Blue Shield/physician price bargain. These three considerations convince us to apply mainstream antitrust doctrine, which allows a buyer or seller freedom to bargain for price, rather than to seek analogies with more unusual cases that do not.

First, the prices at issue here are low prices, not high prices. *See* Comment, 75 Nw. L. Rev. at 522-23. Of course, **HN12**[] a buyer, as well as a seller, can possess significant market power; and courts have held that *agreements* to fix prices -- whether maximum or minimum -- are unlawful. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259 (1951); Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869, **[*931]** (1968). Nonetheless, the Congress that enacted the Sherman Act saw it as a way of protecting consumers against prices that were too *high*, not too low. *See* R. Bork, *supra*, at 61-2. And, the relevant economic considerations may be very different when low prices, rather than high prices, are at issue. These facts **[**30]** suggest that courts at least should be cautious -- reluctant to condemn too speedily -- an arrangement that, on its face, appears to bring low price benefits to the consumer. *See* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d at 231-34.

Second, the subject matter of the present agreement -- medical costs -- is an area of great complexity where more than solely economic values are at stake. How to provide affordable, high quality medical care is much debated. And, many different solutions -- ranging from stricter regulation to greater reliance on competing service organizations -- have been proposed. *See* Clark, "Why Does Health Care Regulation Fail?" 41 Md. L. Rev. 1 (1981); A. Enthovin, *Health Plan* (1980). This fact, too, warrants judicial hesitancy to interfere.

Third, the price system here at issue is one supervised by state regulators. See Kartell v. Blue Shield of Massachusetts, Inc., 384 Mass. 409, 422, 425 N.E.2d 313 (1981). While that fact does not automatically carry with it antitrust immunity, *see* Cantor v. Detroit Edison Co., 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976), it **[**31]** suggests that **HN13**[] strict antitrust scrutiny is less likely to be necessary to prevent the unwarranted exercise of monopoly power. Of course, administrative regulation is a highly imperfect process. But, regulation by judicial decree is not necessarily preferable.

These general considerations do not dictate our result in this case. They do, however, counsel us against departing from present law or extending it to authorize increased judicial supervision of the buyer/seller price bargain. Like the court in *Feldman v. Health Care Corp.*, we see "no need to blaze new trails," 562 F. Supp. at 946. Without such pioneering, we do not believe the antitrust laws forbid Blue Shield's "balance billing " practice. Contrary to the district court's conclusion, the practice does not constitute an unreasonable restraint of trade. And, the same reasons that lead us to this conclusion also lead us to agree with the district court that the practice does not constitute monopolization or an attempt to monopolize. *See* 3 P. Areeda & D. Turner, *supra*, para. 626 at 83.

III

We turn **[**32]** now to four issues that the plaintiff doctors raise in their cross-appeal from other rulings of the district court -- rulings that dismissed various parts of their case against Blue Shield (and against Blue Cross, Blue Shield's sister organization). The fact that we have found Blue Shield's ban on balance billing to be lawful simplifies the issues on the cross-appeal and virtually determines an outcome in defendants' favor.

First, the doctors argue that the district court wrongly dismissed their claim that Blue Shield's refusal to reimburse nonparticipating doctors (except for emergency or out-of-state services) violate the ***antitrust law***. The district court found that Blue Shield's actions were immunized from antitrust attack by a prong of the "state action" doctrine which removes actions required (or forbidden) by state laws from the scope of the federal antitrust laws. *See* *Hoover v. Ronwin, 466 U.S. 558, 80 L. Ed. 2d 590, 104 S. Ct. 1989, 52 U.S.L.W. 4535 (1984)*. The Massachusetts Supreme Judicial Court has held that state law, namely *Mass. Gen. Laws ch. 176B, § 7* prohibits Blue Shield from generally reimbursing nonparticipating doctors, *Kartell v. Blue Shield of Massachusetts, Inc., 384 Mass. 409, 423, 425 N.E.2d 313 (1981)*. **[**33]**

The doctors here argue that Massachusetts state law cannot immunize Blue Shield's conduct because the relevant Massachusetts state law is preempted by federal pension law -- the Employment Retirement Income Security Act ("ERISA"), *29 U.S.C. §§ 1001-1381* -- and it is therefore without legal effect. We need not trace **[*932]** the labyrinthine path of this preemption argument, however, for we uphold the district court's ruling for a simpler reason. Since there is no relevant factual dispute, we have examined the legal merits of the doctors' substantive antitrust claim. We conclude that the facts to which they point do not make out a violation of the antitrust laws. No trier of fact, whether judge or jury, could properly find in their favor.

The doctors charge that Blue Shield simply refuses to deal with doctors who do not agree to participate in its program. The doctors strongly argued that this "refusal to deal " helped Blue Shield implement its ban on balance billing. Were that ban unlawful, the "refusal to deal " conceivably could have been found unlawful, too, as an unjustified means towards that unlawful end. If the ban is lawful, however, the **[**34]** "refusal to deal " charge must rise, or fall, on its own. And, on its own, it runs squarely into basic ***antitrust law*** that ***HN14***[] a firm "generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto Co. v. Spray-Rite, 465 U.S. at 761*; *United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*. There is nothing special here to take this case outside the general rule. There is neither evidence of a horizontal conspiracy nor any charge that Blue Shield agreed with one of its competitors not to deal with nonparticipating doctors. *Cf.* *Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941)* (horizontal agreement to boycott certain customers held illegal). Any participation by Blue Cross in Blue Shield's decision is beside the point, for Blue Cross (a hospital cost insurer) does not compete with Blue Shield, nor does it maintain any relevant balance billing ban of its own. Thus, its (alleged) participation **[**35]** does not compromise in any relevant way the *independence* of Blue Shield's dealing decisions (any more than, say, a hypothetical Blue Shield meeting with a business consultant). *Cf.* *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731, 52 U.S.L.W. 4821, 4825 (U.S. 1984)*. In a nutshell, Blue Shield's independent determination of the terms on which it will deal, of the customers to whom it will sell, and of the suppliers from whom it will purchase is a manifestation of the competitive process, not an effort to suppress or to destroy that process. *Cf.* *Chicago Board of Trade v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918)* ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

Second, the doctors charge that Blue Shield engaged in "predatory" pricing behavior. And, they point to one instance, allegedly supported by the record, when Blue Shield charged a lower price for insurance than a competitor (a firm called GISC), and it later turned **[**36]** out that Blue Shield lost money on the policies. The district court held that the injury suffered as a result of any such predatory conduct, occurred only in the market for insurance; and the doctors did not have a sufficiently direct interest in competitive injuries in that market to give them "standing" to complain of anticompetitive activity there.

On this appeal, the doctors challenge the court's ruling denying them standing to assert this Sherman Act *§ 2* claim. Like their first challenge, their argument would be far stronger had they prevailed on the "balance billing " claim. Then, one might have accepted their claim that this single instance of "predatory pricing" was part and parcel of a bundle of anticompetitive activities designed to give Blue Shield significant market power in the medical insurance business. *See* Plaintiffs' First Amended Complaint, para. 18. And, anticompetitive activities that significantly lessen competition in that business can harm not only other insurance firms, 2 P. Areeda & D. Turner, *supra* para. 340a, but also customers of insurance firms, *id.* para. 337, and suppliers of insurance firms (such as doctors), *id.* paras. 338-39. **[**37]** These harms, plaintiffs assert, were great enough, and direct **[*933]** enough, to confer on suppliers (such as doctors) standing to complain of the anticompetitive conduct in a lawsuit and to seek equitable relief.

Once the "balance billing " claim is eliminated, however, the doctors' argument lacks plausibility. They can no longer argue that insurance prices that reflect Blue Shield's "balance billing " rule are automatically unlawful. The "predatory pricing" charge must stand on its own, and to succeed it requires a showing that the price was below "incremental cost" (or the equivalent). *See* *Barry Wright Corp. v. ITT Grinnell Corp., supra.* The only evidence to which the doctors can now point is the single, isolated instance in respect to GISC. GISC accounted for less than 0.1 percent of the health insurance market. Thus, even if the "predatory pricing" charge is true in respect to GISC, there is no evidence that the charged conduct could lead to any significant increase in Blue Shield's market power. Under these circumstances the possibility of injury to a supplier is simply too remote and indirect to allow a supplier to bring suit. Were the suit one **[**38]** for treble damages, the supplier's injury would be far too indirect to confer standing, *see* *Associated General Contractors of California v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)* (standing to assert treble-damages claim under § 4 of Clayton Act denied where plaintiff's injury was "indirect" and chain of causation tenuous). Although standing rules for an injunctive action under § 16 of the Clayton Act are more liberal, plaintiffs still must show that the charged conduct threatens them with harm. *Hawaii v. Standard Oil Co., 405 U.S. 251, 260-62, 31 L. Ed. 2d 184, 92 S. Ct. 885 (1972)*; 2 P. Areeda & D. Turner, *supra*, paras. 328a, 335e. Plaintiffs cannot show this in respect to the GISC type of conduct. Thus, without the support of a "balance billing " claim, the doctors cannot obtain a reversal of the district court's ruling that they lacked standing to complain of "predatory pricing."

Third, the doctors attack the district court's dismissal of their claims against Blue Cross. Massachusetts state law expressly authorizes Blue Cross and Blue Shield to contract with each other "for the **[**39]** joint administration of their business and for joint and co-operative writing and issuing of certificates." *Mass. Gen. Laws ch. 176A, § 5*; *see also id.*, ch. 176B, § 3. The district court therefore found that the "state action" doctrine and the McCarran-Ferguson antitrust exemption for the "business of insurance," *15 U.S.C. §§ 1011 et seq.*, immunized Blue Cross's challenged conduct from antitrust scrutiny. Again, we need not accept the doctors' invitation to enter the legal thickets that surround these doctrines, for, with the demise of their "balance billing " claim, the doctors are no longer able to make any plausible charge of a substantive antitrust violation. Once the ban on "balance billing " is seen as permissible, the doctors' allegation against Blue Cross amounts to a claim that it conspired or agreed with Blue Shield to achieve a *lawful* objective, not an unlawful one. Blue Cross, concededly, is not a competitor of Blue Shield. There is no claim that the fact of agreement, in and of itself, inhibits any otherwise independently competitive action. *Cf.* *Fashion Originators' Guild of America v. Federal Trade Commission, supra.* **[**40]** Under these circumstances, the agreements violate no principle of ***antitrust law*** of which we are aware. Even were the agreements subject to substantive antitrust scrutiny, the doctors have failed to show us anything about them that would allow a finding of unlawfulness.

Fourth, and finally, the doctors assert that Blue Shield "has engaged in coercive attacks designed to intimidate and retaliate against physicians" -- evidently those who oppose the ban on balance billing. As far as we can tell from the briefs, however, the activities that the doctors allege do not make out independent violations of the antitrust laws, once one accepts the fact that Blue Shield's balance billing rule is lawful. Even viewed in a light most generous to plaintiffs, the conduct they complain of at most might amount to minor business **[*934]** torts, which lie beyond the purview of the antitrust laws, *see* 3 P. Areeda & D. Turner, *supra* para. 626d.

For these reasons, the district court's finding that the ban on balance billing is unlawful is reversed, and the district court's injunction is vacated. In all other respects the order of the district court is affirmed.

Ralph C. Wilson Industries, Inc. v. American Broadcasting Cos.

United States District Court for the Northern District of California

November 28, 1984

No. C-80-4614 SC

Reporter

598 F. Supp. 694 *; 1984 U.S. Dist. LEXIS 21663 **; 1985-1 Trade Cas. (CCH) P66,403

RALPH C. WILSON INDUSTRIES, INC., v. AMERICAN BROADCASTING COMPANIES, INC., Field Communications Corporation, Miami Valley Broadcasting Corporation, Chronicle Broadcasting Company, Viacom International, Inc., Tandem Productions, Inc., Twentieth Century-Fox Film Corporation, et al., Paramount Pictures Corporation, Warner Bros., Inc., MCA Inc., Metro-Goldwyn-Mayer, Inc., United Artists Corporation

Core Terms

station, programming, practices, defendants', summary judgment, licenses, conspiracy, membership, conspired, antitrust, exclusive license, anti trust law, television, conspiracy claim, offer evidence, no evidence, relevant market, offers, rule of reason, supplier, parties, holds, bid, restraint of trade, market power, geographic, prevail, plaintiff's claim, circumstances, ratings

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Appropriateness

Civil Procedure > ... > Summary Judgment > Burdens of Proof > General Overview

Civil Procedure > ... > Summary Judgment > Burdens of Proof > Movant Persuasion & Proof

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Genuine Disputes

HN1[] **Entitlement as Matter of Law, Appropriateness**

Generally, summary judgment is appropriate only when the moving party meets his burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

HN2[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment is equally available in antitrust cases.

Civil Procedure > Trials > Judgment as Matter of Law > Directed Verdicts

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN3[] **Judgment as Matter of Law, Directed Verdicts**

In the context of a fully developed record, if a court finds that a directed verdict for defendants is required even if all plaintiff's proffered evidence were admitted at trial, then the court should not be hesitant to grant summary judgment for defendants at this stage of the proceeding.

Antitrust & Trade Law > Sherman 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 > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

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

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Commodity Exchange Act

HN4[] **Antitrust & Trade Law, Sherman Act**

Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, confers a private right of action for treble damages upon any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. "Antitrust laws" is defined to include the Sherman Act, *15 U.S.C.S. §§ 1-7*. *15 U.S.C.S. § 12(a)*. *Section 1* of the Sherman Act, *15 U.S.C.S. § 1*, prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. This blanket proscription, however, has been interpreted to prohibit only "unreasonable" restraints of trade.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > Sherman Act

HN5[] **Antitrust & Trade Law, Sherman Act**

The practice of licensing television programs on an exclusive basis does not automatically violate the Sherman Act's prohibition of restraints of trade.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] Regulated Industries, Communications

The legal standards applied to a plaintiff's rule of reason antitrust claim are: first, a plaintiff must show that the defendants' challenged practices injure, or decrease, competition in the relevant market. If a plaintiff fails to prove that competition has been injured, it cannot prevail. Secondly, if a plaintiff has shown an injury to competition, it must then show that the challenged restraint is "unreasonable."

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

HN7[] Regulated Industries, Communications

To show that a restraint is unreasonable, a television station must prove one of two things. First, a television station may show that the restraint is unreasonable because it applies to television stations which are not in "substantial competition" with each other. If the television station cannot show that it is not in substantial competition with the other television station, it may nevertheless prevail if it can show that the challenged programming practices of exclusivity, length of license and rights of first refusal, are "unreasonable" under the circumstances.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Civil Procedure > Trials > Judgment as Matter of Law > General Overview

HN8[] Regulated Industries, Communications

In order to show that programming exclusivity practices injure competition, a television station may pursue one of three avenues. First, it may offer evidence to show that the other television stations have conspired to restrain competition. Secondly, it can offer evidence showing that the other television stations' exclusivity practices actually injure competition. Thirdly, it can, as an alternative, seek to show that a television station has "market power," tending to make any action of that station have a substantial effect on competition.

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Geographic Market Definition

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

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

HN9[] Relevant Market, Geographic Market Definition

The first inquiry is whether a plaintiff television station has offered evidence which supports a finding that exclusive license contracts for other television stations injures competition. In order to address this inquiry, the court must first determine what is the "relevant market" in which competition has allegedly been restrained. This "relevant market" is generally determined by reference to both the relevant product market and the relevant geographic market. The relevant product market is quality television programming. The relevant geographic market, however, is more complex. The court must consider the commercial realities of the situation to arrive at the definition of the relevant market.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

HN10[] **Regulated Industries, Communications**

A television station asserting an antitrust violation must offer evidence tending to show that it cannot obtain quality programming, that prices are fixed, that program offerings are detrimentally affected, or that program output is restricted. Some showing of this type is necessary to establish injury to competition.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

HN11[] **Regulated Industries, Communications**

Despite the fact that a television station asserting an antitrust violation produces no evidence to show that other television stations' programming exclusivity practices actually injured competition, a jury might find injury to competition if the plaintiff television station proved that any one defendant television station has market power. If a defendant has market power, it is much more likely that its actions can injure competition. Thus, if a plaintiff submitted evidence tending to show that a defendant has market power, a court might permit the issue to go to the jury.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

HN12[] **Regulated Industries, Communications**

If a plaintiff television station alleging antitrust violations offers sufficient evidence of an injury to competition, the plaintiff must then show that the programming exclusivity practices are "unreasonable." The first way a plaintiff may establish this is by offering sufficient evidence to show that a plaintiff and defendant television stations are not in "substantial competition." If plaintiff is not in substantial competition with defendants, the exclusivity practices are presumptively unreasonable. If the parties are in substantial competition, a plaintiff must then offer evidence showing that the challenged exclusivity practices are unreasonable given the particular circumstances of the case.

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

HN13[] **Regulated Industries, Communications**

Exclusivity, in itself, is a reasonable practice in the television programming industry.

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

HN14[] **Summary Judgment, Entitlement as Matter of Law**

Summary judgment should be "sparingly" granted where "motive and intent" play important roles in plaintiff's conspiracy claim and complete discovery may have been obstructed.

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > Elements

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN15[] **Conspiracy, Elements**

In order to go to the jury on its conspiracy claim, plaintiff must submit some sort of proof that the defendants actually conspired -- some "conscious commitment to a common scheme" -- or other special facts permitting a finding of conspiracy.

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

HN16[] **Concerted Action, Civil Conspiracy**

To be legally insufficient to support a finding of conspiracy, a plaintiff must offer proof of improper motive and illegal concerted action.

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Morrison & Foerster, San Francisco, California, for Field Communications.

Sidley & Austin, Washington, District of Columbia, for Field Communications.

Heller, Ehrman, White & McAuliffe, San Francisco, California, for supplier Defendants, Viacom, 20th Century, Paramount, Warner Bros., M.C.A. Television, Metro-Goldwyn-Mayer, United Artists.

Farella, Braun & Martel, San Francisco, California, for Miami Valley Broadcasting.

Judges: Conti, District Judge.

Opinion by: CONTI

Opinion

[*697] AMENDED ORDER GRANTING DEFENDANTS ' MOTION FOR SUMMARY JUDGMENT CORRECTING TYPOGRAPHICAL ERRORS AT PAGE 29 LINES 10-11

CONTI, District Judge.

This matter is before the court on defendants' motion for summary judgment. The background is as follows.

[*698] Plaintiff is the owner of a television station, KICU Channel 36 (jointly referred to as "plaintiff" herein). Defendants Chronicle Broadcasting Co. (KRON Channel 4), Miami Valley Broadcasting Co. (KTVU Channel 2) and

Field Communications Corp. (KBHK Channel 44) are television **[**2]** stations located in the San Francisco Bay Area. These three defendants will be referred to as the "station defendants." [1] Defendants Viacom International, Inc., P.I.T.S. Films, [2] Twentieth Century-Fox Film Corp., Paramount Television Domestic Distribution Inc., Warner Bros. Television Distribution, Inc., M.C.A. Television Ltd., Metro-Goldwyn-Mayer, Inc., and United Artists Television, Inc., are suppliers or distributors of television programs. These defendants will be referred to as the "supplier defendants."

Plaintiff filed this action on December 29, 1980. [3] Plaintiff's complaint alleges that defendants have violated the antitrust laws because of various practices they follow concerning the licensing of programs and conspiracies to boycott plaintiff. Plaintiff is pursuing three claims against defendants based upon these alleged **[**3]** practices. [4] First, plaintiff claims that all defendants have violated the Sherman Act by unreasonably restraining trade. Plaintiff contends that defendants unreasonably restrain trade by licensing programs on an exclusive basis as against plaintiff, by making the licenses unreasonably long and by incorporating, implicitly or explicitly, rights of first refusal into those licenses. Secondly, plaintiff claims that the station defendants have committed a *per se* violation of the Sherman Act by a horizontal conspiracy to boycott plaintiff. Plaintiff alleges that these three defendants have conspired, through direct communication, to exercise exclusivity of programming against plaintiff. Thirdly, plaintiff claims that defendant Miami Valley Broadcasting Co. has committed a *per se* violation of the Sherman Act by conspiring with the Independent Television News Association (ITNA) to exclude plaintiff from membership in that organization. These three claims will be developed in more detail below.

[4]** This case has been ongoing for almost four years. In 1982, the defendants filed a motion seeking summary judgment. On the state of the record at that time, the court denied that motion. On August 9, 1984, the court held a status conference in order to clarify the issues and facts for trial. At that conference, the court and parties explored whether it would be appropriate to reconsider defendants' motion for summary judgment given the extensive record now before the court. As a consequence of that conference, the station defendants moved to renew their motion for summary judgment, in which they were joined by the supplier defendants. The court granted that motion and set a briefing schedule to permit all parties ample opportunity to brief the legal and factual issues in this case. The court specifically directed plaintiff to present a complete brief of its factual arguments which might preclude summary judgment against it, together with a detailed summary of the specific evidence plaintiff intends to present at trial to support those arguments. After this thorough and voluminous supplemental briefing, defendants' renewed motion for summary judgment is now before the court.

The considerations **[**5]** the court must address in deciding whether summary judgment is appropriate in this case are as follow. ***HN1***[] Generally, summary judgment is **[*699]** appropriate only when the moving party meets his burden of showing that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Fed.R.Civ.P. 56*; *see, Adickes v. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970)*; *Bank of California, N.A. v. Opie, 663 F.2d 977, 979 (9th Cir.1981)*; *State ex rel. Edwards v. Heimann, 633 F.2d 886, 888 (9th Cir.1980)*.

Plaintiff contends that this rule should be applied particularly strictly in antitrust cases, making summary judgment less available in such cases than in civil actions generally. Although there is some support for this contention, the better position, advanced by respected antitrust writers and recognized by the courts, is that ***HN2***[] summary judgment is equally available in antitrust cases. [5] *See, e.g., Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163, 1167*

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[1] Defendant American Broadcasting Co. (KGO-TV Channel 7) was dismissed pursuant to stipulation on June 7, 1982.

[2] Substituted as a defendant in place of Tandem Productions, Inc.

[3] Plaintiff's Supplemental Complaint was filed on March 29, 1982.

[4] Plaintiff originally pursued five antitrust claims against defendants. *See* Transcript of August 9, 1984, hearing; Plaintiff's March 8, 1983, Pretrial Statement. Plaintiff has now abandoned its horizontal conspiracy claim against the supplier defendants and all the monopoly claims and is pursuing only these three claims. *See* Plaintiff's September 4, 1984, Statement of Contentions and Proof.

(7th Cir.1978), *cert. denied*, *440 U.S. 982, 99 S. Ct. 1791, 60 L. Ed. 2d 242 (1979)*; *Zweig v. Hearst Corp., 521 F.2d 1129, 1135-36* (9th Cir.), *cert. denied* **[**6]** , *423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 399 (1975)*; II P. Areeda & D. Turner, ***Antitrust Law*** paras. 316-17 (1978); Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465 (1984)*.

[7]** The argument that summary judgment should be hesitantly granted in antitrust cases is generally founded upon language used by the Supreme Court in *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*. In *Poller*, the Court stated:

> summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

Poller, 368 U.S. at 473, 82 S. Ct. at 491. As antitrust writers point out, however, this language must be read in the context of *Poller's* genuinely disputed factual issues concerning motive and intent and the discovery problems therein, and not as a rule that summary judgment should rarely be granted in antitrust cases. *See, e.g.*, II P. Areeda & D. Turner, ***Antitrust Law*** para. 316.

In fact, some writers believe that summary judgment is often particularly appropriate in antitrust cases because of the "fearful dimensions" of such cases, and the fact that many suits are motivated by "commercial disappointment" rather than genuine antitrust problems. II P. **[**8]** Areeda & D. Turner, ***Antitrust Law*** para. 316 at 57-58 (1978); *see also* J. von Kalinowski, *Antitrust Laws & Trade Regulations* § 113.02 at 113-5 to 113-7 (1984); *c.f., Lupia v. Stella D'Oro, 586 F.2d 1163*; *Zweig v. Hearst, 521 F.2d 1129*. Given the enormous expenditure of time and other resources commonly necessary in antitrust cases, the complexity of the issues and general inexperience of jurors in this area, as well as the need for uniformity and foreseeability in interpretation of the antitrust laws, the court should, rather, be particularly alert to granting summary judgment in appropriate cases. *See, e.g., Mutual Fund Investors v. Putnam Management Co., 553 F.2d 620, 622 (9th Cir.1977)*; II P. Areeda & D. Turner, ***Antitrust Law*** para. 316 at 69-70.

The posture of this case is particularly appropriate for a consideration of summary judgment. This case was filed in 1980. Since that time, the parties have conducted extensive discovery and do not contemplate further discovery. Plaintiff **[*700]** has not indicated that it needs further discovery to adequately defend against defendants' motion for summary judgment. As noted above, the court has directed plaintiff **[**9]** to submit detailed briefs setting forth the specific evidence it intends to use to support its claims at trial. ***HN3***[] In the context of this fully developed record, if the court finds that a directed verdict for defendants would be required even if all plaintiff's proffered evidence were admitted at trial, then the court should not be hesitant to grant summary judgment for defendants at this stage of the proceeding. *See, First National Bank v. Cities Service Co., 391 U.S. 253, 274-90, 88 S. Ct. 1575, 1585-1592, 20 L. Ed. 2d 569 (1968)* [holding that, even though plaintiff's evidence showing conspiracy might present a jury question, defendants' evidence to the contrary was so overwhelming that summary judgment was appropriate]; *see also*, II P. Areeda & D. Turner, ***Antitrust Law*** para. 316 at 61; Schwarzer, *Summary Judgment, etc*., 99 F.R.D. at 468-70. Applying this standard to the facts and arguments set forth below, the court finds that summary judgment in favor of defendants is appropriate in this case.

A. *Rule of Reason Claim*

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[5] *See, e.g., Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc., 732 F.2d 1403 (9th Cir.1984)*; *Fine v. Barry and Enright Productions, 731 F.2d 1394* (9th Cir.), *cert. denied*, ***469 U.S. 881, 105 S. Ct. 248, 83 L. Ed. 2d 186, 53 U.S.L.W. 3269 (1984)***; *Aydin Corp. v. Loral Corp., 718 F.2d 897 (9th Cir.1983)*; *Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc., 710 F.2d 1366 (9th Cir.1983)*; *Klamath-Lake Pharmaceutical Association v. Klamath Medical Service Bureau, 701 F.2d 1276* (9th Cir.), *cert. denied*, ***464 U.S. 822, 104 S. Ct. 88, 78 L. Ed. 2d 96 (1983)***; *JBL Enterprises, Inc. v. Jhirmack Enterprises, Inc., 698 F.2d 1011* (9th Cir.), *cert. denied*, ***464 U.S. 829, 104 S. Ct. 106, 78 L. Ed. 2d 109 (1983)***; *General Business Systems v. North American Philips Corp., 699 F.2d 965 (9th Cir.1983)*; *Continental T.V., Inc. v. G.T.E. Sylvania Inc., 694 F.2d 1132 (9th Cir.1982)*.

Plaintiff's primary claim against the defendants is that they have unreasonably restrained trade through a vertical contract by their combined **[**10]** practices of licensing television programs on an exclusive basis, making the licenses unreasonably long, and by implicitly or explicitly incorporating rights of first refusal into those licenses. The factual basis for these contentions, referred to herein as plaintiff's "rule of reason" claim, is set forth below. First, however, is a brief summary of the statutory basis of plaintiff's claim.

HN4[] Section 4 of the Clayton Act, *15 U.S.C. § 15*, confers a private right of action for treble damages upon "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." "Antitrust laws" is defined to include the Sherman Act, *15 U.S.C. §§ 1-7*. *15 U.S.C. § 12(a)*. *Section 1* of the Sherman Act, *15 U.S.C. § 1*, prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. . . ." This blanket proscription, however, has been interpreted to prohibit only "unreasonable" restraints of trade. *See, e.g., Standard Oil v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*. These sections, therefore, form the statutory basis for plaintiff's claim against **[**11]** defendants for their allegedly unreasonable restraint of trade.

The unreasonable restraint of trade complained of is as follows. The supplier defendants herein are in the business of licensing television programs to television stations. The undisputed practice of these suppliers is to license programs to the stations on an exclusive basis after a competitive bidding process among interested stations. Thus, for example, a supplier would sell an exclusive license for M*A*S*H to defendant KTVU, who would then be the only station in that area permitted to air M*A*S*H (or specified episodes of M*A*S*H) for the duration of the license.

It is undisputed that the station defendants herein enforce this exclusivity against all television stations, including plaintiff, which they consider to be located in the "San Francisco" market area. This area includes San Francisco, Oakland and San Jose, as well as most of the area around these cities. The area includes all station defendants and plaintiff, as well as several non-party stations. The scope of this exclusive licensing area is determined on the basis of the A.C. Nielson Co. and Arbitron Co. ratings services' categorization of geographic **[**12]** area into market groups, both of which ratings services include San Francisco and San Jose in the same market group.

Plaintiff does not contend that ***HN5***[] the practice of licensing television programs on an exclusive basis automatically violates the Sherman Act's prohibition of restraints of trade. In fact, plaintiff itself licenses programs on an exclusive basis. All parties agree that exclusive licenses, as such, may **[*701]** further competition by providing an incentive to the station to invest in promotion and development of the program product and do not constitute a *per se* violation of *Section 1*.

Rather than argue that exclusive licenses automatically violate *Section 1* of the Sherman Act, plaintiff contends that they constitute an unreasonable restraint of trade when enforced by the station defendants against plaintiff. Plaintiff argues that the station defendants are entitled to license programs on an exclusive basis, but that that exclusivity should not apply to plaintiff because it is not in the same "relevant market" as the station defendants. Plaintiff submits that the station defendants are licensed to and operate in the San Francisco-Oakland Bay Area market. Plaintiff **[**13]** argues that it, on the other hand, is located in and operates in the "South Bay." (Plaintiff does not define the area included within the "South Bay," but it apparently covers San Jose and other areas in and around Santa Clara County.) Accordingly, plaintiff contends that it should be placed in a different geographic market than the station defendants for exclusivity purposes. To illustrate, plaintiff's argument is that defendant KTVU should be permitted to obtain a license for M*A*S*H which is exclusive against the other station defendants and other stations in the San Francisco area, but not those in the "South Bay" area, which includes plaintiff. Consequently, plaintiff could also bid for and obtain an exclusive license to show M*A*S*H, which would be exclusive only against other South Bay stations. Thus, plaintiff argues that the exclusive licenses violate the antitrust laws because they are overbroad in geographic scope, are unreasonably long in duration and incorporate unreasonable rights of first refusal.

The economic motivation for this suit is to enable plaintiff to license quality programming [6] at a price below that paid by the station defendants, such as KTVU, for their **[**14]** exclusive licenses to such programs. It is uncontested that the level of prices for exclusive licenses for quality programming is primarily determined by the broadcast market of the prospective licensees. Presently, all the station defendants and plaintiff are placed in the same market for purposes of bidding for the supplier defendants' quality programming. Thus, if defendant KTVU bids $150,000 for an exclusive license for M*A*S*H, plaintiff must better that bid to obtain the license. Plaintiff has made no argument and there is no evidence showing that plaintiff has been excluded from bidding for quality programming at these price levels. In fact, the evidence shows that if plaintiff wished to bid at this "San Francisco" market price, it could obtain quality programming.

Plaintiff contends that, as a small UHF station, **[**15]** [7] it is not commercially feasible for it to bid at the same price levels as the station defendants to obtain quality programming. What plaintiff seeks is to be placed in some market other than that containing the station defendants for purposes of bidding for quality program licenses. If, for example, plaintiff were placed in the Salinas-Monterey market, in which non-party channel 11 is placed, it could bid for quality programming at a much lower price than that paid by the station defendants. The outcome would be, for example, that defendant KTVU would obtain a license for M*A*S*H, exclusive against the other San Francisco stations, but not plaintiff, for $100,000, while plaintiff could also license M*A*S*H, exclusive against other South Bay stations, for, say $15,000. That is the result plaintiff seeks to achieve by means of this antitrust suit. This, then, is the factual basis for plaintiff's rule of reason antitrust claim.

[16] [*702]** The Court will briefly summarize ***HN6***[] the legal standards to be applied to plaintiff's rule of reason claim. First, plaintiff must show that the defendants' challenged practices injure, or decrease, competition in the relevant market. If plaintiff fails to prove that competition has been injured, it cannot prevail. *See, Standard Oil Co. v. United States, 337 U.S. 293, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949)*; *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*; *Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291* (9th Cir.), *cert. denied*, *459 U.S. 1009, 103 S. Ct. 364, 74 L. Ed. 2d 400 (1982)*; *Gough v. Rossmoor Corp., 585 F.2d 381, 385* (9th Cir), *cert. denied*, *440 U.S. 936, 99 S. Ct. 1280, 59 L. Ed. 2d 494 (1979)*. Secondly, if plaintiff has shown an injury to competition, it must then show that the challenged restraint is "unreasonable." *See, e.g., Standard Oil v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*. ***HN7***[] To show that the restraint is unreasonable, plaintiff must, in this case, prove one of two things. First, plaintiff may show that the restraint is unreasonable because **[**17]** it applies to television stations which are not in "substantial competition" with each other. *United States v. Paramount Pictures, Inc., 334 U.S. 131, 146, 68 S. Ct. 915, 923, 92 L. Ed. 1260 (1948)*. If plaintiff cannot show that it is not in substantial competition with the station defendants, it may nevertheless prevail if it can show that the challenged practices of exclusivity, length of license and rights of first refusal, are "unreasonable" under the circumstances of this case. *See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-59, 97 S. Ct. 2549, 2557-62, 53 L. Ed. 2d 568*, (1977); *United States v. Paramount Pictures, Inc., 334 U.S. 131, 68 S. Ct. 915, 92 L. Ed. 1260 (1948)*. For the reasons set forth below, the court holds that plaintiff has not, as a matter of law, met its burden of offering evidence sufficient to support a finding that defendants' exclusivity practices unreasonably restrain trade.

1. *Injury to Competition*.

As noted above, the first inquiry must be whether plaintiff has presented genuine issues of material fact which would support a finding that defendants' exclusivity practices injure competition. ***HN8***[] In order to meet this **[**18]** first test, plaintiff may pursue one of three avenues. First, it may offer evidence to show that the defendants have conspired to restrain competition. Plaintiff does not make this argument and offers no evidence which could justify a finding that the defendants conspired. Secondly, plaintiff could offer evidence showing that the

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[6] Defined, generally, as programming which is high in the viewer ratings. *See, e.g.*, Davison Declaration paras. 11-13; Plaintiff's August 2, 1982, Memorandum of Points & Authorities at 29:1-6.

[7] A UHF (ultra high frequency) station's signal is generally much less powerful than that of a VHF (very high frequency) station. A UHF station generally sells for much less than a VHF station. *See, e.g.*, Park Declaration paras. 45-61.

defendants' exclusivity practices actually injure competition. This is the argument plaintiff primarily relies upon. As shown below, however, plaintiff fails to offer evidence of injury to competition which would withstand a directed verdict for defendants. Thirdly, plaintiff could, as an alternative, seek to show that a defendant has "market power," tending to make any action of that defendant have a substantial effect on competition. [8] Plaintiff offers some argument on this point but, as addressed below, it is unpersuasive. Accordingly, as set forth below, the court holds that plaintiff has failed to offer evidence which would support a finding that defendants' exclusivity practices injure competition.

[19]** ***HN9***[]

The first inquiry is whether plaintiff has offered evidence which could support a finding that the exclusive license contracts **[*703]** injure competition. In order to address this inquiry, the court must first determine what is the "relevant market" in which competition has allegedly been restrained. *See,* *Gough v. Rossmoor, 585 F.2d at 385-89*. This "relevant market" is generally determined by reference to both the relevant product market and the relevant geographic market. *See, e.g*., Harris & Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 Cal.L.Rev. 1, 46-52 (1984). In this case, the parties agree, and the court accepts, that the relevant product market is quality television programming. The relevant geographic market, however, is more complex.

Plaintiff contends that the relevant geographic market is the "South Bay." Although they contested this definition in their earlier motion for summary judgment, defendants now accept, for purposes of this motion, plaintiff's definition. The court, however, is not persuaded by this definition.

The relevant market is not defined by the parties. *See, e.g.,* *Gough v. Rossmoor Corp., 585 F.2d at 389*. Rather, **[**20]** the court must consider the commercial realities of the situation to arrive at the definition of the relevant market. [9] *See, e.g.,* *Brown Shoe Co. v. United States, 370 U.S. 294, 336-37, 82 S. Ct. 1502, 1529-30, 8 L. Ed. 2d 510 (1962)*; Harris & Jorde, *Antitrust Market Definition*, 72 Cal.L.Rev. at 47-52, 65-66. In this case, the commercial realities are so clear that the court holds that the relevant geographic market is the entire San Francisco-Oakland-San Jose Bay Area, as currently defined.

[21]** These commercial realities are as follow. First, the Federal Communications Commission (FCC) considers San Jose and San Francisco to be in the same market. *See*, *47 C.F.R. § 76.51*; *Memorandum Opinion, 37 R.R.2d 695, 698 (1976)*; *40 R.R.2d 473, 477-78 (1977)*. Secondly, the two recognized national ratings services, A.C. Nielson Co. and Arbitron Co., consider San Jose and San Francisco to be in the same market. *See*, McClure Affidavit paras. 16-17 (Exhibit CC to Levy Declaration); Broadcasting/Cablecasting Yearbook 1982 at B-1 (Exhibit A

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[8] The court need not decide, for purposes of this motion, whether plaintiff must prove that a defendant has market power in order to support a rule of reason antitrust claim. Plaintiff, relying upon *N.C.A.A. v. Board of Regents, 468 U.S. 85, 104 S. Ct. 2948, 2965, 82 L. Ed. 2d 70 (1984)*, contends that market power need not be proved. Defendants, relying upon *General Leaseways v. National Truck Leasing, 744 F.2d 588, 1984-2* Trade Cases para. 66,205 (7th Cir.1984) and the proposed Department of Justice guidelines concerning vertical restraints (*see* Mr. Popofsky's November 1, 1984, letter to this court), argue that plaintiff cannot avoid summary judgment because it offers no proof that any defendant has market power. This court need not decide that issue. In this case plaintiff has not shown a conspiracy, actual injury to competition *or* market power.

[9] As one antitrust writer has stated:

> In some cases, the evidence adduced may not permit the court confidently to decide the question of market definition. For example, the plaintiff's prima facie definition and defendant's rebuttal definition might both be plausible. In that situation, the parties would do well to present -- and the trier of fact to consider -- other evidence of market power that might assist the court in deciding which market definition is the more appropriate.

Harris & Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 Cal.L.Rev. 1, 66 (1984). This court adds that it may in fact find, after considering the commercial realities of the situation, that some market definition other than that advanced by the parties is the most appropriate. It is the facts and realities of the situation that establish the actual market -- not the desires or wishes of the parties. Unlike most controversies where the parties might stipulate as to the facts surrounding the lawsuit, in antitrust cases, it is market competition that the court is concerned with, not competitors.

to Thurston Declaration); *c.f.*, *47 C.F.R. § 73.658(1)(1)(vii)*; *WIXT Television, Inc. v. Meredith Corp., 506 F. Supp. 1003 (N.D.N.Y.1980)*; Davison Deposition 615:24-617:3; 992:23-993:20; 1100:22-1101:23; Heath Deposition 290:14-20; Romanelli Deposition 975:3-12; Snyder Deposition 5:13-19; Wischmeyer Deposition 208:4-8; Bell Deposition 48:16-49:12; Heath Deposition 28:6-30:14; Dean Deposition 26:2-12; Welch Deposition 39:17-23. Thirdly, there is a large overlap in the signal coverage of plaintiff's and the station defendants' signals. *See, e.g.*, Exhibit DD to Levy Declaration; Bell Deposition 59:1-5; Wischmeyer Deposition 232:23-28; **[**22]** Maguire Exhibits 32-33; Heath Exhibit 4; Romanelli Exhibit 72; Welch Deposition 18:22-20:23, 34:3-5, 36:4-38:4, 37:7-38:4, 48:24-49:12, Exhibits 3, 7. Finally, plaintiff and the station defendants share a substantial overlap of viewers. *See*, Arbitron Ratings (1984); Welch Deposition Exhibit 5; Maguire Deposition 1047; Hirshey Deposition 951; Scheiner Deposition 93-94; Ball Deposition 242-43, 511-12; Frischer Deposition 84-85; Plaintiff's Contentions paras. 81, 202-04; Park Declaration paras. 21-25.

[*704] These facts are so clear that a reasonable jury would have to find that the relevant geographic market is the entire San Francisco Bay Area, including San Jose. Accordingly, the court holds that the relevant market in this case is the San Francisco Bay Area quality television programming market. Even were the court to accept the parties' definition of the relevant market as the "South Bay" quality programming market, however, the outcome would be the same. For the reasons set forth below, it is clear that plaintiff cannot prove that defendants' exclusivity practices unreasonably restrain trade in either market.

As noted above, the court must determine whether plaintiff **[**23]** has produced evidence, sufficient to avoid a directed verdict, showing injury to competition in the relevant market. The court finds that plaintiff has not met that burden. As argued more fully in the defendants' Memoranda of Points and Authorities, it is not sufficient for plaintiff to establish an injury to itself or its own competitive position. *See, e.g., Cascade Cabinet Co. v. Western Cabinet & Millwork, Inc., 710 F.2d 1366, 1373 (9th Cir.1983)*; *Klamath-Lake Pharmaceutical Association v. Klamath Medical Service Bureau, 701 F.2d 1276, 1292* (9th Cir.), *cert. denied*, *464 U.S. 822, 104 S. Ct. 88, 78 L. Ed. 2d 96 (1983)*; *Kaplan v. Burroughs Corp., 611 F.2d 286, 291 (9th Cir.1979)*, *cert. denied*, *447 U.S. 924, 100 S. Ct. 3016, 65 L. Ed. 2d 1116 (1980)*; *Gough v. Rossmoor Corp., 585 F.2d at 385-89*. This is all plaintiff has done. ***HN10***[] Plaintiff offers no evidence tending to show that it cannot obtain quality programming, that prices are fixed, that program offerings are detrimentally affected, or that program output has in any way been restricted. Some showing of this type is necessary to establish injury to competition. *See, e.g., National Collegiate Athletic Association **[**24]** v. Board of Regents, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*; *Mid-West Underground Storage, Inc. v. Porter, 717 F.2d 493 (10th Cir.1983)*; *Zoslaw v. MCA Distributing Corp., 693 F.2d 870 (9th Cir.1982)*, *cert. denied*, *460 U.S. 1085, 103 S. Ct. 1777, 76 L. Ed. 2d 349 (1983)*; *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc., 637 F.2d 1376* (9th Cir.), *cert. denied*, *454 U.S. 831, 102 S. Ct. 128, 70 L. Ed. 2d 109 (1981)*.

HN11[] Despite the fact that plaintiff has produced no evidence to show that defendants' exclusivity practices actually injured competition, a jury might find injury to competition if plaintiff proved that any one defendant [10] **[**25]** has market power. [11] If a defendant has market power, it is much more likely that its actions can injure competition. Thus, if plaintiff submitted evidence tending to show that a defendant has market power, the court might permit the issue to go to the jury. The court finds, however, that plaintiff has not offered evidence from which a jury could find that any defendant has market power.

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[10] Plaintiff contended, in oral argument on this motion, that it may aggregate defendants' market shares to establish market power. It is not clear whether plaintiff contends that it may aggregate *one* defendant's share of several markets or that it may aggregate *all* the station defendants' market shares to establish market power. If plaintiff seeks to aggregate one defendant's share of more than one market, it has offered no factual evidence or legal argument which would permit such aggregation in this case. If plaintiff seeks to aggregate all the station defendants' market shares to establish market power, it may not do so. As noted above, plaintiff does not claim, and the evidence does not show, that the defendants conspired. Absent a conspiracy among defendants, plaintiff may not aggregate the respective market shares of individual defendants to establish market power. If a plaintiff could do so, it could merely sue all its competitors in a given market, aggregate their shares, and thus unfailingly establish market power.

[11] *See* note 8 *supra*.

Plaintiff has offered no evidence showing that any one defendant has market power. The evidence shows that the ten or more Bay Area stations all compete vigorously in both the South Bay and the Bay Area as a whole. The evidence also shows that the supplier defendants actively compete in both areas. *See*, Park Deposition 45-57; Fisher Declaration para. 52. There **[*705]** is no evidence showing that any one defendant has the power to significantly affect prices, available programming, or any other important market component. Consequently, plaintiff has not offered evidence sufficient to go to the jury on the issue whether a defendant has market power.

To summarize the above, the court holds that the plaintiff has not met its burden of producing evidence which would support a finding that the challenged practices restrain competition. Plaintiff has not shown that the exclusivity practices actually injure competition or that any defendant has market power. Accordingly, the court holds that plaintiff cannot prevail on its rule of reason claim. Defendants are consequently **[**26]** entitled to summary judgment.

The court might end its inquiry at this point. In deference to the enormous record before the court and in the interests of caution, however, the court will proceed to address the parties' other arguments.

Assuming, contrary to this court's ruling, that ***HN12***[] plaintiff had offered sufficient evidence of an injury to competition, plaintiff must then show that the exclusivity practices are "unreasonable." The first way plaintiff may establish this is by offering sufficient evidence to show that plaintiff and defendants are not in "substantial competition." If plaintiff is not in substantial competition with defendants, the exclusivity practices are presumptively unreasonable . . . *See, United States v. Paramount Pictures, Inc., 334 U.S. at 144-48, 68 S. Ct. at 922-24*. If the parties are in substantial competition, plaintiff must then offer evidence showing that the challenged exclusivity practices are unreasonable given the particular circumstances of this case. *See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49-54, 97 S. Ct. 2549, 2557-59, 53 L. Ed. 2d 568 (1977)*; *United States v. Paramount Pictures, Inc., 334 U.S. at 144-48,* ***[**27]*** *68 S. Ct. at 922-24*; *see also*, P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* (Federal Judicial Center 1981).

The court will first determine whether there is sufficient evidence in the record to support a finding that plaintiff is not in "substantial competition" with the station defendants. As noted, if the parties are not in substantial competition, then the exclusivity practices are "unreasonable" restraints of trade. [12] *United States v. Paramount, 334 U.S. at 144-48, 68 S. Ct. at 922-24*. The court finds that the evidence that the parties are in substantial competition is so overwhelming that the court may make such a ruling in this summary proceeding. As set forth above, the relevant market herein is the San Francisco Bay Area quality programming market. Even if the court accepted the parties' definition of the relevant market as the South Bay, however, the court would nevertheless find that plaintiff and defendants are in substantial competition in that market.

[28]** As noted above, plaintiff argues that it is not in substantial competition with the station defendants because it is a "local" station attracting "local" advertisers. The evidence shows, however, that the station defendants actively compete with plaintiff for viewers, quality programming and advertising in both the San Francisco Bay Area and the South Bay markets. *See*, Fisher Decl. para. 4; Davison Decl. paras. 11-13, 38, 39; Plaintiff's Contentions paras. 14, 81, 168 n. 17, 202-04; Park Decl. paras. 21-25, 89, 94; Arbitron Ratings Data (1984) (Ross Declaration); Welch Deposition Exhibit 5; Scheiner Decl. para. 9. This evidence, including evidence from plaintiff's own experts, shows clearly that plaintiff and the station defendants are in "substantial competition."

Given that plaintiff and the station defendants are in substantial competition with each other, plaintiff must now offer evidence sufficient to find the exclusivity practices "unreasonable" under the particular circumstances of this case. If plaintiff cannot submit evidence sufficient to support a finding that the exclusivity practices **[*706]** are unreasonable, it cannot prevail on its rule of reason claim. After **[**29]** careful review of the evidence in the record, the court finds that plaintiff has failed to offer evidence to support a finding that the exclusivity practices herein, consisting of the geographic breadth of the exclusivity, the length of the licenses and the alleged rights of first refusal, are unreasonable under the circumstances of this case.

[12] This, of course, again assumes that plaintiff has produced evidence of injury to competition.

The court holds that no reasonable jury could find that the practices complained of herein are unreasonable. The parties agree that ***HN13***[] exclusivity, in itself, is a reasonable practice in the television programming industry. Such exclusivity gives the licensee the incentive to promote and develop the licensed program. Without exclusivity, it is likely that no one licensee would expend the resources necessary to fully develop the program. *See*, Bell Deposition 36:6-24, 59:20-60:23; *c.f., Sandura Co. v. FTC, 339 F.2d 847, 852-53 (6th Cir.1964)*. Plaintiff itself utilizes exclusive licenses similar to those attacked herein. The exclusive licenses used herein promote competition by maximizing the number of available programs and preventing audience fragmentation for a program. *See*, Thurston Deposition 230:19-20; Maguire Deposition 369:20-370:19, **[**30]** 375:21-376:1; *c.f., Cascade Broadcasting Corp. v. KPDQ, Inc*., 1976-1 Trade Cases (CCH) para. 60,617 (D.Ore.1976); FCC, *First Report on Microwave Relays, 4 R.R.2d 1725, 1748 (1965)*. This exclusivity also promotes competition by maximizing the program's value and avoiding overexposure, which can shorten the program's useful life. *See*, Davison Deposition 155:12-156:13; Snyder Deposition 3:4-11, 4:3-1; Thurston Deposition 231:1-2; Park Deposition 23:20-22. Exclusivity also adds to the uniqueness of each station's viewer identity. *See*, Welch Deposition 80:19-23; Bell Deposition 58:8-11, 68:10-16; Boyer Deposition 111:3-6; Thurston Deposition 230:14-16. Exclusivity permits each station to plan programming to compete with another station's programming, with the knowledge that no other station will dilute the value of this competitive programming by airing the same program at the same time. *See*, Hirshey Deposition 276:7-277:8 and Exhibit 14; Wischmeyer Deposition 129:23-130:28; Breen Deposition 476:9-477:13. Exclusive licenses promote competition among suppliers by providing an incentive to maximize the number of programs offered and by maximizing the suppliers' revenues **[**31]** from the licenses. [13] *See*, Grayson Deposition 235:13-236:26; Snyder Deposition 17:10-24; Thurston Deposition 230:19-21, 692:24-28, 743:18-22; *c.f., Naumkeag Theatres Co., Inc. v. New England Theatres, Inc., 345 F.2d 910, 912* (1st Cir.), *cert. denied*, *382 U.S. 906, 86 S. Ct. 241, 15 L. Ed. 2d 158 (1965)*; Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U.Chi.L.Rev. 6, 15 (1981).

[32]** In contrast to this overwhelming evidence of the reasonableness and procompetitive aspects of the defendants' exclusivity practices, plaintiff offers very scanty evidence of the practices' unreasonableness. Plaintiff suggests that defendants' exclusivity practices decrease the number of time slots in which viewers can tune in to a specific program. *See*, Park Declaration at paras. 91-96. This argument, however, does not support a finding that the particular exclusivity practiced here is unreasonable, **[*707]** just that exclusivity generally is unreasonable, which is not plaintiff's claim.

Plaintiff also argues that the exclusivity practices here are unreasonable because not enforced against plaintiff's alleged competitor, non-party KNTV Channel 11. It is undisputed that exclusivity is not enforced against KNTV. The evidence shows overwhelmingly, however, that KNTV is not in the same competitive position as is plaintiff. KNTV's signal coverage begins in San Jose, but extends only south, into the Salinas-Monterey area. The ratings services assign KNTV to that Salinas-Monterey market, from which it draws a majority of its viewers. *See*, Ross Declaration para. 11, Exhibit C, **[**33]** Tables 1-3; Fisher Declaration paras. 37-38; Park Declaration paras. 22, 50, 51, 71. Thus, there is a strong factual argument that KNTV 11 is not a "competitor" of the station defendants and, therefore, that defendants' exclusivity practices *should* not extend to KNTV. Even were KNTV in the same position as plaintiff, however, such disparate treatment would not support a finding of unreasonableness. *See, e.g., Zoslaw v. MCA Distributing Corp., 693 F.2d 870 (9th Cir.1982)*, *cert. denied*, *460 U.S. 1085, 103 S. Ct. 1777, 76 L. Ed. 2d 349 (1983)*; *c.f., Ron Tonkin v. Fiat Distrib., 637 F.2d at 1387*.

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[13] Contrary to plaintiff's argument, there is no evidence showing that a supplier's revenues would be increased by licensing a program, for example M*A*S*H, to both a station defendant and plaintiff. Plaintiff's argument seems to be based upon the faulty assumption that the station defendant would pay the same price as it currently pays for a program which is not exclusive against plaintiff. The evidence shows, however, that a station defendant would *not* pay the same price, but a substantially lower one. There is no evidence showing that the combined prices paid by a station defendant and plaintiff for the same show would exceed the price currently paid by the station defendant for a license which is exclusive against plaintiff. The evidence, in fact, indicates the contrary. *See, e.g.*, argument of Jessica Pers, supplier defendants' attorney, at August 9, 1984, hearing, and deposition evidence cited immediately after note 13 in the text, *supra*.

Plaintiff also has offered no evidence showing that the length of the licenses and rights of first refusal, if they exist, are unreasonable under the circumstances of this case. It is interesting to note that plaintiff itself obtains licenses with similar terms. *See*, Crocker Declaration. This scanty evidence is entirely unpersuasive and cannot overcome the overwhelming evidence submitted by defendants that their exclusivity practices, including the length of the licenses and any rights of first refusal, are reasonable. Accordingly, it is appropriate to summarily hold that **[**34]** defendants' challenged exclusivity practices are reasonable. [14]

In summary, the court holds that defendants are entitled to summary judgment on plaintiff's rule of reason claim. Plaintiff has offered no evidence which would withstand a directed verdict for defendants on the issue whether defendants' challenged practices have injured competition. Because plaintiff cannot show that defendants' practices have injured competition, **[**35]** it cannot prevail on its rule of reason claim. Even if plaintiff could show an injury to competition, however, plaintiff cannot prevail because it cannot show that it is not in substantial competition with the station defendants or that the combined exclusivity practices are otherwise unreasonable under the circumstances of this case. Accordingly, the court hereby grants summary judgment for the defendants on plaintiff's rule of reason claim.

B. *Conspiracy Claim Against Station Defendants*.

Plaintiff's second antitrust claim is directed against the station defendants. Plaintiff contends that the station defendants have violated *Section 1* of the Sherman Act by a *per se* horizontal conspiracy to enforce exclusivity against plaintiff.

HN14[] Summary judgment should, as the Supreme Court has held, be "sparingly" granted where "motive and intent" play important roles in plaintiff's conspiracy claim and complete discovery may have been obstructed. *Poller v. Columbia Broadcasting, 368 U.S. at 473, 82 S. Ct. at 491*. That is not the situation here. The record here has been fully developed and plaintiff has been given the opportunity to offer evidence to the court supporting its conspiracy **[**36]** claim. No issues of motive or intent have been raised. If, under these **[*708]** circumstances, plaintiff fails to present evidence to support its claim that defendants conspired to enforce exclusivity against it, then summary judgment is appropriate. *See, e.g., First National Bank v. Cities Service Co., 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*; *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 539-44, 74 S. Ct. 257, 258-61, 98 L. Ed. 273 (1954)*; *Mutual Fund Investors v. Putnam Management Co., 553 F.2d 620, 624 (9th Cir.1977)*.

The court will now address the evidence plaintiff offers to determine whether such evidence can withstand summary judgment on this conspiracy claim. For the reasons given below, the court finds that it cannot.

Plaintiff's first argument is that the defendants' parallel conduct permits an inference of conspiracy. Even if plaintiff could show that the defendants' conduct with respect to exclusivity is parallel, which defendants dispute, [15] such evidence could not, by itself, support plaintiff's conspiracy claim. *See, Theatre Enterprises v. Paramount, 346 U.S. at 541, 74 S. Ct. at 259*; *Workman v. State* ***[**37]*** *Farm Mutual Automobile Insurance Co., 520 F. Supp. 610, 620 (N.D.Cal.1981)*.

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[14] Even if plaintiff offered stronger evidence to prove unreasonableness, the court might still find the practices reasonable as a matter of law where, as here, the facts are undisputed and the court is only required to apply the proper legal standard of "reasonableness" to those undisputed facts. *See, Continental T.V., Inc. v. GTE Sylvania, Inc., 694 F.2d 1132, 1135 (9th Cir.1982)*; *c.f.*, II P. Areeda & D. Turner, ***Antitrust Law*** para. 315 (1978); Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 469-77 (1984)*.

[15] *See*, Efigenio Declaration; Bell Deposition Exhibit 6; Thurston Deposition Exhibit 41; Wischmeyer Deposition Exhibit 17. This evidence shows that the defendants' exclusivity practices are different, not identical. Such evidence supports a finding that the defendants' conduct was not "parallel." *See, e.g., Du Pont Glore Forgan, Inc. v. American Telephone & Telegraph Co., 437 F. Supp. 1104, 1125 (S.D.N.Y.1977)*, *aff'd mem.*, ***578 F.2d 1366*** (2d Cir.), *cert. denied*, ***439 U.S. 970, 99 S. Ct. 465, 58 L. Ed. 2d 431 (1978)***.

Similarly, plaintiff's offered proof of an opportunity to conspire, even if accepted by a fact finder, cannot, even when combined with proof of parallel conduct, support a finding of conspiracy. *See, Kreuzer v. American Academy of Periodontology, 237 U.S. App. D.C. 43, 735 F.2d 1479, 1488 (D.C.Cir.1984)*; *Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir.1976)*, *cert. denied*, *429 U.S. 1074, 97* ***[**38]*** *S. Ct. 813, 50 L. Ed. 2d 792 (1977)*.

HN15[] In order to go to the jury on its conspiracy claim, plaintiff must submit some sort of proof that the defendants actually conspired -- some "conscious commitment to a common scheme" -- or other special facts permitting a finding of conspiracy. *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 1471, 79 L. Ed. 2d 775, 785-86 (1984)*; *see, e.g., First National Bank v. Cities Service Co., 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569*; *Independent Iron Works, Inc. v. U.S.* *Steel Corp., 322 F.2d 656, 661* (9th Cir.), *cert. denied*, *375 U.S. 922, 84 S. Ct. 267, 11 L. Ed. 2d 165 (1963)*.

Despite extensive discovery, plaintiff offers only one item of evidence to substantiate its claim that the station defendants conspired to enforce exclusivity against it. This one item is telephone calls by KTVU's Mr. Breen to other stations in the area, in which they discussed exclusivity practices. Defendants do not dispute that these telephone calls occurred. Rather, defendants present convincing and undisputed evidence showing that these calls were made *after* the alleged conspiracy began, on advice of counsel after plaintiff **[**39]** threatened litigation concerning exclusivity, and were undertaken to *discover* the exclusivity practices of other stations in the area. *See* Breen Deposition 221:22-222:2; Lutzker Affidavit of June 11, 1982, paras. 4-5. Such overwhelming and uncontested evidence shows that plaintiff's only item of evidence cannot, as a matter of law, substantiate its conspiracy claim. *C.f., Impro Products, Inc. v. Herrick, 715 F.2d 1267, 1280 (8th Cir.1983)*, *cert. denied*, *465 U.S. 1026, 104 S. Ct. 1282, 79 L. Ed. 2d 686 (1984)*.

In addition to their evidence rebutting plaintiff's meager evidence of conspiracy, the defendants have submitted overwhelming evidence that their exclusivity practices were undertaken in the exercise of their independent and sound business judgment. *See*, Fisher Declaration paras. 16, *et seq*.; evidence of procompetitive and legitimate purposes set out above, at 18-19; and evidence that the FCC sanctions defendants' exclusivity practices, which is an indicator of an independent procompetitive **[*709]** practice, *see 47 C.F.R. § 73.658(m)*; *Broadcast Music, Inc. v. CBS, 441 U.S. 1, 13, 99 S. Ct. 1551, 1559, 60 L. Ed. 2d 1 (1979)*; *c.f., Foster* ***[**40]*** *v. Maryland State Savings & Loan Association, 191 U.S. App. D.C. 226, 590 F.2d 928 (D.C.Cir.1978)*, *cert. denied*, *439 U.S. 1071, 99 S. Ct. 842, 59 L. Ed. 2d 37 (1979)*. This showing, which makes it more likely than not that defendants' exclusivity practices were the result of independent business judgment, is sufficient to compel summary judgment on plaintiff's conspiracy claim. *See, e.g., Admiral Theatre Corp. v. Douglas Theatre Co., 585 F.2d 877, 884 (8th Cir.1978)*.

The court is confronted with a situation where the plaintiff has offered no evidence from which a jury could find that the station defendants conspired to practice exclusivity against plaintiff. Despite extensive discovery, plaintiff has found no probative evidence showing a conspiracy. On the other hand, the defendants have submitted extensive, convincing evidence that they did not conspire but, rather, made independent decisions concerning exclusivity in the exercise of sound business judgment. Under the circumstances of this case, the court holds that summary judgment for the station defendants is appropriate on plaintiff's conspiracy claim. *C.f., First National Bank v. Cities Service, Co., 391 U.S. at* ***[**41]*** *274-90, 88 S. Ct. at 1585-93*. Accordingly, the court hereby grants defendants' motion for summary judgment on plaintiff's second claim of a horizontal conspiracy.

C. *Conspiracy by Miami Valley and ITNA*.

Plaintiff's third and last antitrust claim is that defendant Miami Valley illegally conspired with the Independent Television News Association (ITNA) to exclude plaintiff from membership in that organization. The facts underlying this claim are as follow.

The ITNA is a cooperative association which provides non-exclusive news feeds to its members. *See*, Bell Deposition at 129. The price charged for membership in the association is based upon the broadcasting market of the prospective station member. It is undisputed that, in 1980, plaintiff applied for membership in ITNA. Mr. Novitz, managing director of ITNA, originally indicated that ITNA would charge plaintiff a membership price based on the size of the San Jose market. Plaintiff's Exhibit 544; Plaintiff's Contentions paras. 214-18; Defendants' Response to paras. 214-18. Shortly thereafter, however, Novitz told plaintiff that its membership rate would be set at the San Francisco price, approximately four times the price **[**42]** originally discussed.

Plaintiff claims that Novitz' action in refusing to give plaintiff membership at a San Jose price was the result of a conspiracy with defendant Miami Valley (KTVU) to exclude plaintiff from the organization. Plaintiff's claim is thus not that it was excluded from membership in ITNA completely, but that it was excluded at anything but the San Francisco membership price.

Plaintiff offers no evidence from which a jury could find that KTVU conspired with ITNA to exclude plaintiff from membership. Plaintiff's only allegation is that KTVU, a board member of ITNA, voted to refuse to permit plaintiff membership at less than the San Francisco market rate. The board, however, consists of seven directors who jointly voted to extend plaintiff membership only at the established San Francisco market rate. *See*, Bell Deposition at 128-148; Davison Deposition at 609-610; Plaintiff's Exhibit 670. This evidence, without more, is ***HN16***[] legally insufficient to support a finding of conspiracy where, as here, plaintiff offers no proof of improper motive or any illegal concerted action. *See, e.g., Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 643 n. 9 (9th Cir.1969)*; *Nelson* **[**43]** *Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir.1952)*, *cert. denied*, *345 U.S. 925, 73 S. Ct. 783, 97 L. Ed. 1356 (1953)*.

Defendants, on the other hand, offer convincing evidence that there was no conspiracy and that ITNA's decision to permit plaintiff membership only at the "San Francisco" price was an independent business decision based upon its established **[*710]** practices. First, ITNA's membership rates are determined by the prospective member's market as defined by Arbitron's ADI book. PX 578. As noted above, the ratings book puts plaintiff in the same San Francisco market as all the station defendants. Evidence from plaintiff's own employee, Buckmaster, who negotiated with ITNA's Novitz, shows that Novitz did not, at the time of the original negotiations, know that plaintiff was listed in the San Francisco Arbitron market. Buckmaster Deposition 102-04, 120. In addition, KTVU's director Alan Bell's uncontradicted testimony is that KTVU did not conspire to exclude plaintiff from membership, but was perfectly willing to permit plaintiff to join ITNA at the same San Francisco price which KTVU paid for membership. Bell Deposition 133, 141.

The court finds **[**44]** that plaintiff cannot, as a matter of law, prevail on its ITNA conspiracy claim. First, plaintiff offers no proof of conspiracy. Secondly, ITNA's decision to abide by its normal pricing structure rather than give plaintiff preferential treatment cannot support such a claim. *See, United States v. Colgate & Co., 250 U.S. 300, 306, 39 S. Ct. 465, 467, 63 L. Ed. 992 (1919)*; *Hatley v. American Quarter Horse Association, 552 F.2d 646, 652 (5th Cir.1977)*; *Ricchetti v. Meister Brau, Inc., 431 F.2d 1211, 1214 (9th Cir.1970)*, *cert. denied*, *401 U.S. 939, 91 S. Ct. 934, 28 L. Ed. 2d 219 (1971)*; *Bridge Corp. of America v. American Contract Bridge League, 428 F.2d 1365, 1370 (9th Cir.1970)*, *cert. denied*, *401 U.S. 940, 91 S. Ct. 940, 28 L. Ed. 2d 220 (1971)*. In addition, plaintiff has offered no evidence whatsoever to prove an injury to competition, as opposed to injury to itself as a competitor, or proof that ITNA has market power, to support its conspiracy claim. *See, e.g., Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Association, Inc., 672 F.2d 1280, 1287 (7th Cir.1982)*. For these reasons, plaintiff cannot prevail on its ITNA conspiracy **[**45]** claim and defendant Miami Valley is entitled to summary judgment on that claim.

In summary, the court holds that plaintiff cannot prevail on any of its three antitrust claims. There is no evidence in the record to show that the defendants conspired to exclude plaintiff from quality programming or to enforce exclusivity against plaintiff. Nothing in the record shows that defendants acted anything but reasonably in obtaining and enforcing exclusive licenses, or in any other challenged practice. Rather, the record shows that plaintiff is unwilling to pay the going market price for programs or news feeds, and is seeking redress from this grievance by means of an antitrust suit. This is not the purpose of antitrust laws. Antitrust laws were designed to protect free market competition, not the financial success of any particular competitor. Nothing in the record shows that defendants' challenged actions in any way have decreased or injured competition. [16]

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[16] Given the court's disposition of this case, it need not address defendants' argument that the new Copyright Act exempts these exclusive licenses from coverage under the antitrust laws.

[46]** In accordance with the foregoing, the court hereby grants defendants' motion for summary judgment on the entire action.

[Ballo v. James S. Black Co.](#)

Court of Appeals of Washington, Division Three

November 29, 1984

No. 5581-7-III

Reporter

39 Wn. App. 21 *; 692 P.2d 182 **; 1984 Wash. App. LEXIS 3609 ***; 1985-1 Trade Cas. (CCH) P66

Gary R. Ballo and Kristin E. Ballo, on behalf of themselves and as class representatives for all others similarly situated, Respondents and Cross Appellants, v. James S. Black Co., Inc., James S. Black, individually, Appellants, Sullivan Realty, Inc., Lowell Stack, Orville Mark, individually and Comstock Development Co., Defendants

Core Terms

price fixing, custom home, per se violation, competitors, percent commission, antitrust, prices, joint venture, trial court, shareholders, consumer, minimum price, horizontal, damages, unfair methods of competition, purchasers, allocated, percent, custom, buyer, restraint of trade, joint venturer, residential, speculative, practices, built

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Regulated Practices, Price Fixing & Restraints of Trade**

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > 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 > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN2[] **Antitrust & Trade Law, Sherman Act**

In evaluating conduct allegedly in violation of the Sherman Antitrust Act, federal courts have applied two tests. The "rule of reason" test requires the fact finder to decide whether under all the circumstances of the case, the restricted practice imposes a reasonable restraint on competition. The second approach, the "per se" test, is premised upon the principle that certain agreements or practices are so plainly anticompetitive and so often lacking any redeeming virtue that they are conclusively presumed illegal without further examination under the rule of reason test generally applied in the Sherman Act cases.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Governments > Legislation > Overbreadth

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

HN3[] **Per Se Rule & Rule of Reason, Per Se Violations**

Price fixing is not a question simply of determining whether two or more potential competitors have literally fixed a price. Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally "price fixing," but they are not per se in violation of the Sherman Act. Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which courts apply the label "per se price fixing."

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Business & Corporate Law > Joint Ventures > Formation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Business & Corporate Compliance > ... > Business & Corporate Law > Cooperatives > Formation

Business & Corporate Law > Cooperatives > Member Duties & Liabilities

Business & Corporate Law > Joint Ventures > General Overview

Mergers & Acquisitions Law > Antitrust > Joint Ventures

HN4[] **Types of Contracts, Joint Contracts**

Joint ventures and other cooperative arrangements are not usually unlawful, at least as price-fixing schemes, where the agreement on price is necessary to market the product at all. Thus, agreements between members of a joint venture are subject to scrutiny under the rule of reason, and are upheld if there are legitimate business reasons for the activity.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Business & Corporate Law > Joint Ventures > Formation

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Joint Contracts

Antitrust & Trade Law > Exemptions & Immunities > Exempt Cartels & Joint Ventures

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Business & Corporate Law > Closely Held Corporations > General Overview

Business & Corporate Law > Joint Ventures > General Overview

HN5[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The essential elements of a joint venture are a contract, express or implied; a common purpose; a community of interest; and an equal right to control.

Headnotes/Summary

Summary

[*1] Nature of Action:** Purchasers of a custom built home sought damages for violations of the Consumer Protection Act from the realtors, builders, and development company which had created the subdivision, sold the lot, and built the house.

Superior Court: The Superior Court for Spokane County, No. 250095, John J. Ripple, J., on April 15, 1982, entered a judgment in favor of the purchasers.

Court of Appeals: Holding that a price and commission agreement was not in violation of the Consumer Protection Act under the circumstances and that other agreements had not harmed the plaintiffs, the court *reverses* the judgment.

Headnotes

WASHINGTON OFFICIAL REPORTS HEADNOTES

WA[1][] [1]

Consumer Protection > Unfair Competition > Per Se Violation > What Constitutes

Only actions such as price fixing, division of markets, group boycotts, and tying arrangements, which are anticompetitive on their face and which lack any redeeming features, are conclusively presumed to violate the Consumer Protection Act (RCW 19.86). Other actions are evaluated under the rule of reason.

WA[2][] [2]

Joint Ventures > Consumer Protection > Unfair Competition > Per Se Violation > Cooperative Price Arrangement

Price-fixing agreements between members of a joint venture are not per se violations of the Consumer Protection Act (RCW 19.86). If challenged under the act, such agreements are reviewed to determine if there are reasonable legitimate business needs and practices involved which, under the terms of *RCW 19.86.920*, would remove the agreements from the scope of the act.

WA[3][] [3]

Joint Ventures > Consumer Protection > Unfair Competition > Market Impact > Cooperative Price Arrangement

In determining whether an agreement between members of a joint venture to fix prices is reasonable and therefore not in violation of the Consumer Protection Act, the impact of the agreement upon the prevailing market area must be evaluated.

Counsel: *Robert J. Crotty, Terence R. Whitten, David K. DeWolf,* and *Lukins, Annis, Shine, McKay, Van Marter & Rein,* Spokane, Washington, for appellants.

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Kenneth O. Eikenberry, Attorney General, John R. Ellis, Deputy, and *Jon P. Ferguson, Assistant;* Seattle, Washington, *William H. Mellor III, Gale A. Norton, Alison D. Ling, Casey Shpall, Michael J. Myers, Randall & Danskin,* Spokane, Washington, on behalf **[***2]** of Mountain States Legal Foundation; and *John C. Guadnola* and *Thomas L. Fishburne, Gordon, Thomas, Honeywell, Malanca, Peterson & O'Hern,* Tacoma, Washington, on behalf of National Association of Realtors, Washington Association of Realtors, and Spokane Board of Realtors, amici curiae.

Judges: Green, A.C.J. Edgerton, J. Pro Tem., concurs. McInturff, J., dissents by separate opinion.

Opinion by: GREEN

Opinion

[*22] **[**184]** James S. Black and James S. Black, Inc., appeal a decision in a civil antitrust action involving an alleged conspiracy in restraint of trade and unfair competition in the development of a residential area in Spokane. Initially, this was a class action, but the class was decertified leaving only the Ballos as plaintiffs.

The issue which we find dispositive of this appeal is whether, after entering findings of fact, the court erred in concluding there were per se violations of *RCW 19.86.020*.030. We have considered this issue based solely on the court's findings and reverse.

[*23] While the trial court entered 85 findings of fact, the following are pertinent to the Ballos: James S. Black, Inc., is a real estate brokerage and development firm. James **[***3]** S. Black is a licensed real estate broker. Lowell Stack is an independent residential home building contractor, as is Orville Mark. In 1967, Mr. Black, Lowell Stack, Don Stack, Mr. Mark, Guy Wilcox and Lyle Wilcox incorporated Comstock Development Corporation (CDC). Each owned 20 percent of the shares of CDC except Guy and Lyle Wilcox, who owned 10 percent each. Mr. Black was the president of CDC; Mr. Mark and Lowell Stack were also officers. CDC, with capital received from the shareholders and other borrowed capital, purchased undeveloped land in the Comstock area. When CDC was formed, Lowell Stack and Mr. Mark expected the corporation would supply them with land upon which to construct homes; the Wilcox brothers anticipated CDC would supply **[**185]** them with excavation work; and Mr. Black expected his real estate company would market the Comstock subdivision.

CDC's sole function has been the development and sale of residential building lots. CDC carefully controlled the numbers, sizes, styles and prices of homes built in the area. In 1976 and thereafter, the shareholders of CDC who were also builders selected the lots in rotation among themselves. No other builders **[***4]** were involved after 1976 except Dave Mark and Paul Rodeen, close relatives of two officer shareholders. Shortly after the lots were selected, earnest money agreements were executed between CDC and the builder. "It was agreed that the builders would pay [CDC] a nominal down payment of $ 25.00 to hold the lot until it was 'sold' by the builder." When a customer desired to purchase a lot and have a custom home built, the builder to whom the lot had been allocated would execute an earnest money agreement with his customer for the sale of the lot before construction of the home commenced. At the time of closing, CDC deeded the lot directly to the builder's customer.

In 1977, Gary and Kristin Ballo, working with Glenmar **[*24]** Freeman of Sullivan Realty, decided to purchase a lot in the Comstock area. The lot was offered to the Ballos for $ 11,000 by Lowell Stack. The Ballos agreed to that price without negotiation. The closing agent paid CDC $ 9,350 and Lowell Stack the difference of $ 1,650, pursuant to CDC's apparent authorized builder's discount. The lot was deeded directly to the Ballos from CDC. The Ballos agreed to the following conditions: (1) use the services of the **[***5]** builder to whom the lot was allocated; and (2) pay 6 percent commission on the combined price of the lot and the estimated price of the house to be constructed.

In October 1978 the Ballos filed a class action complaint against James S. Black, Inc., Sullivan Realty, Inc., CDC and Messrs. Black, Stack and Mark. Count 1 alleged a price fixing and tying arrangement in violation of the Consumer Protection Act (CPA) and count 2 alleged breach of fiduciary duty and constructive fraud. The Ballos sought certification of the class of all purchasers of speculative and custom homes in the Comstock subdivision. The court determined *CR 23(a)* was satisfied but certified a smaller class consisting of the Ballos and other purchasers of custom homes built by Stack or Mark in the Comstock area. A notice was sent to purchasers in the potential class informing them of their rights, including the right to opt out. Shortly after the notices were received, the court learned that Messrs. Black, Stack and Mark had been responsible for personal contact with most of the potential class members. The court ruled this contact violated the spirit of the certification order and appointed two special masters **[***6]** to determine whether the contact influenced the class members' decision to opt out, as a vast majority of them had done. Following the special masters' report, the court found the potential class members were supplied with sufficient information to make a voluntary and intelligent decision, the class was decertified and this action proceeded with the Ballos as sole plaintiffs. Consequently, we are concerned only with the Ballos and the circumstances surrounding the purchase of their lot in the Comstock area.

[*25] Following a bench trial, the court determined the defendants combined and conspired with other builders to fix prices of Comstock lots and homes in restraint of trade, *RCW 19.86.030*, and constituted an unfair method of competition, *RCW 19.86.020*. Such price fixing, the court concluded, was a per se violation of these statutes. The court found that as a result of the agreement between Black, Stack and Mark to establish the minimum price at which the lots would be offered for sale by CDC to the public, the Ballos were damaged in the amount of $ 1,650 -- the difference between what Ballos paid for the lot and CDC's price to Lowell Stack. It was also determined the **[***7]** agreement to charge a 6 percent commission on custom homes damaged the Ballos in the amount of $ 5,500. On the Ballos' motion, a hearing was held and the **[**186]** court awarded them treble damages of $ 21,450 plus costs and attorney fees in the amount of $ 213,731.48. A $ 110,000 settlement was approved between the Ballos and all defendants except Mr. Black and James S. Black, Inc. The settlement amount was deducted and judgment for $ 125,181.48 was entered against Mr. Black and his company. A permanent injunction was also entered enjoining Black and James S. Black, Inc., from certain activities when acting in concert with two or more builders.

Mr. Black and James S. Black, Inc., appeal claiming the court blindly applied the per se rule, failed to analyze the relationship of the alleged conspirators, and erroneously condemned legitimate restraints established by a joint venture development corporation. The Ballos cross-appeal challenging the court's decertification of the class.

The Consumer Protection Act was enacted in 1961 to promote free competition in the marketplace for the ultimate benefit of the consumer. *State v. Black, 100 Wn.2d 793, 799, 676 P.2d 963 (1984)*. **[***8]** *RCW 19.86.030* provides: "Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful." This provision is patterned after and contains nearly identical language to the federal **[*26]** Sherman Antitrust Act, *15 U.S.C. § 1*. [1] When the Legislature enacted the CPA, it anticipated our courts would be guided by the interpretation given by the federal courts to the corresponding federal statutes. *RCW 19.86.920*.

HN2[] ***WA[1]***[] [1] In evaluating conduct allegedly in violation of the Sherman Antitrust Act, **[***9]** federal courts have applied two tests. The "rule of reason" test requires the fact finder to decide whether under all the circumstances of the case, the restricted practice imposes a reasonable restraint on competition. *Arizona v. Maricopa Cy. Med. Soc'y, 457 U.S. 332, 344, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*. The second approach, the "per se" test, is premised upon the principle that certain agreements or practices are so plainly anticompetitive and so often lacking any redeeming virtue that they are conclusively presumed illegal without further examination under the rule of reason test generally applied in the Sherman Act cases. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 9, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*; *National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*; *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*. Traditionally, practices which are deemed to be unlawful per se are price fixing, division of markets, group boycotts and tying arrangements. *Arizona v. Maricopa Cy. Med. Soc'y, supra;* **[***10]** *Northern Pac. Ry. v. United States, 356 U.S. 1, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. When conduct is found to fall within one of these categories, any explanation of why the act was done or what its effect might be in a particular case is of no consequence or materiality. *Plymouth Dealers' Ass'n v. United States, 279 F.2d 128, 131 (9th Cir. 1960)*.

WA[2][] [2] However, not all arrangements among actual or potential competitors that impact prices are per se violations **[*27]** of the antitrust laws. As the Court said in *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. at 9*:

> ***HN3***[] [Price fixing] is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." . . . Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally "price fixing," but they are not *per se* in violation of the Sherman Act. Thus, it is necessary to characterize the challenged conduct as falling within or without that category **[***11]** of **[**187]** behavior to which we apply the label "*per se* price fixing."

HN4[] (Citation omitted.) And, at page 23: "Joint ventures and other cooperative arrangements are . . . not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." Thus, agreements between members of a joint venture are subject to scrutiny under the rule of reason, *Copperweld Corp. v. Independence Tube Corp., __ U.S. __, 81 L. Ed. 2d 628, 104 S. Ct. 2731, 2740-41 (1984)*, and are upheld if there are legitimate business reasons for the activity. *North Am. Soccer League v. National Football League, 670 F.2d 1249, 1259 (2d Cir. 1982)* (citing *Standard Oil Co. v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*); *McElhinney v. Medical Protective Co., 549 F. Supp. 121, 132 n.7 (E.D. Ky. 1982)*; 70 Cal. L. Rev. 595, 657 (1982). Furthermore, *RCW 19.86.920*, which provides:

> It is, however, the intent of the legislature that this act shall not **[***12]** be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the purblic interest . . .

supports the conclusion this case should be evaluated pursuant to the rule of reason. We proceed to do so based on the findings of fact entered by the trial court.

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[1] ***HN1***[] -

15 U.S.C. § 1 provides in part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

HN5[] The essential elements of a joint venture are: (1) a contract, express or implied; (2) a common purpose; (3) a community of interest; and (4) an equal right to control. *Paulson v. Pierce Cy., 99 Wn.2d 645, 654, 664 P.2d 1202* ***[*28]*** *(1983)*; *Goeres v. Ortquist, 34 Wn. App. 19, 21, 658 P.2d 1277 (1983)*. "An ownership or proprietary interest in the subject matter of the enterprise by all parties is not essential to creation of a joint venture." *Paulson v. Pierce Cy., supra at 655*.

Here, Black, Mark, the Wilcoxes and the Stacks agreed to enter into a venture to purchase, develop and sell residential lots in the Comstock Addition to Spokane. All the elements of a joint venture are present. **[***13]** To implement the venture, they formed CDC, a closely held corporation. If the corporation were dissolved, the joint venturers would have owned the land. These joint venturers anticipated CDC would supply them with either building, excavation or real estate marketing work. To market the lots in the subdivision these joint venturers, who in reality owned undivided interests in the lots, of necessity had to agree upon the sale price of each lot, which they did. As noted in *Broadcast Music, Inc.,* this is not the type of price determination that is forbidden by antitrust laws.

Further, there were legitimate business reasons for what occurred and what the Ballos complain was injurious to them. The trial court found (1) through the hard work and imaginative foresight of the shareholders, CDC achieved a high degree of success in its effort to sell the subdivided property; (2) there were sound reasons for limiting the annual number of lots sold; (3) the services of James S. Black, Inc., were necessary for the ultimate success of Comstock and therefore it was entitled to be paid for its services; (4) the 6 percent real estate commission was paid to CDC which in turn paid James S. **[***14]** Black the 6 percent commission; and (5) the lot the Ballos purchased was deeded directly to them from CDC. These findings establish that CDC's activities were legitimate and necessary to accomplish the purposes of the joint venture.

WA[3][] [3] The rule of reason analysis also requires consideration of the impact of the activity upon competition in the relevant geographic market. *Gough v. Rossmoor Corp., 585 F.2d 381 (9th Cir. 1978)*, *cert. denied, 440 U.S. 936, 59 L.* ***[*29]*** *Ed. 2d 494, 99 S. Ct. 1280 (1979)*; *Harold Friedman Inc. v. Thorofare Markets Inc., 587 F.2d 127, 142-43 (3d Cir. 1978)*. *See generally* *United States v. First Nat'l Bank & Trust Co., 376 U.S. 665, 667-68, 12 L. Ed. 2d 1, 84 S. Ct. 1033 (1964)*; *Times-Picayune Pub'g Co. v. United States, 345 U.S. 594, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*. It is **[**188]** essential that the geographic market be defined and the burden of establishing it rests on the plaintiff. *Gough v. Rossmoor Corp., supra at 385, 389*; *see also* *Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. at 53 n.21*. The relevant **[***15]** geographic market for purposes of ***antitrust law*** is determined, in part, by the area to which the purchaser can reasonably turn to obtain the product. *Gough v. Rossmoor, at 389*.

Here, while the court found the "[l]ots and new homes offered for sale in the Comstock area are a separate, unique, identifiable, exclusive portion of the Spokane real estate market", it also found "[t]here were some homes in other real estate developments in the Spokane County area which were comparable in quality, size and price range to some homes in the Comstock area"; and that "[p]rior to deciding to purchase in Comstock, [the Ballos] considered new and used homes throughout Spokane County . . ." and "with the assistance of Glenmar Freeman of Sullivan Realty, they examined various properties." No error was assigned to these findings; therefore, they are verities. Since the Ballos examined properties in the Spokane area, it was the relevant market. The Comstock area comprised only about 240 lots and any price fixing impact on the relevant market was minimal, if not nonexistent.

Thus, we hold that because (1) the land in the Comstock area was actually owned by Black, Stack, Mark, and the **[***16]** other two minor shareholders in the name of CDC as a joint venture, and (2) the Comstock area occupied a minuscule portion of the geographic market, Spokane County, the setting of the price for the sale of lots and the 6 percent real estate commission paid to CDC were reasonable and did not violate *RCW 19.86.030*.

[*30] Finally, *RCW 19.86.090* provides that a private citizen who brings an action under the CPA must show injury to his business or property. The court found two other agreements to be per se violations of *RCW 19.86.020* and .030. The first concerned the sale of lots, prior to 1973-74, by CDC to the general public. Since the Ballos purchased their home after this alleged practice was discontinued, they do not have standing to challenge it. The second agreement related to increasing the minimum size of the homes above that specified in the covenants. The court found this agreement in effect increased the minimum base price at which homes could be offered in Comstock. This alleged conduct did not affect the Ballos. They contracted to have their house constructed at a size exceeding both the minimum size requirements of the covenant and the size requirement in the **[***17]** builders' agreement. Since the Ballos failed to show any injury to either their business or property by reason of these two agreements, it was error to hold they were per se violations of the act.

Further, we find no abuse of discretion in the court's decertifying the class action or requiring defendants to pay for the services of a special master.

In summary, the Ballos were not damaged. After searching for and considering other comparable properties in Spokane, they selected a lot and house plan in the Comstock area. Having made that choice, it is apparent the Comstock area was competitive with other comparable areas in Spokane County. The Ballos obtained what they bargained for at a price they agreed to pay. There was no unreasonable restraint involved.

In light of our holding, we need not consider the parties' other contentions.

Reversed.

Dissent by: McINTURFF

Dissent

McInturff, J. (dissenting)

I respectfully dissent because I disagree with the majority's characterization of **[*31]** Black, Stack and Mark as members of a joint venture who could legitimately fix prices on the lots in question.

The following additional facts are pertinent to my analysis: The sole function **[***18]** of Comstock Development Co. (CDC) was the **[**189]** development and sale of residential building lots. CDC never owned, built or sold any houses. In its early years, CDC was faced with low market demand and substantial mortgage payments. In order to meet its financial obligations from 1967 to the mid-1970's, CDC sold lots to the general public in competition with the builders who had purchased lots from it. These builders included the Stacks and Orville Mark, shareholders in CDC, and other, private builders.

Sometime during 1973 or 1974, the shareholders agreed CDC would no longer offer lots for sale to builders in general or to the public. From that time on, lot sales were restricted to the two shareholder builders and four non-shareholder builders. [2] These builders met at least annually and allocated the lots then available on a rotation basis. Black, Stack and Mark met periodically to establish minimum prices at which the lots would be offered for sale, through the builders, to the general public. Simultaneously, a second price was established for each lot which reflected a 15 percent discount from the minimum offering price. It was understood and agreed that the minimum **[***19]** prices were the starting point for builder-consumer sales and were 15 percent higher than the amount CDC was willing to sell and the builders were willing to pay for the lots.

In the early years of CDC, if a consumer wanted to build a custom home, the only real estate commission involved would be a 6 percent commission paid by CDC to James S. Black, Inc. (Black, Inc.), based on the sale price of the *lot*. During these years, no commissions were paid on the value **[*32]** of a completed custom home. After 1973-74, lots were offered to consumers on two conditions: first, the consumer had to agree to have his custom home built by the builder who had been allocated the lot. Second, he had to agree to pay a 6 percent commission to Black, Inc., on the price of the lot *and* **[***20]** the estimated cost of the custom home. This 6 percent commission was charged even though the house was not constructed until after the consumer had purchased the lot, and in some instances, when Black, Inc., had performed no services beyond the initial lot sale. The admitted purpose of

[2] These non-shareholder builders were Don O'Connell, who participated from 1974 to 1976, George Dullanty, who participated in 1974 and 1975, Dave Mark, who participated from 1974 to 1981, and Paul Rodeen, who participated from 1978.

the 6 percent commission on custom homes was to *equalize* the prices of custom and speculative homes so that the custom home buyer did not enjoy an advantage over the speculative home buyer. [3]

[*21]** The Comstock lot which the Ballos selected in 1977 was a lot that had been allocated to Stack, a shareholder builder. Previously, CDC had agreed to sell and Stack had agreed to pay $ 9,350 for the lot. The lot was offered to the Ballos for $ 11,000, the minimum price set by Black, Stack and Mark. The closing agent paid CDC $ 9,350 and paid Stack the $ 1,650 difference. The Ballos did not see the deed at closing and did not learn until later that CDC had previously agreed to sell the lot for $ 9,350.

The Ballos contracted with Stack to build them a custom home on their lot. To the contracted price, a commission of $ 5,500 was added which was split 50-50 between Black, Inc., and Sullivan Realty. Neither Black, Inc., nor Sullivan Realty, Inc., performed any services other than those connected with the sale of the lot.

[*33] The trial court concluded that Black, Mark and Stack and the other builders engaged in agreements and understandings **[**190]** which were contracts, combinations and conspiracies to fix prices of lots and new homes in Comstock, a per se violation of *RCW 19.86.030*, as well as an unfair method of competition in violation of *RCW 19.86.020*. The trial court **[***22]** based its conclusion on its findings that (1) Black, Stack and Mark established the minimum price at which the lots were offered to potential consumer buyers, (2) Black, Stack and Mark communicated with the other builders the minimum price of the lots for resale to consumers as well as informing them that their price was discounted 15 percent, (3) Black, Stack and Mark and the other builders understood and agreed that this minimum price was the guideline for builder-consumer sales and (4) Black, Stack and Mark agreed that all purchasers of custom houses would pay a 6 percent commission to Black, Inc., and they enforced this agreement with the other builders. In my judgment, the trial court's conclusions were correct.

Traditionally, the practices which the federal courts have deemed to be per se unlawful are price fixing, division of markets, group boycott, and tying arrangements. *Arizona v. Maricopa Cy. Med. Soc'y, 457 U.S. 332, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)*. When conduct is found to fall within one of these categories, any explanation of why the act was done or what its effect might be in a particular case is of no consequence or materiality. *Plymouth* **[***23]** *Dealers' Ass'n v. United States, 279 F.2d 128, 131 (9th Cir. 1960)*.

Categorically, restraints of trade are either horizontal, an agreement between competitors at the same level of the market structure, or vertical, agreements between competitors at different levels of the market structure, *e.g.,* manufacturers and distributors, *United States v. Topco Assocs., 405 U.S. 596, 31 L. Ed. 2d 515, 92 S. Ct. 1126, 1136 (1972)*. In price fixing cases, both horizontal and vertical agreements are per se antitrust violations. *White Motor Co. v. United States, 372 U.S. 253, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963)*; *United States v. Parke, Davis & Co., 362 U.S. 29, 4* ***[*34]*** *L. Ed. 2d 505, 80 S. Ct. 503 (1960)*; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259 (1951)*.

The agreement between Black, Stack and Mark and the other builders, that the price they fixed for the lot would be the price at which all of the builders (horizontal competitors) would offer the lots for sale, shifted the defendants' activity from the arena of legitimate corporate decision-making **[***24]** into the realm of antitrust violations. In other words, Black, Stack and Mark set the prices at which Stack and Mark, as well as their horizontal competitors, the other builders, would charge a consumer for a lot in Comstock. It must be remembered that while setting these prices Stack and Mark retained their competitor identity and were competing with one another in Comstock.

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[3] In a letter on December 19, 1978, to the National Association of Realtors seeking their "legal muscle", Black explained the rationale underlying the commission on custom homes:

> It is vitally important to this marketing program and to the builders involved that any custom houses built in the area carry the same costs of this marketing program as the speculative houses with which it competes. If this were not true, the builder would find that his speculative houses were being used as models to build custom houses. Thus, the speculative house would stand on the market while the customer saved the sales commission by going across the street to build a custom house.

There are no antitrust problems with the defendants forming CDC to market Comstock lots and setting the price at which CDC would sell its product. In fact, that is what was done when the defendants agreed that CDC would charge $ 9,350 to the builder who was allocated the Ballos' lot. The antitrust problems arose when the defendants *and* the other builders mutually agreed that the $ 11,000 price would be the agreed minimum price for builder-consumer sales. Thus, I would hold the agreement between Black, Mark and Stack and the other builders to set the price at which a builder would sell a lot purchased from CDC was an agreement between competitors and a per se violation of *RCW 19.86.030*.

The second agreement which directly affected the Ballos was the agreement between Black, Stack and Mark and the other **[***25]** builders to charge all custom home purchasers a 6 percent commission on the combined value of the lot and house. The admitted purpose of this agreement was to "equalize the prices of custom and speculative homes so custom home buyers did not enjoy any advantage over the speculative home buyer." This agreement clearly falls within the classical definition of price fixing:

> **[*35]** **[**191]** [A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 84 L. Ed. 1129, 60 S. Ct. 811 (1940). I would hold the agreement between Black, Stack and Mark and the other builders to equalize prices, by imposing a 6 percent commission on custom home buyers, is an agreement between horizontal competitors in restraint of trade and a per se violation of *RCW 19.86.030*.

I also agree with the trial court's conclusion that the agreements which constituted price fixing in per se violation of *RCW 19.86.030* also constituted unfair methods of competition in violation of *RCW* ***[***26]*** *19.86.020*.

Our State's unfair competition statute is *RCW 19.86.020*: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." In order to establish a per se consumer protection violation based on *RCW 19.86.020* the conduct must meet a twofold test: (1) is the action illegal, *i.e.,* is it unlawful; and (2) is it against public policy as declared by the Legislature or the judiciary. *Salois v. Mutual of Omaha Ins. Co., 90 Wn.2d 355, 358, 581 P.2d 1349 (1978)*.

I have already opined that the defendants' actions constituted price fixing in per se violation of *RCW 19.86.030* and were the proximate cause of the Ballos' damages. *RCW 19.86.920* provides in part: "the purpose of this act is . . . to protect the public and foster fair and honest competition." Thus, the Ballos have established the elements necessary for a per se violation of the unfair methods of competition clause of the CPA.

The majority takes the position that CDC was a corporate joint venture and the actions condemned by the trial court were merely actions necessary to market the joint venture's product. I recognize **[***27]** that persons who would otherwise be competitors may legitimately pool their capital **[*36]** and share profits and losses. *Maricopa, 457 U.S. at 355-57*; *see* *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*. However, the fundamental flaw in the majority's position is that Black, Stack and Mark were not the only actors in the conspiracy. The antitrust problem arose when the joint venturers banded together with the other builders who were not corporate officers and agreed to set resale prices on lots and charge a 6 percent commission on the sale of custom homes. Once the defendants acquired the land from CDC and sought to resell it to the public while maintaining their separate and distinct economic identities as competitors, they were no longer acting solely as joint venturers. When the other builders were made a part of this scheme, the trial court properly found there was an agreement among horizontal competitors which constituted illegal price fixing.

The remaining issues raised by Black concern the Superior Court's (1) issuance of a permanent injunction which prohibited Black from **[***28]** participating in horizontal price fixing, (2) award of treble damages and (3) attorney fees, and (4) denial of Black's motion for an independent appraisal of the Ballo home and lot. Because I am in a dissenting position, I will not treat these issues at length. Suffice it to say that the facts and the pertinent law support a holding that the trial court did not abuse its discretion with regard to these items.

Finally, I turn to the Ballos' cross appeal which assigns error to rulings made by the Superior Court on the questions of certification and decertification of their class action. [4] Again, these questions are ones left **[**192]** to the discretion **[*37]** of the trial court, and I find no abuse of discretion on the record.

[*29]** In summary, I would affirm the judgment of the Superior Court that Black, Stack and Mark engaged in illegal price fixing in violation of *RCW 19.86.030* and thereby engaged in unfair methods of competition in per se violation of *RCW 19.86.020*. I would also affirm the Superior Court's award of treble damages, costs and attorney fees, and its rulings regarding certification and decertification of the class. Pursuant to the Consumer Protection Act, *RCW 19.86.090*, I would award the Ballos their reasonable attorney fees for this appeal.

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[4] After the trial court had sent notice of certification of a class action to the other purchasers of custom homes built by Stack or Mark in the subdivision, Black, Stack and Mark personally contacted most of the class members. This improper action by Black, Stack and Mark necessitated that the trial court appoint two special masters to investigate. They determined that the potential class members had been supplied with sufficient information to make a voluntary and intelligent decision, and that they had decided to opt out of the class.

McGlinchy v. Shell Chemical Co.

United States District Court for the Northern District of California

November 30, 1984

No. C-84-0474-SC

Reporter
1984 U.S. Dist. LEXIS 21581 *; 1985-2 Trade Cas. (CCH) P66,672

WILLIAM J. McGLINCHY and DAN-DE PRODUCTS CORP., a California corporation, Plaintiffs, vs SHELL CHEMICAL COMPANY, SHELL INTERNATIONAL CHEMICAL CO. LTD., PECTEN CHEMICALS, INC., SHELL OIL CO., et al., Defendants.

Core Terms

commerce, alleges, plaintiffs', terminate, personal jurisdiction, export, subject matter jurisdiction, lack personal jurisdiction, first amended complaint, import, foreign nation, defendants', counts, court concludes, Sherman Act, contacts

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

HN1[] Antitrust & Trade Law, Sherman Act

15 U.S.C.S. § 6(a) provides: 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 on import trade or import 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 §§ 1 to 7 of this title, other than this section. If §§ 1 to 7 of this title apply to such conduct only because of the operation of paragraph 1(B), then §§ 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Antitrust & Trade Law, Sherman Act

15 U.S.C.S. § 6(a) has been construed to exempt from United States ***antitrust law*** conduct that lacks the requisite domestic effect, even where such conduct originates in the United States or involves American-owned entities operating abroad.

International Law > Dispute Resolution > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

International Law > Authority to Regulate > General Overview

HN3[] International Law, Dispute Resolution

For the court to have subject matter jurisdiction plaintiffs must satisfy either 15 U.S.C.S. § 6(a)(1)(A) or (1)(B), and also § 6(a)(2). To satisfy § 6(a)(1)(A) plaintiffs must demonstrate that defendants' alleged conduct has had a direct and substantial effect on either intra-United States trade or import trade.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Antitrust & Trade Law, Sherman Act

To satisfy 15 U.S.C.S. 6(a)(1)(B) plaintiffs must show that defendants' alleged conduct has had a direct, substantial, and reasonably foreseeable effect on export trade or export commerce of a person engaged in such trade or commerce in the United States.

Antitrust & Trade Law > Sherman Act > Penalties

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Sherman Act, Penalties

To state a claim under § 1 of the Sherman Act plaintiffs must show injury to a market or to competition in general, not merely injury to individuals.

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > Preliminary Considerations > Jurisdiction > General Overview

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN6[] Jurisdiction, Subject Matter Jurisdiction

Personal jurisdiction will result if the nonresident defendant's activities within a state are "substantial" or "continuous and systematic," because there is a sufficient relationship between the defendant and the state to support jurisdiction even if the cause of action is unrelated to the defendant's forum activities. However, even if defendant's activities are not so pervasive as to subject him to general personal jurisdiction, personal jurisdiction may nevertheless obtain, and will turn on the quality of defendant's contacts in relation to the cause of action. Under this second test, the following factors must be present: (1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws. (2) The claim must be one which arises out of or results from the defendant's forum-related activities. (3) Exercise of jurisdiction must be reasonable.

Opinion by: [*1] CARTER

Opinion

ORDER RE MOTIONS TO DISMISS

Plaintiffs William J. McGlinchy ("McGlinchy") and Dan-De Products Corporation ("Dan-De") bring in their first amended complaint in this action against defendants, seeking relief for antitrust violations under the Sherman Act, and related pendent claims for breach of contract, tort, and violations of the California antitrust laws. This court ultimately has jurisdiction because of diversity of citizenship of the plaintiff and defendant parties. The matter is before the court on defendant Shell International Chemical Company Ltd.'s ("SICCO") motion to be dismissed entirely from the action against it, because of lack of subject matter jurisdiction over counts one and nine (joined by the other defendants also seeking dismissal of counts two and ten), lack of personal jurisdiction, and failure to state claims.

This case principally centers around certain agreements between defendant Shell Chemical Co. ("Shell Chemical") and Dan-De. The first amended complaint alleges that in 1978, plaintiffs and Shell Chemical entered into an oral agreement, and in 1979 they entered into a written agreement, pursuant to which Dan-De was appointed as **[*2]** the exclusive representative of Shell Chemical regarding the promotion and solicitation of orders for the product known as polybutylene ("PB"), used in the pipe industry, in certain countries in Southeast Asia and Saudi Arabia. It is alleged that in 1981 McGlinchy and Shell Chemical entered into a written contract whereby McGlinchy was to act as consultant to Shell Chemical for the marketing and sale of PB in Latin America. The first amended complaint alleges that around this time period, at the encouragement of Shell Chemical and SICCO, McGlinchy and Dan-De entered into various contractual arrangements with local firms in several countries to encourage the use of PB. The crux of the first amended complaint is that Shell Chemical breached and wrongfully terminated its oral and written agreements with Dan-De. It is alleged that at sometime in 1981 Shell Chemical, Shell Oil Co. ("Shell Oil"), and Pecten Chemicals, Inc. ("Pecten"), took various actions in breach of their agreements with plaintiffs. Plaintiffs also allege that these breaches were at the inducement of and were in concert with the remaining defendants. The actions of defendants were undertaken for the alleged purpose **[*3]** of eliminating McGlinchy and Dan-De as representatives of Shell Chemical and as sells of PB and PB related products, and for the resulting financial benefit of defendants.

All defendants move to dismiss counts one and nine of the first amended complaint pursuant to *Fed. R. Civ. P. 12(b)(1)* for lack of subject matter jurisdictiona. In count one, entitled "Sherman Act, § 1 - Concerted Refusal to Deal Against All Defendants," plaintiffs allege that pursuant to a conspiracy defendants took various actions to terminate plaintiffs' agreement with Shell Chemical to be its exclusive representative in the sale, promotion, and distribution of PB in Southeast Asia and other areas, to terminate all other business relations with plaintiffs, and thus refused to deal with plaintiffs in any matters involving PB. Defendants argue that the court lacks subject matter jurisdiction as to count one by point to *15 U.S.C. § 6(a)*. Plaintiffs do not contend that *Section 6(a)* is inapplicable, but urge that it nevertheless does not prevent subject matter jurisdiction in this case. The court concludes that defendants' interpretation of *Section 6(a)* is correct, and the court thus lacks support matter jurisdiction **[*4]** over count one.

HN1[] *Section 6(a)* provides:

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 on import trade or import 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 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph 1(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

HN2[] *Section 6(a)* has been construed to "exempt from United States ***antitrust law*** conduct that lacks the requisite domestic effect, even where such conduct originates in the United States or involves American-owned entities operating abroad." *Eurim-Pharm GmbH v. Pfizer, Inc., et al.,* 1984-2 **[*5]** Trade Cas. § 66,028 at 66,815 (SDNY 9/25/84).

Because it is clear from the amended complaint that the conduct challenged in count one involves trade or commerce (other than import trade or import commerce) with foreign nations, ***HN3***[] for the court to have subject matter jurisdiction over this count plaintiffs must satisfy either subsection (1)(A) or (1)(B) of *Section 6(a)*, anbd also subsection (2) of the statute.Plaintiff satisfies neither subsection (1)(A) nor (1)(B). To satisfy subsection (1)(A) plaintiffs must demonstrate that defendants' alleged conduct has had a direct and substantial effect on either intra-United States trade or import trade. Nowehere in count one do plaintiffs allege any effect on these two areas of trade, and thus plaintiffs cannot rely on subsection (1)(A).

HN4[] To satisfy subsection (1)(B) plaintiffs must show that defendants' alleged conduct has had a direct, substantial, and reasonably forseeable effect on export trade or export commerce of a person engaged in such trade or commerce in the United States. The injury alleged by plaintiffs in count one is to customers or potential customers located in Southeast Asia and to plaintiffs themselves. Neither plaintiffs' **[*6]** customers nor plaintiffs come within the ambit of subsection (1)(B). The customers are not alleged to be engaged in the export trade in the United States. Furthermore, plaintiffs do not allege a direct, substantial, and reasonably forseeable effect on their export trade. In fact, it is not entirely clear that plaintiffs are complaining at all about defendants' conduct having to do with plaintiffs' *export* trade.

Nevertheless, plaintiffs' allegations as to injury to themselves does not satisfy subsection (2) of *Section 6(a)*, in that ***HN5***[] to state a claim under Section 1 of the Sherman Act plaintiffs "must show injury to a market or to competition in general, not merely injury to individuals." *Fine v. Barry and Enright Prod., 731 F.2d 1394, 1399 (9th Cir. 1984)*. Plaintiffs' allegations of injury to themselves does not state a claim of injury to a market or competition in general. Thus, because the alleged wrongful conduct of defendants involves commerce with foreign nations, and because the requirements of *Section 6(a)* have not been fulfilled, the court lacks subject matter jurisdiction over count one and this count is thus dismissed.

The joining defendants seek to dismiss **[*7]** count two, entitled "Sherman Act, §§ 1 and 2 - Unilateral Refusal to Deal and Attempt to Monopolize Against Shell Chemical," for the same reasons that count one was dismissed. In count two plaintiffs allege that Shell Chemical terminated its agreement with plaintiffs, has refused to do business with plaintiffs, and commited the acts alleged in count one with the specific intent of controlling the resale price and marketing of PB and of maintaining a monopoly in the manufacture and sale of PB and PB products. The court concludes that the reasoning set forth above dismissing count one is equally applicable to count two, and thus count two is dismissed.

Defendants move to dismiss count nine, entitled "California Cartwright Act Claim Against All Defendants," for lack of subject matter jurisdiction. In count nine plaintiffs reallege as a violation of *Cal. Bus. & Prof. Code §§ 16700 et seq.* the same paragraphs which constitute the Sherman Act claim set out in count one. Regardless of subject matter jurisdiction, it appears to the court that count nine should be dismissed for failing to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)*. Because the conduct complained of does **[*8]** not involve intrastate commerce (*See* *R.E. Spriggs Co. v. Adolph Coors Co., 37 Cal.App.3d 653 (1974))*, but instead involves foreign commerce, and with plaintiffs not opposing defendants' motion, the court concludes that count nine will be dismissed.

The joining defendants seek to dismiss count ten, entitled "California Cartwright Act Claim Against All Defendants," for the same reasons that count nine was dismissed. In count ten plaintiffs reallege monopolization on the part of Shell Chemical as set out in count two, but state that such monopolization violates the California Cartwright Act. The court holds that the same reasoning dismissing count nine applies to count ten, and thus count ten is dismissed.

SICCO moves to be dismissed entirely from plaintiffs' action. SICCO alleges that it should be dismissed because the court lacks personal jurisdiction over SICCO pursuant to *Fed. R. Civ. P. 12(b)(2)*, and because plaintiffs' remaining counts against SICCO fail to state a claim upon which relief can be granted pursuant to *Fed. R. Civ. P. 12(b)(6)*. Because the court concludes that it does lack personal jurisdiction over SICCO, it will not be necessary to determine whether **[*9]** plaintiffs' remaining claims against SICCO fail to state cognizable claims.

SICCO is incorporated under the laws of England. As such, this court will have personal jurisdiction over SICCO if one of the two following tests is met. First, ***HN6***[] personal jurisdiction will result if "the nonresident defendant's activities within a state are "substantial" or "continuous and systematic," [because] there is a sufficient relationship between the defendant and the state to support jurisdiction even if the cause of action is unrelated to the defendants forum activities." *Data Disc, Inc. v. Systems Tech. Assoc., Inc., 557 F.2d 1280, 1287 (9th Cir. 1977)*. However, even if defendant's activities are not so pervasive as to subject him to general personal jurisdiction, personal jurisdiction may nevertheless obtain, and will turn on the quality of defendant's contacts in relation to the cause of action. Under this second test, the following factors must be present: "(1) The nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the **[*10]** benefits and protections of its laws. (2) The claim must be one which arises out of or results from the defendant's forum-related activities. (3) Exercise of jurisdiction must be reasonable." *Id.*

SICCO's activities are not sufficiently pervasive to subject it to general personal jurisdiction under the first of the above tests. The record indicates that since its incorporation in 1928, SICCO has not carried on activities anywhere in the United States, including California. Furthermore, SICCO never has been qualified to do businss in the United States, never has regularly solicited business in the United States, never has had employees or agents assigned to work in the United States on a regular basis, never has owned, used or possessed any real property located in the United States, and has never contracted to supply goods or services in the United States.

Consequently, if the court is to have personal jurisdiction over SICCO, such jurisdiction must ensue from the second of the above tests, which analyzes SICCO's contacts in relation to the present cause of action. The court should examine the issue of personal jurisdiction separately for each count asserted by plaintiffs **[*11]** in the amended complaint. *See,* *S.L. Kaye Co., Inc., v. Dulces Anahuac, S.A., 524 F.Supp. 17, 20 (SDNY 1981)*. The court concludes that under the second test the court lacks personal jurisdiction over SICCO as to each of the remaining four counts (sixth, seventh, eighth, and eleventh) against it.

Count six, asserted against all defendants except Shell Chemical, principally alleges that those defendants engaged in a pattern or practice to induce Shell Chemical not to deal with plaintiffs and to terminate their contracts with plaintiffs. Count six alleges that such actions by defendants include those listed in paragraph 29 of the first amended complaint. However, the actions listed in paragraph 29 are those of Shell Chemical, Shell Oil, and Pecten, and in no way are attributed to SICCO. Furthermore, even if these actions were attributable to SICCO, it is not clear that they have contacts with the United States, much less California. Accordingly, the court lacks personal jurisdiction over SICCO with respect to count six.

Count eight alleges that all defendants tortiously interfered with certain joint ventures entered into by plaintiffs and third parties in in Kuwait, Saudi **[*12]** Arabia, Egypt, and Botswana. Like count six, this count alleges that the acts listed in paragraph 29 constituted the basis for the count. Again, paragraph 29 in no way refers to SICCO. Plaintiffs also make other vague allegations in reference to all defendants in count eight in regard to the above mentioned joint ventures. However, there is no stated nexus between any act alleged and the United States, much less California. Furthermore, considering the joint ventures were located in the Middle East and Africa, it is impropable that United States or California contacts exist. Consequently, the court lacks personal jurisdiction over SICCO with respect to Count eight.

Count eleven alleges that SICCO's decision to exercise its right of termination under the SICCO contract with Dan-De, to provide consultation services in the setting up of PB pipe projects in various countries in the Middle East and Africa, was violative of an alleged promise by SICCO not to terminate the contract unless SICCO was no longer in the PB business. Plaintiffs further allege that SICCO was no longer in the PB business. Plaintiffs further allege that SICCO breached the agreement by failing to fully perform **[*13]** thereunder. As to the alleged promise not to terminate, there is no showing whatsoever that it has any true contact with the United States or California. The same is true of the SICCO contract itself. Furthermore, the full record indicates that such contacts do not exist. Accordingly, the court lacks personal jurisdiction over SICCO with respect to count eleven.

Count seven alleges that Shell Chemical, Pecten, and SICCO acted in bad faith for the purpose of inducing the termination of plaintiffs' agreements with defendants, and in so doing breached an implied covenant of good faith and fair dealing. As to SICCO, count seven must refer to the earlier described SICCO contract. Thus, the court lacks personal jurisdiction over SICCO with respect to count seven for the same reasons with regard to count eleven. It should be noted that count seven also refers to the acts listed in paragraph 29, but such acts are not attributed to SICCO.

In accordance with the foregoing, it is hereby ordered that:

(1) defendants' motion to dismiss counts one, two, nine and ten of the first amended complaint is granted; and

(2) defendant SICCO's motion to be dismissed entirely from this action **[*14]** is granted.

End of Document

Mizlou Television Network, Inc. v. National Broadcasting Co.

United States District Court for the District of Columbia

November 30, 1984

Civil Action No. 84-1613

Reporter

603 F. Supp. 677 *; 1984 U.S. Dist. LEXIS 21588 **; 1985-1 Trade Cas. (CCH) P66,357

MIZLOU TELEVISION NETWORK, INC., Plaintiff, v. NATIONAL BROADCASTING COMPANY, et al., Defendants

Core Terms

Bowl, rights, television, broadcast, allegations, monopolize, plaintiff's claim, antitrust, pendent, games, personal jurisdiction, competitors, state law claim, negotiations, conspiracy, Clayton Act, contacts, monopoly, offers

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN1[] **Defenses, Demurrers & Objections, Motions to Dismiss**

Upon consideration of defendants' motions to dismiss for jurisdictional and pleading deficiencies, the court must accept as true the factual allegations set forth in the complaint.

Governments > State & Territorial Governments > Claims By & Against

HN2[] **State & Territorial Governments, Claims By & Against**

An unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state. In the absence of consent, a suit in which the state or one of its agencies is named as the defendant is proscribed by the *Eleventh Amendment*.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > Challenges

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > Constitutional Sources

Civil Procedure > ... > Jurisdiction > In Rem & Personal Jurisdiction > General Overview

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN3[] **In Personam Actions, Challenges**

Due process concerns delineate the extent of the United States District Court for the District of Columbia's jurisdiction not only under the United States Constitution but also under the District of Columbia statute permitting an exercise of long-arm personal jurisdiction over a nonresident defendant who, directly or by an agent, transacts any business in the District of Columbia. *D.C. Code Ann. § 13-423(a)(1)* (1981).

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

HN4[] **Subject Matter Jurisdiction, Jurisdiction Over Actions**

Familiar principles of due process dictate that an out-of-state defendant may be haled into court only if there exist certain minimum contacts between the defendant and the forum state such that the maintenance of the suit does not offend traditional notions of fair place and substantial justice. In judging minimum contacts, a court properly focuses on the relationship among the defendant, the forum, and the litigation.Even in the absence of connections between the subject matter of the controversy and the forum state, jurisdiction may be based solely on a nonresident defendant's continuous and systematic general business contacts with the forum.

Antitrust & Trade Law > Regulated Practices > Market Definition > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Regulated Practices, Market Definition**

To distinguish a claim under *§ 1* of the Sherman Act, *15 U.S.C.S. §§ 1* from a mere business tort, a plaintiff must make a sufficient allegation of anticompetitive effects resulting from the defendant's actions; absent injury to competition, injury to plaintiff as a competitor will not satisfy this pleading requirement. The legality of a defendant's conduct turns on the consequences of that conduct in the relevant market.

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act outlaws practices that make markets less competitive and thereby hurt the people transacting with the firms in those markets. To injure, even to cripple or destroy, one or two competitors in a market will not, if there are many competitors in that market, have much if any effect on consumers or anyone else besides the injured competitor.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] **Sherman Act, Claims**

An essential element of a monopolization claim is the possession of monopoly power in the relevant market. That is, a plaintiff under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2* must allege that the defendant has the power to control price and exclude competition generally in the relevant market. Even a claim of attempt to monopolize requires a plaintiff to plead facts alleging a dangerous probability that, if unchecked, the defendant's conduct will ripen into monopolization. Furthermore, a plaintiff raising claims of attempt or conspiracy to monopolize must allege a specific intent to monopolize on the part of the defendant.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Motions to Dismiss

HN8[] **Antitrust & Trade Law, Sherman Act**

A plaintiff's "naked statement" that defendants conspired to establish one supplier as "dominant marketer" of goods, without supporting factual allegations, will not survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss in an action under *§ 2* of the Sherman Act, *15 U.S.C.S. § 2*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Exclusive Dealing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN9[] **Tying Arrangements, Clayton Act**

Section 3 of the Clayton Act, *15 U.S.C.S. § 14*, prohibits certain exclusive dealing or tied sale arrangements which substantially lessen competition or tend to create a monopoly.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN10[] **Antitrust & Trade Law, Sherman Act**

Liberal use of the language of antitrust will not transform the cause of action, when stripped to its essentials, the complaint does no more than state plaintiff's commercial disappointment, a matter grounded in state law.

Counsel: **[**1]** Wayne Hartke, Vance Hartke, Hartke & Hartke, Falls Church, Virginia, for Plaintiff.

Morrisson.

Zeifang.

Peterson.

Judges: Green

Opinion by: GREEN

Opinion

[*678] MEMORANDUM OPINION AND ORDER

This action involves a dispute over rights to televise the 1984 Florida Citrus Bowl (formerly the Tangerine Bowl), a college football game to be played on December 22 of this year. Plaintiff Mizlou Television Network, Inc. ("Mizlou") raises various federal antitrust and pendent state law claims in connection with the decision of defendant Florida Citrus Sports Association to grant the broadcast rights for this year's Citrus Bowl to defendant National Broadcasting Company. For the reasons that follow, all of plaintiff's claims against each defendant must be dismissed.

Procedural Posture

Plaintiff filed this action on May 23, 1984, alleging a "contract, combination and conspiracy in restraint of trade" in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1* (Complaint para. 7), an attempt to monopolize and a conspiracy to monopolize (Complaint para. 8) and perhaps monopolization (Complaint para. 14), all in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*, a contract **[**2]** "to substantially lessen competition or tend to create a monopoly" in violation of *Section 3* of the Clayton Act, *15 U.S.C. § 14*, and breach of contract and tortious interference with contract (Complaint paras. 13, 14). Named as defendants to the complaint are:

(1) National Broadcasting Company ("NBC").

(2) Arthur Watson, President, NBC Sports.

(3) Jeffrey Cokin, Director of Sports Contract Negotiations, NBC Sports.

(4) Florida Citrus Sports Association, Inc. ("FCSA").

(5) Sam Hines, member of the FCSA Executive Committee.

(6) Charles Rohe, member of the FCSA Executive Committee.

(7) Vernon Hinely, member of the FCSA Executive Committee.

(8) Florida Citrus Commission.

On July 9, 1984, the NBC defendants (NBC, Watson and Cokin), the FCSA defendants (FCSA, Hines, Rohe and Hinely) and the Florida Citrus Commission filed separate motions to dismiss under *Federal Rule of Civil Procedure 12(b)*. Three weeks after those motions ripened, plaintiff filed its October 1, 1984 "motion for declaratory relief" seeking an expedited hearing and resolution of "the issue of rights to televising the bowl game." Plaintiff's Motion at 3. At the oral hearing on all motions held November 2, 1984, **[**3]** plaintiff confirmed that it seeks immediate consideration of its pendent state law claims, but acknowledged that it did not expect the antitrust claims to be decided on the merits before the December 22 Citrus Bowl game.

Plaintiff's sudden demand for expedition is somewhat puzzling. Mizlou's chief executive learned of the FCSA's agreement with NBC in August 1983 at the latest, yet **[*679]** devoted fully eight months to "soulsearching" before deciding to bring this action. [1] Once in court, plaintiff stipulated to extensions of filing deadlines requested by defendants and sought an extension of its own. Furthermore, plaintiff's complaint on its face seeks monetary relief only -- there is no request in that pleading that the Court enjoin any conduct by any defendant before any fixed date.

More fundamentally, even if plaintiff's subsequent pleadings are viewed as amending the complaint to state a claim for injunctive relief, the merits of plaintiff's state law claims **[**4]** cannot be considered without first addressing issues raised by defendants in their motions to dismiss. Defendants assert, among other things, that defendant Florida Citrus Commission is immune from suit in this Court, that this Court lacks personal jurisdiction over six of the eight defendants, and that plaintiff's allegations fail to state an actionable claim under applicable state law or the federal antitrust statutes, the foundation of this Court's pendent jurisdiction over plaintiff's state law claims. Until those issues are resolved, consideration of the merits of the pendent claims would be premature. *See* *Financial General Bankshares, Inc. v. Metzger, 220 U.S. App. D.C. 219, 680 F.2d 768, 773 (D.C. Cir. 1982)* (if federal claims are dismissed at an early stage of litigation, pendent state claims should be dismissed as well).

Factual Background

HN1[] Upon consideration of defendants' motions to dismiss for jurisdictional and pleading deficiencies, the Court must accept as true the factual allegations set forth in the complaint. *See* *Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)*. Those allegations, supplemented by documents introduced by plaintiff **[**5]** at the November 2, 1984 hearing, state the following:

Mizlou and FCSA, the successor corporation of the Tangerine Sports Association, Inc. ("TSA"), are parties to a contract entitled "Tangerine Bowl Television Rights Agreement" and dated November 12, 1980. Pursuant to that agreement, TSA granted to Mizlou the exclusive broadcast television rights to the 1980, 1981, 1982 and 1983 Tangerine/Citrus Bowls. Clause 15 of the Mizlou/TSA contract provided that TSA/FCSA could offer the right to cover the 1984, 1985 and 1986 games to competing broadcasters, but reserved to Mizlou the opportunity to match or better the offers of third parties under certain circumstances. [2]

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[1] Transcript of Nov. 2, 1984 hearing at 19.

[2] The full text of Clause 15 reads as follows:

"15. OPTION TO RENEW

"Commencing on July 1, 1983, TSA will negotiate with MTN [Mizlou] and other third parties with respect to the TV broadcast rights to the games for 1984, 1985 and 1986. If by December 31, 1983, the parties hereto have not reached an agreement in regard to such rights, TSA may offer such rights to third persons, provided that TSA shall not offer such rights upon terms and conditions less favorable to TSA than those which MTN shall have, in writing, last previously offered to TSA (whether prior to or after December 31, 1983) unless TSA shall have first made available to MTN, bona fide offers from other companies, in reasonable detail and in writing, and afforded MTN a period of ten (10) business days within which to match or better such offers. Any such offers shall be deemed to be bona fide only if the terms thereof are susceptible to ready reduction to a determinable sum of money.

"If no agreement has been reached by TSA with respect to the TV broadcast rights to the games for 1984, 1985 and 1986, with MTN or any other company (excluding NBC, CBS or ABC) by April 1, 1984, then MTN's option for 1984, 1985 and 1986 is automatically renewed as of that date and time, under the terms and conditions of the agreement applicable for the 1983 Game, plus ten (10%) percent."

Exh. A to Affidavit of Jeffrey Cokin.

[6]** By letter dated August 9, 1983, defendant FCSA, through defendant Hines, informed Mizlou of existing offers (including one by defendant NBC) made to FCSA for future television coverage of the Citrus Bowl, beginning in 1984. Defendant's letter stated that FCSA was submitting the list of offers "as required by [its] contract with Mizlou which runs through the 1983 game," and further stated that "by previous agreement Mizlou has ten (10) days in which to exercise first right of refusal." **[*680]** PX-2. On August 17, 1984, plaintiff responded that it had "elect[ed] to exercise [its] option to renew the agreement on the same terms and conditions offered by NBC Television Network" and stated its intention to submit to FCSA a formal agreement covering all points in the NBC offer. PX-3. Through its attorney, FCSA conveyed by telegram the following reply (PX-1):

> On behalf of Florida Citrus Sports Association, Inc., we hereby advise you that the 10-day period within which you requested an opportunity to respond to other offers has now expired. It is our opinion that paragraph 15 of your contract with TSA does not confer upon you a right of first refusal under these circumstances. **[**7]** Nonetheless, pursuant to subsequent correspondence, it was thought to be appropriate to inform you, of the NBC offer. In our opinion, your offer does not match the value of the NBC offer. Since 10 days have passed since you have been informed of the NBC offer, it is our opinion that Florida Citrus Sports Association has no further obligations to Mizlou for 1984 and thereafter.

Subsequently, FCSA through defendant Hinely and NBC through defendant Cokin entered into an agreement whereby FCSA granted to NBC the rights to broadcast the 1984 Citrus Bowl and options to renew those rights in 1985 and 1986, under certain conditions. [3] As a result of that agreement, plaintiff alleges, FCSA received from the Florida Citrus Commission a "financial donation" which had been contingent upon NBC obtaining television rights to the Citrus Bowl games.

Against **[**8]** that background, plaintiff alleges that all of the defendants, including the designated officials of NBC and FCSA, acted in concert to bring about a breach of plaintiff's asserted contract right to match or better NBC's offer to cover the 1984, 1985 and 1986 Citrus Bowl games. [4] On a grander scale, plaintiff claims that the FCSA/NBC agreement is a product of NBC's "dominance of power and control" in the market for college football bowl games. Plaintiff depicts a scenario in which "smaller competitors" in that market, including Mizlou, develop bowl games to the point of significant profitability, only to be displaced when NBC expresses interest in televising the events. Complaint paras. 9, 18. In this instance, plaintiff claims, NBC and the other named defendants joined forces to replace Mizlou with NBC as Citrus Bowl broadcaster, with the intent and effect of impairing competition for bowl game television rights and creating a monopoly in the market for those rights. Complaint paras. 7-10, 18. Before considering whether these allegations state any actionable claim, the jurisdictional issues raised by the various defendants shall be first addressed.

[9]** *Eleventh Amendment*

Among the Florida Citrus Commission's several arguments is that as an arm of the State of Florida, it is not subject to the jurisdiction of this or any other federal district court. The Commission relies upon the recent Supreme Court decision of *Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984)*:

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[3] Under the agreement, NBC also obtained options to renew the broadcast rights for the 1987 and 1988 games. The 1987 and 1988 options are not relevant to this complaint.

[4] With respect to the individual defendants, plaintiff alleges that:

Defendant Hines signed the August 9, 1983 letter from FCSA to plaintiff (Complaint para. 4);

Defendant Rohe made statements to the effect that he would make life miserable for Mizlou (Complaint para. 13); and

Defendants Hinely and Cokin signed the FCSA/NBC contract (Complaint para. 16).

Plaintiff attributes no specific action to defendant Watson.

> HN2[] "'An unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another state. ' [Citations omitted] . . . . In the absence of consent, a suit in which the state or one of its agencies is named as the defendant is proscribed by the *Eleventh Amendment*."

[*681] *104 S. Ct. at 908*. Under Florida law, the Florida Citrus Commission is a twelve-man board within the Florida Department of Citrus which serves as the head of that department. The Department of Citrus is, in turn, a unit of the executive branch of government of the State of Florida. *Fla. Stat. §§ 601.04*, *20.04* (1983). Plaintiff does not dispute that by virtue of this statutory organizational structure, the Florida Citrus Commission is a sub-unit of the State of Florida. Accordingly, **[**10]** under *Pennhurst*, the Commission is not amenable to suit in this Court and must be dismissed as a defendant.

In Personam Jurisdiction

Six of the seven remaining defendants challenge plaintiff's assertion that this Court may exercise personal jurisdiction over them. HN3[] Due process concerns delineate the extent of this Court's jurisdiction not only under the United States Constitution but also under the District of Columbia statute permitting an exercise of long-arm personal jurisdiction over a nonresident defendant who, directly or by an agent, "transact[s] any business in the District of Columbia." *D.C. Code § 13-423(a)(1)*(1981); *Mitchell Energy Corp. v. Mary Helen Coal Co., 524 F. Supp. 558, 563 (D.D.C. 1981)*; *see also Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd., 207 U.S. App. D.C. 375, 647 F.2d 200 (D.C. Cir. 1981)*; *Mouzavires v. Baxter, 434 A.2d 988 (D.C. App. 1981)*, *cert. denied*, *455 U.S. 1006, 71 L. Ed. 2d 875, 102 S. Ct. 1643 (1982)*. [5]

[11]** HN4[] Familiar principles of due process dictate that an out-of-state defendant (a description fitting all defendants to this action except NBC, which maintains a permanent office in the District of Columbia) may be haled into court only if there exist

> 'certain minimum contacts' [between the defendant and the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair place and substantial justice. '

International Shoe Co. v. State of Washington, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945) (citations omitted); *accord* *Helicopteros Nacionales de Colombia, S. A. v. Hall, 466 U.S. 408, 104 S. Ct. 1868, 1872, 80 L. Ed. 2d 404 (1984)*; *Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980)*. In judging minimum contacts, a court "properly focuses on 'the relationship among the defendant, the forum, and the litigation. '" *Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 104 S. Ct. 1473, 1478, 79 L. Ed. 2d 790 (1984)*, *quoting* *Shaffer v. Heitner, 433 U.S. 186, 204, 53 L. Ed. 2d 683, 97 S. Ct. 2569 (1977)*; *see also* *Calder v. Jones, 465 U.S. 783, 104 S. Ct. 1482, 1486, 79 **[**12]** L. Ed. 2d 804 (1984)*. Even in the absence of connections between the subject matter of the controversy and the forum state, jurisdiction may be based solely on a nonresident defendant's "continuous and systematic general business contacts" with the forum. *Helicopteros Nacionales de Colombia, S.A. v. Hall, 104 S. Ct. at 1873*; *Keeton v. Hustler Magazine, Inc., 104 S. Ct. at 1481*.

Plaintiff has alleged no business contacts of a continuous and systematic nature linking FCSA or any of the individual defendants with this jurisdiction. Furthermore, factual support for any connection between those defendants and the District of Columbia relating to the subject matter of this controversy is scanty at best. Plaintiff has argued that unspecified "critical acts in furtherance of the conspiracy and tort" occurred in the District of Columbia, basing that argument on a supposed "admission" that "acts of review and decisionmaking concerning the terms of the NBC contract" took place here. The sources of that "admission" -- unrebutted affidavits of defendants Cokin and Rohe -- in fact assert that all contract negotiations between NBC and FCSA were conducted either by telephone between Cokin **[**13]** in New York City and Hines and Rohe in Orlando, Florida or in meetings held in New York or Orlando. **[*682]** Affidavit of Jeffrey Cokin ("Cokin Aff.") at para. 4, Affidavit of Charles Rohe ("Rohe Aff.") at para. 4. Through those negotiations, NBC and FCSA reached an agreement in principle, the terms of which

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[5] No other provision of the District of Columbia long-arm statute is applicable to these facts. *See* *D.C. Code § 13-423* (1981).

are essentially unchanged in the final contract, which was drafted in New York and executed in Florida. Cokin Aff. at para. 5, Rohe Aff. at para. 6.

The *only* link between the NBC/FCSA contract, defendants and the District of Columbia is through a nonparty law firm. Defendant FCSA receives legal counsel from the Orlando office of a firm with offices in five cities, including Washington, D.C. The firm's communications law specialist practices from the District of Columbia office; consequently, on communications matters FCSA consults that specialist here. After the negotiations between NBC and FCSA had been completed and an agreement had been reached, the District of Columbia attorney, on behalf of FCSA, contacted Cokin in New York on six to twelve occasions by telephone or letter and together they reduced the NBC/FCSA agreement to writing. In addition, the attorney mailed **[**14]** the telegram (PX-1) informing Mizlou that FCSA recognized no further obligations to Mizlou for 1984 and thereafter.

Without more, these actions of the District of Columbia attorney do not justify an assertion of personal jurisdiction over FCSA and the individuals who negotiated, signed and/or approved the NBC/FCSA contract. The core of plaintiff's complaint is the alleged substitution of NBC for Mizlou as the holder of rights to televise the 1984 Citrus Bowl and options for subsequent games. That alleged substitution, as charged, took place by the actions of the defendants, not the lawyer -- that is, by the decision of NBC (in New York) to extend an offer for the broadcast rights to FCSA coupled with the decision of FCSA (in Florida) to accept that offer. The location of the attorney when those decisions were made is immaterial, as plaintiff does not assert that he played any part whatsoever in the actual decisionmaking process. The agreement was neither negotiated nor executed and will not be performed in the District of Columbia, and the few communications from the District lawyer on behalf of FCSA to NBC or Mizlou will not draw the nonresident defendants within the sphere of this **[**15]** Court's jurisdiction. *See* *Mitchell Energy Corp. v. Mary Helen Coal Co., supra, 524 F. Supp. 558*; *see generally* *Cockrell v. Cumberland Corp., 458 A.2d 716 (D.C. App. 1983)* (even calls and letters placed rather than received by out-of-state defendant do not satisfy long-arm statute's "transacting business" test, which is jurisdictionally coextensive with due process analysis).

Finally, the mere fact that FCSA retained counsel in the District of Columbia will not confer personal jurisdiction over that or any other defendant in an action not arising from the lawyer/client relationship. Were this an action by the attorney for recovery of fees, defendant's solicitation of a District of Columbia attorney would be jurisdictionally significant. *See* *Mouzavires v. Baxter, supra, 434 A.2d 988*; however, plaintiff here cannot claim that the fortuitous relationship between the Orlando-based FCSA and an expert in its counsel's District of Columbia office constitutes a "purposeful availment" of the benefits and privileges of this forum *vis-a-vis this litigation* such that any of these defendants could reasonably anticipate being haled before this Court. *See generally* *Hanson v. Denckla* ***[**16]*** *, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958)*; *see also* *Transamerican Steamship Corp. v. Somali Democratic Rep., 590 F. Supp. 968, 977 (D.D.C. 1984)*.

Plaintiff's meager allegations in support of personal jurisdiction do not begin to establish the requisite minimum contacts with the District of Columbia. Plaintiff does not challenge the accuracy of the jurisdictional facts submitted by defendants, and in fact relies upon them to construct the arguments rejected above. Under these circumstances, plaintiff's request to conduct discovery on this issue shall be denied, *see* *Naartex Consulting Corp. v. Watt, 232 U.S. App. D.C. 293, 722 F.2d 779, 788 (D.C. Cir. 1983)*, *cert. denied*, *467 U.S. 1210, 104 S. Ct. 2399,* ***[*683]*** *81 L. Ed. 2d 355 (1984)*, and, in accordance with due process, plaintiff's claims against defendants FCSA, Watson, Cokin, Rohe, Hines and Hinely shall be dismissed for lack of personal jurisdiction.

Claims Against NBC

(a). *Antitrust Claims*

Remaining before the Court are plaintiff's antitrust and state law claims against NBC. Although the complaint is replete with the vocabulary of ***antitrust law***, the facts alleged, even accepted as **[**17]** true, do not state a claim under *Sections 1* or *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2* ("*Sections 1* and *2*"), or *Section 3* of the Clayton Act, *15 U.S.C. § 14* ("*Section 3*").

Plaintiff's *Section 1* claim rests on the proposition that the NBC/FCSA contract constitutes a contract, combination or conspiracy in restraint of trade. ***HN5***[] To distinguish this claim from a mere business tort, plaintiff must make a sufficient allegation of anticompetitive effects resulting from NBC's actions; absent injury to *competition*, injury to plaintiff as a *competitor* will not satisfy this pleading requirement. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977)*; *Brown Shoe Co. v. United States, 370 U.S. 294, 320, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*; *Havoco of America, Ltd. v. Shell Oil Co., 626 F.2d 549, 554 (6th Cir. 1980)*. Furthermore, unlike some horizontal relationships among competitors, the *vertical* arrangement between NBC and FCSA described by plaintiff cannot be characterized as *per se* unlawful, *see* *Continental T.V., Inc. v. G.T.E. Sylvania, Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*; *Transource International,* **[**18]** *Inc. v. Trinity Indus., Inc., 725 F.2d 274 (5th Cir. 1984)*; but instead must be analyzed under a "rule of reason": to state an actionable claim, plaintiff must allege an *unreasonable* restraint on competition, *see* *National Society of Professional Engineers v. United States, 435 U.S. 679, 688, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*; *Transource International, supra*. Thus, the legality of defendant's conduct turns on the consequences of that conduct in the relevant market. *See* *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*; *Havoco of America, 626 F.2d at 554*.

Despite conclusory assertions that NBC's conduct will restrain competition, plaintiff has alleged no specific impact on competition in any particular market. At one point in the complaint, plaintiff challenges NBC's conduct only as it affects competition for television rights to the Bluebonnet Bowl, Holiday Bowl, Hall of Fame Bowl and Citrus Bowl, only 4 of the 21 college football bowl games scheduled to take place at the end of the 1984 season. Complaint para. 18. That market definition is unduly narrow, as it excludes rights to numerous other bowl games which **[**19]** are "reasonably interchangeable" from the broadcaster's standpoint. *See* *Brown Shoe Co. v. United States, 370 U.S. at 325*; *Southern Pacific Communications Co. v. American Telegraph and Telephone Co., 556 F. Supp. 825 (D.D.C. 1983)*, *aff'd* *238 U.S. App. D.C. 309, 740 F.2d 980 (D.C. Cir. 1984)*; *Gianna Enterprises v. Miss World (Jersey) Ltd., 551 F. Supp. 1348, 1354 (D.N.J. 1982)* (rejecting market definition which included only international beauty pageants but excluded state and national pageants).

Even accepting for present purposes a broader market definition of "collegiate football bowl games", *see* Complaint paras. 8, 10, 18, the Court finds no facts to support plaintiff's bald claim of anticompetitive impact -- plaintiff has alleged no specific and demonstrable *market* effect of NBC's contract to cover the Citrus Bowl, and plaintiff's own loss of business with FCSA will not suffice. *See* *Gianna Enterprises v. Miss World (Jersey) Ltd., supra*; *see also Car Carriers, Inc. v. Ford Motor Co*., 1984-2 CCH Trade Cases P 66,220 (7th Cir. 1984); *Havoco of America, 626 F.2d at 558*. ***HN6***[] The Sherman Act outlaws practices that make markets less competitive and thereby **[**20]** hurt the people transacting with the firms in those markets. *See, e.g.,* *Reiter v. Sonotone Corp., 442 U.S. 330, 343, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979)*. **[*684]** "To injure, even to cripple or destroy, one or two competitors in a market will not, if there are many competitors in that market, have much if any effect on consumers or anyone else" besides the injured competitor. *Sutliff, Inc. v. Donovan Companies, Inc., 727 F.2d 648 (7th Cir. 1984)*.

For similar reasons, plaintiff's *Section 2* claims of monopolization, attempt to monopolize, and conspiracy to monopolize must be dismissed. Plaintiff makes the conclusory assertion that the NBC/FCSA agreement is a "consequence of [NBC's] dominance of power and control", Complaint para. 9, but offers not a single fact to document NBC's supposed actual or probable market power. The omission is fatal -- ***HN7***[] an essential element of a monopolization claim is "the possession of monopoly power in the relevant market ", *United States v. Grinnell Corp., 384 U.S. 563, 570, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*; that is, a *Section 2* plaintiff must allege that the defendant has the power to control price and exclude *competition* **[**21]** *generally* in the relevant market. *Id. at 571*; *Southern Pacific Communications Co*., 740 F.2d at 1000. Even a claim of attempt to monopolize requires a plaintiff to plead facts alleging a dangerous probability that, if unchecked, the defendant's conduct will ripen into monopolization. *Transource International, Inc. v. Trinity Indus., Inc., supra*; *Merit Motors, Inc. v. Chrysler Corp., 417 F. Supp. 263 (D.D.C. 1976)*, *aff'd 187 U.S. App. D.C. 11, 569 F.2d 666 (D.C. Cir. 1977)*. Furthermore, a plaintiff raising claims of attempt or conspiracy to monopolize must allege a specific intent to monopolize on the part of the defendant. *See e.g.,* *Arthur S. Langenderfer, Inc. v. S.E. Johnson, 729 F.2d 1050 (6th Cir. 1984)*.

Plaintiff's complaint recites the proper conclusory verbiage but suffers from a paucity of facts. It does not identify the owner(s) of rights to any bowl game except the Citrus Bowl, nor does it contain a shred of data concerning NBC's market position relative to other television broadcasters, including the competing major networks. Absent *any* facts even hinting at an actual, imminent or intended concentration of *market* power in NBC alone, plaintiff's **[**22]** allegations do not state a claim under *Section 2*. *See generally* *Havoco of America, 626 F.2d at 558* ***HN8***[] (plaintiff's "naked statement" that defendants conspired to establish one supplier as "dominant marketer" of goods, without supporting factual allegations, did not survive 12(b)(6) motion to dismiss).

Finally, the minimal factual allegations of plaintiff's complaint provide no basis for plaintiff's claim under *Section 3* of the Clayton Act. ***HN9***[] *Section 3* prohibits certain exclusive dealing or tied sale arrangements which "substantially lessen competition or tend to create a monopoly." *15 U.S.C. § 14*. Even if the rights to broadcast the 1984 Citrus Bowl may be considered a "commodity" within the meaning of this provision, plaintiff has failed to allege facts, as distinguished from legal conclusions, indicating any decrease in competition in the market for those rights. The only effect of the NBC/FCSA contract discernible from the complaint is that NBC will cover the Citrus Bowl and Mizlou will not. Any tendency toward monopoly would depend on NBC's ability to drive out not only plaintiff, but all or nearly all other competitors. No facts submitted by plaintiff adumbrate such a threat, **[**23]** and from the face of the complaint a *Section 3* injury to competition is not self-evident. *See generally* *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. at 488* (antitrust statutes -- including the Clayton Act -- guard against injury to competition generally, not mere injury to competitors).

In sum, the gist of this complaint is that Mizlou -- not the market -- has been wronged. Although we do not decide this today, it is, of course, possible that plaintiff may have a cognizable claim under tort or contract; however, the allegations before this Court simply cannot rise to the level of federal antitrust claims. ***HN10***[] Liberal use of the language of antitrust will not transform the cause of action -- "when stripped to its essential[s], the complaint does no more than state plaintiff's commercial disappointment", a matter grounded in state law. *See Car Carriers, Inc. v. Ford Motor* ***[*685]*** *Co., supra, quoting* *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc., 691 F.2d 241, 245 (6th Cir. 1982)*; *see also* *Sutliff, Inc. v. Donovan Companies, Inc., 727 F.2d at 654*.

(b). *Pendent Claims*

In light of the prompt dismissal of plaintiff's federal antitrust claims against NBC, principles **[**24]** of comity and federalism support dismissal of plaintiff's pendent state claims as well. *See* *Financial General Bankshares, Inc. v. Metzger, 680 F.2d at 772*. The interests underlying the doctrine of pendent jurisdiction -- "judicial economy, convenience, and fairness to litigants", *United Mine Workers of America v. Gibbs, 383 U.S. 715, 726, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)*; *see also* *Rosado v. Wyman, 397 U.S. 397, 25 L. Ed. 2d 442, 90 S. Ct. 1207 (1970)* -- would not be served by this Court's retention of plaintiff's state law claims, inasmuch as this litigation has not progressed beyond the initial pleading and dispositive motions. *See* *Financial General Bankshares, Inc., supra.*

In accordance with the above discussion, it is, by the Court, this 30th day of November, 1984

ORDERED that:

1. Plaintiff's claims against defendant Florida Citrus Commission are dismissed in accordance with the *Eleventh Amendment*;

2. Plaintiff's claims against defendants Arthur Watson, Jeffrey Cokin, Florida Citrus Sports Association, Sam Hines, Charles Rohe and Vernon Hinely are dismissed for lack of personal jurisdiction;

3. Plaintiff's claims against defendant National Broadcasting **[**25]** Company under *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1*, *2*, and *Section 3* of the Clayton Act, *15 U.S.C. § 14*, are dismissed for failure to state a claim upon which relief can be granted; and

4. Plaintiff's pendent state law claims against defendant National Broadcasting Company are dismissed in accordance with principles of federalism and comity.

This cause stands dismissed.

Walker v. U-Haul Co. of Mississippi

United States Court of Appeals for the Fifth Circuit

December 3, 1984

No. 83-4035

Reporter

747 F.2d 1011 *; 1984 U.S. App. LEXIS 16259 **; 1984-2 Trade Cas. (CCH) P66,306

Charles L. WALKER, Plaintiff-Appellant, v. U-HAUL CO. OF MISSISSIPPI, U-HAUL International, Inc. and Amerco, Etc., Defendants-Appellees

Subsequent History: **[**1]** Petition for Rehearing En Banc Denied January 14, 1985, Reported at: *747 F.2d 1011 at 1016*.

Prior History: Appeal from the United States District Court for the Southern District of Mississippi. Original Opinion of June 25, 1984, 5th Cir., 1984, Reported at: *734 F.2d 1068*.

Core Terms

antitrust, competitor, monopolize, original opinion, rental market, trailer, retail, truck, anti trust law, treble damages, monopolistic, damages

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN1[] **Monopolies & Monopolization, Actual Monopolization**

Section 2 of the Sherman Act, *15 U.S.C.S. § 2*, proscribing monopolies or attempts to monopolize does not explicitly require a plaintiff to prove an injury to competition; the plaintiff must prove only the existence of monopoly power and the willful continued maintenance of that power. Injury to competition is presumed to follow from the conduct proscribed by *§ 2*.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Civil Procedure > ... > Justiciability > Standing > General Overview

Torts > Business Torts > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Remedies > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > Damages

HN2[] **Remedies, Damages**

Congress did not intend to authorize every single person who can demonstrate the likelihood that he suffered some sort of economic injury as a result of such a per se antitrust violation to have a right of action for treble damages under § 4 of the Clayton Act, *15 U.S.C.S. § 15*. An antitrust violation may cause harm of some kind to a vast number of persons and businesses. "Standing" is the term used to describe a particular plaintiff's right to recover treble damages for injury to his trade or business. To have standing to recover under the Sherman Act, an antitrust plaintiff must demonstrate that his injury was a direct consequence of the alleged antitrust violation, that the extent of his injury is determinable and not speculative, and that recovery by him will not duplicate potential recovery by other plaintiffs.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

HN3[] **Private Actions, Standing**

A plaintiff who seeks to recover for an antitrust violation must establish not only direct and determinable injury, but also that this injury was of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful. This is summed up as "antitrust injury." The standing analysis determines who has a right to bring the action: whether the plaintiff is the proper party to bring a private treble damage action. "Antitrust injury" looks to the nature of the damage suffered: an antitrust plaintiff may recover only those damages that are of a type that the antitrust laws were intended to prevent and that flow from the illegal aspects of the defendant's conduct.

Counsel: A. Spencer Gilbert, III, Jackson, Mississippi, for Appellant.

Alan W. Perry; Fred Krutz, III, Jackson, Mississippi, for Appellee.

Gary Klinefelter, U-Haul International, Inc., Phoenix, Arizona, for Appellee.

Judges: Rubin, Johnson and Davis, Circuit Judges.

Opinion by: RUBIN

Opinion

[*1013] ON PETITIONS FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

ALVIN B. RUBIN, Circuit Judge:

Walker's petition for rehearing questions our analysis of Walker's standing under Section 4 of the Clayton Act to maintain a private treble damages action for alleged violations of *Section 2* of the Sherman Act. We grant the petition for rehearing to clarify our analysis of standing to bring a private action under Section 4 of the Clayton Act, and to point out the applicability of the additional requirement for the recovery of damages, that the injury be of a type the **[**2]** antitrust laws were meant to redress. Applying that test, we affirm the result originally reached. We also respond to a request made in U-Haul's application for rehearing by clarifying our reference to the applicability of the Mississippi Statute of Frauds to the lease between Walker and U-Haul. Having thus clarified our prior opinion, we reinstate it.

I.

HN1[] *Section 2* of the Sherman Act proscribing monopolies or attempts to monopolize does not explicitly require a plaintiff to prove an injury to competition; the plaintiff must prove only the existence of monopoly power and the willful continued maintenance of that power. [1] Injury to competition is presumed to follow from the conduct proscribed by *§ 2*. [2] However, ***HN2***[] Congress did not intend to authorize every single person who can demonstrate the likelihood that he suffered some sort of economic injury as a result of such a per se antitrust violation to have a right of action for treble damages under § 4 of the Clayton Act. An antitrust violation may cause **[*1014]** harm of some kind to a vast number of persons and businesses. "Standing" is the term used to describe a particular plaintiff's right to recover treble damages for **[**3]** injury to his trade or business. To have standing to recover under the Act, an antitrust plaintiff must demonstrate that his injury was a direct consequence of the alleged antitrust violation, that the extent of his injury is determinable and not speculative, and that recovery by him will not duplicate potential recovery by other plaintiffs. [3]

In his initial brief on appeal Walker **[**4]** contended that the district court's summary judgment was predicated, at least in part or in the alternative, on his lack of standing. U-Haul contended that the district court relied only on lack of evidence of injury to competition. We discussed standing in our original opinion, and concluded, on the basis of two of our earlier opinions, which we discuss below, that Walker lacked standing. Walker questions the accuracy of our observations concerning standing in these opinions, in the light of Supreme Court decisions. We now conclude that Walker may have indeed demonstrated his standing sufficiently to withstand summary judgment. He alleges an injury that is both direct and measurable: he alleges that U-Haul destroyed his business in an attempt to monopolize the truck and trailer retail rental market in the Jackson area. Walker was not a direct competitor in that market; he competed only as an agent for U-Haul. Even assuming that Ryder, Hertz or others who offer rentals in competition with U-Haul were the ultimate targets of U-Haul's alleged anticompetitive acts, we conclude, on reconsideration, that recovery by Walker would not duplicate potential recoveries by these U-Haul competitors. **[**5]** The damage to Hertz, Ryder, and other competitors would be their lost opportunity either to enter into franchise contracts with dealers in the market area or to lease their equipment to customers. Walker's injury is different: it is the loss of his business as an agent. Each potential plaintiff would have suffered his own damages, in the form of loss of a different kind of business, caused by U-Haul's alleged illegal conduct. Recovery by a competitor for consumer business would in no sense duplicate or compensate the damage suffered by a competitor for an agency.

As noted in our original opinion, however, ***HN3***[] a plaintiff who seeks to recover for an antitrust violation must establish not only direct and determinable injury, but also that this injury was "of the type the antitrust laws were

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[1] *See United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778, 786 (1966)*.

[2] *See Almeda Mall, Inc. v. Houston Lighting & Power Co., 615 F.2d 343 (5th Cir.)*, *cert. denied*, ***449 U.S. 870, 101 S. Ct. 208, 66 L. Ed. 2d 90 (1980)***.

[3] *Blue Shield of Virginia v. McCready, 457 U.S. 465, 474, 102 S. Ct. 2540, 2546*, et seq., *73 L. Ed. 2d 149 (1982)*; *Assoc. Gen. Contractors of Cal. v. Cal. St. Council, 459 U.S. 519, 540, 103 S. Ct. 897, 910*, et seq., *74 L. Ed. 2d 723 (1983)*.

intended to prevent and that flows from that which makes defendant's acts unlawful." [4] This is summed up as "antitrust injury." The standing analysis determines who has a right to bring the action: whether the plaintiff is the proper party to bring a private treble damage action. "Antitrust injury" looks to the nature of the damage suffered: an antitrust plaintiff may recover only those damages **[**6]** that are of a type that the antitrust laws were intended to prevent and that flow from the illegal aspects of the defendant's conduct. [5]

Recent Supreme Court decisions have emphasized the directness or indirectness of the injury, the risk of duplicative recoveries, avoidance of speculative claims, and other factors without mentioning antitrust standing as a distinct inquiry. The Court, however, has also emphasized the requirement **[**7]** that the injury be of the kind the antitrust laws were meant to prevent **[*1015]** so we consider that question specifically. [6] To show antitrust injury, Walker must establish that the injury to his business as an agent "flowed from" or reflected the presumed anticompetitive effects resulting from U-Haul's alleged monopolization of or attempt "to monopolize the retail truck and trailer rental market in Jackson, Mississippi." [7]

[8]** The requirement of antitrust injury is not inconsistent with the presumption of injury to competition in *Section 2* cases. As one commentator has stated:

> To say that the plaintiff need not show public injury in per se cases to establish the fact of a violation does not tell us what kind of individual injury should be compensable. . . . The inquiry into antitrust injury addresses the question of damages and does not even begin until the court finds that a violation has been alleged and that the plaintiff has been injured by it. The purpose of the inquiry is to determine whether and to what extent the plaintiff's injury flows from the kind of inefficiency to which the substantive law is directed.

Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*. [8]

[9]** The prohibition of monopolization in *Section 2* is intended to protect against the elimination of competitors and competing products or services in a given product and geographic market by a monopolist. The complaint defines the alleged monopoly as embracing the retail truck and trailer rental market in Jackson, Mississippi. To demonstrate, in opposition to a motion for summary judgment, that his business injury flowed from this anticompetitive impact on that business, Walker must submit some evidence from which the district court might conclude that U-Haul committed acts that furthered a monopolistic scheme to eliminate competitors and competing products from the retail rental market in Jackson, Mississippi. [9] In the trial court, Walker alleged vaguely that "for purpose of monopolizing or attempting to monopolize the retail truck and trailer rental market in Jackson,

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[4] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701, 712 (1977)*. *See also* *Blue Shield of Virginia v. McCready, 457 U.S. 465, 479, 102 S. Ct. 2540, 2549*, et seq., *73 L. Ed. 2d 149 (1982)*; *Assoc. Gen. Contractors of Cal. v. Cal. St. Council, 459 U.S. 519, 537, 103 S. Ct. 897, 908*, et seq., *74 L. Ed. 2d 723 (1983)*.

[5] See Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 Univ. of Chicago L.R. 467, 497-98 (1980).

[6] *See* *Blue Shield of Virginia v. McCready, 457 U.S. 465, 474, 102 S. Ct. 2540, 2546*, et seq., *73 L. Ed. 2d 149 (1982)*; *Assoc. Gen. Contractors of Cal. v. Cal. St. Council, 459 U.S. 519, 540, 103 S. Ct. 897, 910*, et seq., *74 L. Ed. 2d 723 (1983)*; Comment, 72 Calif. L. R. 437, 454 (1984).

[7] *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701, 712 (1977)*. *See* *Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300 (5th Cir.1984)*; *Multiflex, Inc. v. Samuel Moore & Co., 709 F.2d 980, 993-94 (5th Cir.1983)*, *cert. denied*, ***465 U.S. 1100, 104 S. Ct. 1594, 80 L. Ed. 2d 126 (1984)***.

[8] 47 University of Chicago Law Review 467, 488 (1980). *See also* Note, *Antitrust Standing, Antitrust Injury, and the Per Se Standard*, 93 Yale Law Journal 1309, 1313-14, 1318 (1984).

[9] To demonstrate antitrust injury, Walker must "formulate a plausible substantive claim sufficient to survive summary disposition." See 2 Areeda and Turner, ***Antitrust Law***, para. 334e at 168.

Mississippi," U-Haul raised Walker's rent to a level that forced Walker to surrender his moving center dealership and vacate the premises. However, as discussed in our original opinion, [10] Walker made no mention in the lower court of how U-Haul's termination of a single agent for its own services (Walker) was intended **[**10]** to or would in fact affect the competing services that might be offered by other truck and trailer renters, the interbrand, as opposed to the intrabrand, market. The termination of Walker as an agent for U-Haul eliminated only an intrabrand competitor. Neither in the complaint nor otherwise in the lower court has Walker set forth how U-Haul's acts furthered a monopolistic scheme to eliminate the competition of Ryder, Hertz, or other brands from the "retail truck and trailer rental market." Walker not only did not make sufficient allegations of a specific monopolistic scheme, but he also failed to adduce evidence sufficient to raise a genuine dispute of material fact concerning the existence of such a claim. Walker has not therefore established a factual basis for the prerequisite of antitrust injury. Absent some evidence of this prerequisite to recovery in the affidavits or depositions filed in opposition to the motion **[*1016]** for summary judgment, Walker has failed to demonstrate a basis from which a fact trier might conclude that he suffered antitrust injury. [11] Finally, we reiterate the observations in our original opinion: Walker has failed to adduce sufficient evidence **[**11]** that U-Haul engaged in forbidden monopolizing conduct. [12]

As Walker points out in his application for rehearing, the district court opinion in *Action Towing and Rental v. U-Haul International* [13] did not distinguish between standing, the right to bring a private treble damages action under the Clayton Act, and the components of a cause of action under the Sherman Act. In relying on this decision and a phrase used in dicta by this court in *Bayou Bottling, Inc. v. Dr. Pepper Co.*, [14] our prior opinion improperly suggested that an antitrust plaintiff must establish a marketwide injury to competition as an element of standing. The antitrust laws exact no such additional requirement, and we **[**12]** state this explicitly to clarify both the scope of our affirmance in *Action Towing* and the limited meaning of the phrase used in *Bayou Bottling*.

We adhere to our original opinion that Walker failed to raise a genuine issue of fact tending to show that U-Haul engaged in purposeful monopolistic conduct.

II.

We also grant U-Haul's petition for rehearing to the following extent: the fourth sentence of the second full paragraph on slip opinion page 4262, 734 F.2d at 1078, is changed to read as follows:

> With regard to the requirement that the agreement be in writing, the statute draws no distinction between an agreement to sell land and the making of a lease for a term longer than one year, covering both of these promises in the same subsection. [15]

[13]** The court's original opinion is in all other respects reinstated and made the opinion of the court on rehearing.

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[10] 734 F.2d at 1071-1072.

[11] *See supra* note 9.

[12] 734 F.2d at 1074.

[13] 507 F. Supp. 987 (E.D. La.1981), *aff'd without opinion*, ***683 F.2d 415 (5th Cir.1982)***.

[14] 725 F.2d 300, 303 (5th Cir.1984).

[15] The sentence corrected originally read:

> With regard to the admissibility of parol evidence, the statute draws no distinction between an agreement to sell land and the making of a lease for a term longer than one year, covering both of these promises in the same subsection.

National Independent Theatre Exhibitors, Inc. v. Charter Financial Group, Inc.

United States Court of Appeals for the Eleventh Circuit

December 5, 1984

No. 82-8669

Reporter
747 F.2d 1396 *; 1984 U.S. App. LEXIS 16182 **; 1984-2 Trade Cas. (CCH) P66,305; 40 Fed. R. Serv. 2d (Callaghan) 979

NATIONAL INDEPENDENT THEATRE EXHIBITORS, INC., et al., Plaintiffs-Appellants, v. CHARTER FINANCIAL GROUP, INC., etc., et al., Defendants-Appellees

Prior History: [1]** Appeal from the United States District Court for the Northern District of Georgia.

Core Terms

film, district court, distribute, exhibitors, theatre, breach of contract claim, antitrust, distributor, plaintiffs', parties, antitrust claim, discovery, movie, leave to amend, contracted, exhibition, solicit, target

LexisNexis® Headnotes

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

HN1[] **Clayton Act, Claims**

Standing to prosecute a private antitrust action under § 4 of the Clayton Act requires that the plaintiff prove that he is within that sector of the economy, which is endangered by a breakdown of competitive conditions in a particular industry. The plaintiff must be the target against which anticompetitive activity is directed. The injury must be of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' act unlawful. Incidental or consequential injury or injury remotely caused by an antitrust violation does not give a plaintiff standing to complain that he has been injured by reason of anything forbidden in the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN2[] Private Actions, Standing

Neither an officer nor an employee of a corporation has standing to bring an action in his own right for an antitrust violation causing injury to the corporation and its business. To be sure, such persons may suffer indirect or secondary financial injury from antitrust violations, but the law does not consider them to be the target of the anticompetitive practices.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN3[] Price Fixing & Restraints of Trade, Horizontal Refusals to Deal

A manufacturer generally has a right to deal, or refuse to deal, with whomever it chooses so long as its decision is made independently.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN4[] Scope, Monopolization Offenses

Section 2 of the Sherman Act prohibits monopolization and attempts to monopolize. A plaintiff need not demonstrate that the monopolization or attempt was the product of concerted action. Therefore, a wholly unilateral refusal to deal, when accompanied by the intent to monopolize and the requisite degree of market power, may constitute a violation of § 2.

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Civil Procedure > Trials > Jury Trials > Jury Deliberations

HN5[] Jury Trials, Jury Instructions

In reviewing jury instructions, the appellate court considers the court's charge as a whole. When the instructions, taken together, accurately express the law applicable to the case without confusing or prejudicing the jury, there is no reason for reversal even though isolated clauses may, in fact, be confusing, technically imperfect, or otherwise subject to criticism. An erroneous instruction does not require reversal unless the reviewing court is left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations.

Contracts Law > Statute of Frauds > General Overview

HN6[] **Contracts Law, Statute of Frauds**

See Georgia Statute of Frauds, *O.C.G.A. § 13-5-30* (1982).

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Oral Agreements

Civil Procedure > ... > Jury Trials > Jury Instructions > Objections

Contracts Law > Statute of Frauds > Requirements > Performance

Civil Procedure > ... > Jury Trials > Jury Instructions > General Overview

Contracts Law > Statute of Frauds > General Overview

Contracts Law > Statute of Frauds > Requirements > General Overview

HN7[] **Types of Contracts, Oral Agreements**

In Georgia, the statute of frauds does not bar enforcement of an oral contract if one side is capable of completing his performance within one year.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN8[] **Pleadings, Amendment of Pleadings**

The grant of leave to amend is committed to the district court's discretion, but *Fed. R. Civ. P. 15(a)* provides that leave shall be freely given when justice so requires.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN9[] **Pleadings, Amendment of Pleadings**

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be freely given.

Counsel: James Thomas Patterson, Sr., Riverdale, Georgia, for Appellant.

Lawrence L. Aiken, Riverdale, Georgia, for Appellant.

D.R. Cumming, Jr; Alfred A. Lindseth; Thomas A. Varlan; Sutherland, Asbill & Brennan, Atlanta, Georgia, for Appellee.

Jeffrey R. Nickerson; Steven W. Korn; Kevin C. Green; June Ann Kirkland; Troutman, Sanders, Lockerman & Ashmore, Atlanta, Georgia, for Appellee.

Judges: Tjoflat and Hatchett, Circuit Judges, and Garza, [*] Senior Circuit Judge.

Opinion by: TJOFLAT

Opinion

[*1398] TJOFLAT, Circuit Judge:

This suit arises out of a dispute over the right to distribute a motion picture, "The Buddy Holly Story," for exhibition in theatres across the United States. James Thomas Patterson, Sr. and National Independent Theatre Exhibitors, Inc. (NITE) claim that they had a contract right, given them by Charter Financial Group, Inc. (Charter), one of the film's co-executive producers, to distribute the film and that Charter and Columbia Picture Industries, Inc. (Columbia) wrongfully **[**2]** deprived them of that right when Charter made Columbia the exclusive distributor of the film.

Patterson and NITE sued Charter and Columbia in the district court in three counts, each seeking money damages on a discrete theory of liability. First, plaintiffs, invoking section 4 of the Clayton Act, *15 U.S.C. § 15 (1982)*, [1] **[**3]** claimed that the defendants' conduct violated *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2 (1982)*, and that they were entitled to treble damages. Second, plaintiffs claimed that Charter's breach of its distribution contract with them rendered Charter liable for the revenues they would have obtained had they distributed the film. Third, plaintiffs claimed that Columbia had tortiously interfered with their contract with Charter and thus was also liable for the same lost revenues. [2] The defendants denied the alleged wrongdoing. Charter also counterclaimed, alleging that the plaintiffs fraudulently induced it to enter into any distribution contract it may have made with them and that it had suffered consequential damages as a result.

The case was tried to a jury. At the close of the plaintiffs' case, the court directed a verdict for Columbia and dismissed it from the case. At the close of all the evidence, the court directed a verdict for Charter on plaintiffs' antitrust claims. It submitted plaintiffs' breach of contract claim to the jury, and the jury found for Charter.

Patterson and NITE appeal. Patterson contends that the district court erred in taking his antitrust [3] and tort claims from the jury and that the court committed reversible error in charging the jury on his **[*1399]** breach of contract claim against Charter. NITE does not challenge the district court's direction of verdicts; it takes issue only with the court's handling of its breach of contract claim against Charter. We find no reversible error in this case and accordingly affirm.

[4]** I.

Charter is an investment brokerage company operating out of Houston, Texas. It serves as an intermediary in the financing of business ventures. Its clients include entrepreneurs who are in need of venture capital and individual

[*] Honorable Reynaldo G. Garza, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

[1] Jurisdiction for plaintiffs' antitrust claims was predicated on *28 U.S.C. §§ 1331* & *1337 (1982)*. Jurisdiction for plaintiffs' breach of contract and tortious interference with contract claims was based on *28 U.S.C. § 1332 (1982)* and the district court's pendent jurisdiction.

[2] In their *ad damnum* clause at the end of their complaint, plaintiffs prayed for $20 million in punitive damages, presumably as to each of their three claims for relief. Charter's counterclaim also sought punitive damages, in the sum of $100000.

[3] The court summarily dismissed Patterson's antitrust claims on the defendants' motions prior to trial. It directed a verdict for Columbia on Patterson's tortious interference with contract claim at trial, at the close of plaintiffs' case. *See infra* text at slip op. p. 6.

investors who possess such capital. Charter's involvement in the distribution of "The Buddy Holly Story" was its first experience in a motion picture venture.

In 1976, Ed Cohen, Fred Bauer and Steve Rush (the "Owners") acquired the movie rights to the life of Buddy Holly, a famous rock star musician of the 1950's. They lacked the resources to produce and distribute a movie and entered into a formal contract with Charter to fund the production and distribution of "The Buddy Holly Story." The contract provided that Charter would solicit $2 million in investment capital and form a limited partnership consisting of the Owners, who would contribute their film rights, and individual investors. The limited partnership would, in turn, contract with the Owners and Charter, as co-executive producers, to produce the film. In addition to being a co-executive producer, Charter would distribute the film, alone or through a major film distributor, to the exhibiting **[**5]** theatres across the country.

In the summer of 1976, after Charter contracted with the Owners, its vice president, Fred Kuehnert, contacted Patterson, who was president of NITE, about the possibility of NITE's distributing "The Buddy Holly Story." NITE was an association of independently owned theatre operators who, collectively, possessed some 5,000 theatre screens. NITE's board of directors had recently decided to distribute high quality films in competition with the major film distributors, such as Columbia, and was looking for a first run film to kick off its distribution program. Patterson convinced Kuehnert that NITE could do as good a job as the major distributors in obtaining theatre exhibitors to show the movie. He also impressed Kuehnert with his representation that, in advance of the film's distribution, NITE would obtain binding commitments from the exhibitors for minimum film rentals which Charter, in turn, could use to entice investors [4] to underwrite the film's production costs.

[6]** After a series of negotiations, Patterson and Kuehnert, on April 11, 1977 in Atlanta, Georgia, orally agreed on the following terms to be incorporated into a written exclusive distribution agreement between NITE and Charter. [5] NITE would get 750 of its member theatres to sign exhibition contracts with Charter obligating the theatre to rent "The Buddy Holly Story" for a specified period at a guaranteed minimum rent. Patterson told Kuehnert that it would take NITE about two months to solicit these exhibitors, so they agreed that NITE would have 120 days thereafter to place the exhibitors under contract. Charter, in return, would pay NITE $50,000 and would underwrite certain of NITE's solicitation expenditures. After the movie was **[*1400]** produced and ready for distribution, Charter would deliver it to the NITE members who had contracted to exhibit it, collect the film rentals, and pay NITE twenty percent of these rentals.

[7]** Charter's obligation to distribute "The Buddy Holly Story" through NITE was contingent upon its acquisition of investment capital sufficient to produce the movie. Once Patterson and Kuehnert came to the understanding we have described, Charter set about the task of raising that capital. It soon found a group of investors in Boston, Massachusetts (the "Boston Group") willing to provide the necessary capital provided they could borrow it. The Boston Group contacted First National Bank of Boston, which had considerable experience in financing film production costs, and were advised that the investment Charter proposed was a poor risk. The bank based its judgment in large part on NITE's lack of experience in distributing first run films and the perceived worthlessness of NITE's exhibitor members' guarantees. [6] It advised the Boston Group that it's investment would be much less risky, and thus capable of being bank financed, if they could obtain a major film distributor, such as Columbia, or a circuit

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[4] Patterson told Kuehnert that he could get at least 750 of NITE's members to guarantee a minimum rental. He estimated that each guarantee would average about $2,000 and that, collectively, they would approximate $2 million. Presumably, these guarantees would inure to the benefit of Charter's investors, serving indirectly to underwrite their provision of production costs.

[5] It is undisputed that these negotiators contemplated a written contract between Charter and NITE. Each party had retained counsel and they were to reduce the negotiators' understanding to writing. Charter's lawyer advised Charter not to accept the negotiators' proposal, and Charter followed that advice. NITE had no experience in distributing motion pictures, and the exhibitors' commitments would be worthless. To enforce those commitments, Charter would have had to sue the exhibitors in their jurisdictions, and considering the exhibitors' limited exposure the litigation expenses would have been prohibitive.

[6] *See supra* note 5.

exhibitor, such as General Cinema Corporation of America (which operated 850 screens across the country), to market the film and underwrite a portion of the production costs.

[8]** The Boston Group promptly communicated this information to Kuehnert at Charter and told Kuehnert that they would not go along with his NITE proposal. Kuehnert consequently looked elsewhere, and Charter eventually contracted with Columbia to distribute the film.

The production of "The Buddy Holly Story" was completed in February 1978, and Columbia immediately solicited exhibition bids from theatre operators, including NITE's members. When Patterson learned of this solicitation, he contacted Columbia's attorneys claiming that NITE had the exclusive right to distribute the movie and that it would sue Columbia if Columbia continued its distribution effort. Columbia ignored Patterson's threat and distributed the film. This litigation followed.

Patterson and NITE filed their complaint, in the three counts we have described *supra*, on December 1, 1978. After Columbia and Charter responded, the parties engaged in several months of discovery. When discovery was about concluded, the plaintiffs moved the court for leave to amend their complaint to add numerous parties, including the Owners, the Boston Group, and General Cinema Corporation of America, as defendants in their antitrust **[**9]** and tortious interference of contract counts. The court denied their motion because the plaintiffs had long known of these parties, and to allow plaintiffs to join them as discovery was coming to a close would "unduly prejudice [Columbia and Charter] and unnecessarily delay trial of the action."

Columbia and Charter thereafter moved for summary judgment on all counts. The district court denied their motions, except as to Patterson's antitrust claims. As to those claims the court concluded that Patterson had no standing to bring them because he was merely an employee of NITE. Following this ruling, the case proceeded to trial.

At the close of the plaintiffs' case, the court directed a verdict for Columbia on all issues. In making its ruling, the court assumed that Charter had given NITE the exclusive right to distribute "The Buddy Holly Story" and had denied it that right by substituting Columbia as the film's distributor. The court rejected NITE's antitrust claims against Columbia on the ground that it was not a violation of the Sherman Act for a manufacturer or supplier, like Charter, unilaterally to cancel an exclusive distributorship with one party, such as NITE, and to **[**10]** substitute another, such as Columbia. *Monsanto Co. v. Spray-Rite Service Co., 465 U.S. 752, 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775 (1984)*; **[*1401]** *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992 (1919)*. The court rejected Patterson's and NITE's tortious interference of contract claim against Columbia because there was no evidence indicating that Columbia, when it contracted with Charter, either had knowledge of an extant Charter-NITE distributorship agreement or caused its breach.

At the close of all the evidence, the court directed a verdict for Charter on the balance of the antitrust claims. Addressing NITE's *section 1* Sherman Act claim, the court found no evidence of a conspiracy between Charter and a third party. As for NITE's *section 2* claim, the court followed its reasoning in dismissing Columbia from the case. It also observed that Charter, having no presence in the film production and distribution industries, did not create a monopoly, attempt to create a monopoly, or restrain trade in the relevant product market. *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704, 16 L. Ed. 2d 778 (1966)*. **[**11]**

The district court denied Charter's motion for a directed verdict on plaintiffs' breach of contract claim, although the court seriously doubted that Charter and NITE and/or Patterson had ever reached a binding agreement to distribute "The Buddy Holly Story." The court also denied the plaintiffs' motions for a directed verdict on Charter's counterclaim. The jury thereafter returned defense verdicts on those respective claims.

II.

As we have indicated *supra*, NITE does not appeal the district court's dismissal of its antitrust claims. Patterson, however, questions the court's ruling that he lacked standing to prosecute those claims individually. We dispose of his point in subpart A below.

Both plaintiffs challenge the court's instructions to the jury on their breach of contract claim against Charter. We reject their challenge in subpart B. Plaintiffs also claim reversible error in the court's denial of their pretrial motion for leave to amend their complaint and the manner in which it conducted the trial. Only the former claim of error is worthy of discussion, in subpart C; the remaining claims are frivolous and receive no further comment.

A.

[12]** ***HN1***[] Standing to prosecute a private antitrust action under section 4 of the Clayton Act requires that the plaintiff prove that "he is within that sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir. 1975)*. *See* *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc., 710 F.2d 752, 762 (11th Cir. 1983)*. The plaintiff must be the target against which anticompetitive activity is directed. *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 710 (11th Cir.1984)*; *Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 546-47 (5th Cir.1980)*, *cert. denied*, *454 U.S. 927, 102 S. Ct. 427, 70 L. Ed. 2d 236 (1981)*. The injury must be "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' act 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)*. "Incidental or consequential injury or injury remotely **[**13]** caused by an antitrust violation does not give a plaintiff standing to complain that he has been injured by reason of anything forbidden in the antitrust laws." *Midwestern Waffles, 734 F.2d at 710-11*. *See* *Jeffrey, 518 F.2d at 1131* (citing cases).

The film distribution market was the target of the defendants' alleged anticompetitive behavior. Patterson never intended or prepared to enter this business. There is no evidence that any of the defendants' alleged behavior was directed against him individually. Patterson clearly fell outside the target area. Accordingly, the district court correctly determined that he lacked standing to sue.

[*1402] Patterson claimed individual injury in his capacity as an officer of NITE and the manager of its film distribution program, a target of the alleged conspiracy. The law on standing in this situation is clear. ***HN2***[] Neither an officer nor an employee of a corporation has standing to bring an action in his own right for an antitrust violation causing injury to the corporation and its business. *Midwestern Waffles, 734 F.2d at 710-11*; **[**14]** *Pitchford v. Pepi, Inc., 531 F.2d 92, 97-98 (3d Cir.1975)*, *cert. denied*, *426 U.S. 935, 96 S. Ct. 2649, 49 L. Ed. 2d 387 (1976)*; *Jeffrey, 518 F.2d at 1131*. To be sure, such persons may suffer "indirect" or "secondary" financial injury from antitrust violations, but the law does not consider them to be the target of the anticompetitive practices. *Jeffrey, 518 F.2d at 1131*.

In addition, we are certain that any error concerning Patterson's standing to prosecute the antitrust claims was harmless. Patterson only contends that he should have been treated as a distributor in the same position as NITE. Had the district court allowed his case to proceed to trial, his evidence would have been the same as NITE's. That evidence, considered in the light most favorable to Patterson, would have established nothing more than it established for NITE, a unilateral refusal by Charter to deal with Patterson and NITE. *Section 1* of the Sherman Act does not proscribe independent action. ***HN3***[] A manufacturer generally has a right to deal, or refuse **[**15]** to deal, with whomever it chooses so long as its decision is made independently. *Monsanto Co. v. Spray-Rite Service Corp.*, __ U.S. at __, 104 S. Ct. at 1469 (1984); *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 468, 63 L. Ed. 992 (1919)*; *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc., 710 F.2d 752, 772-73 (11th Cir. 1983)*.

HN4[] *Section 2* of the Act prohibits monopolization and attempts to monopolize. A plaintiff need not demonstrate that the monopolization or attempt was the product of concerted action. Therefore, a wholly unilateral refusal to deal, when accompanied by the intent to monopolize and the requisite degree of market power, may constitute a violation of *section 2*. *Otter Tail Power Co. v. United States, 410 U.S. 366, 377-78, 93 S. Ct. 1022, 1029-30, 35 L. Ed. 2d 359 (1973)*; *see also* *Lorain Journal Co. v. United States, 342 U.S. 143, 152-55*; *72 S. Ct. 181, 186-87, 96 L. Ed. 162 (1951)*. Charter's actions cannot be viewed as a predatory **[**16]** refusal to deal as proscribed by *section 2*, however, because the company plainly lacked sufficient market power to present a dangerous probability of success. *Walker Process Equipment, Inc. v. Food Machinery and Chemical Corp., 382 U.S. 172, 177-78, 86 S. Ct.*

347, 350-51, 15 L. Ed. 2d 247 (1965); Quality Foods de Centro America, S.A. v. Latin American Agribusiness Development Corp., 711 F.2d 989, 997 (11th Cir.1983). In sum, even if Patterson had standing, he could not have made out a claim under either section of the Sherman Act, and the district court would have been required to take his case from the jury, as it did NITE's.

B.

According to NITE and Patterson, the district court, in charging the jury on their breach of contract claim against Charter, improperly instructed the jury on propositions of law about which there was no evidence. *See* Collins v. Metropolitan Life Insurance Co., Inc., 729 F.2d 1402, 1405 (11th Cir.1984). They also contend that the court's charge contained such inflammatory language as to prejudice the jury against them.

[17]** ***HN5***[] In reviewing jury instructions, we consider the court's charge as a whole. When the instructions, taken together, accurately express the law applicable to the case without confusing or prejudicing the jury, there is no reason for reversal even though isolated clauses may, in fact, be confusing, technically imperfect, or otherwise subject to criticism. Somer v. Johnson, 704 F.2d 1473, 1477-78 (11th Cir.1983); Johnson v. Bryant, 671 F.2d 1276, 1280 (11th Cir.1982). An erroneous instruction does not require reversal unless the reviewing **[*1403]** court is "left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations," Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1372 (5th Cir.1981).

The bulk of appellants' criticisms deal with the court's treatment of Charter's statute of frauds defense. *See* Ga. Code § 13-5-30(5) (1982). Charter contended that the oral agreement plaintiffs alleged it made in Atlanta on April 11, 1977, *see supra*, part I, was unenforceable because it was "not to be performed within one year." [7]

[18]** The law ***HN7***[] in Georgia, although not recently articulated, appears to be that the statute of frauds does not bar enforcement of an oral contract if one side is capable of completing his performance within one year. Johnson v. Watson, 1 Ga. 348 (1846). [8] The court properly instructed the jury on the statute, and, before the jury retired, plaintiffs objected to the instruction, contending that the evidence failed to support Charter's statute of frauds defense. *See* Fed. R. Civ. P. 51. They argued that the evidence conclusively established that they could have performed their part of the bargain within one year and that the court's submission of Charter's defense to the jury caused them substantial prejudice. We are not persuaded.

[19]** The evidence in this case, viewed most favorably for the plaintiffs, indicated that no contract of any kind existed between Charter and Patterson. At all times, Patterson was acting as NITE's representative; hence the court should have withdrawn his claim from the jury when Charter moved for a directed verdict. It follows, then, that the court's charge on the breach of contract claim caused Patterson no prejudice.

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[7] The Georgia Statute of Frauds, codified as Ga. Code § 13-5-30 (1982), provides in relevant part:

> **13-5-30.** ***HN6***[] **Agreements required to be in writing**.
>
> To make the following obligations binding on the promisor, the promise must be in writing and signed by the party to be charged therewith or some person lawfully authorized by him:
>
> (5) Any agreement that is not to be performed within one year from the making thereof; . . . .

[8] It is clear that, under Georgia law, if *both* parties to a contract are capable of performing within one year, the contract is outside the statute of frauds. Henderson v. Touchstone, 22 Ga. 14 (1857); Weems v. Assoc. Life Ins. Co., 154 Ga. App. 552, 269 S.E.2d 57, 59 (1980); Klag v. Home Insurance Co., 116 Ga. App. 678, 158 S.E.2d 444, 451 (1967). These cases should not necessarily be read, however, as *requiring* that *both* parties be capable of performing within a year in order for the contract to be outside the statute of frauds; thus they need not be read as overturning the holding in Johnson v. Watson, 1 Ga. 348 (1846). If, however, Georgia law does require that both parties be capable of performing within one year in order for the contract to be outside the statute of frauds, the contract before us clearly could not have met this more stringent requirement. For, as we demonstrate *infra*, it would have been nearly impossible for even one of the parties, NITE, to have performed within one year.

There is little, if any, possibility that the charge prejudiced NITE either. There was a remote chance, at best, that NITE could have performed the April 11, 1977 oral contract within one year. First, NITE needed at least two months, at minimum, to prepare itself to publicize its distribution of "The Buddy Holly Story"; thereafter, it needed four more months to sign up the 750 exhibitors it promised Charter it would obtain. Production of the film was not to commence for several months; in all, the parties contemplated that practically a year would pass before the film reached NITE's exhibitors. Finally, NITE was required to monitor its exhibitors' performance throughout the film's exhibition. On this record, we would be hard pressed to reverse the district court had **[**20]** it directed a verdict for Charter on this claim.

Having declined to direct a verdict, the district court was manifestly required to submit Charter's statute of frauds defense to the jury. The court's instruction carefully tracked the statute and, in our view, was entirely free of error. The plaintiffs have no room for complaint, and we accordingly reject their challenges to the manner **[*1404]** in which the court submitted their breach of contract claim to the jury.

C.

NITE and Patterson contend that the district court erred in not granting them leave to amend their complaint to add fourteen new defendants, including the Owners, the Boston Group, and General Cinema Corporation of America, and to increase their prayer for punitive damages from $20 million to $150 million. The plaintiffs made their request after almost a year of extensive discovery. During the interval, thirty-three people were deposed and the parties propounded numerous interrogatories and produced substantial quantities of documents. Discovery was about concluded, and the defendants were preparing to go to trial.

[21]** ***HN8***[] The grant of leave to amend is committed to the district court's discretion, but *Fed. R. Civ. P. 15(a)* provides that "leave shall be freely given when justice so requires." *See, e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330, 91 S. Ct. 795, 802, 28 L. Ed. 2d 77 (1971)*; *Espey v. Wainwright, 734 F.2d 748, 750 (11th Cir.1984)*. In this case, the district court correctly applied the standard enunciated in *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962)*:

> ***HN9***[] If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be **[**22]** "freely given."

Here, the plaintiffs unnecessarily delayed the prosecution of their claims against the fourteen additional parties. Charter and Columbia, both ready for trial, would have been prejudiced by the delay and expense occasioned by the largely repetitious discovery the new defendants would have required. Finally, the plaintiffs, in moving for leave to amend, made no showing in their factual allegations as to how the additional parties could be held liable on any of the claims they were asserting against Charter and Columbia. Under these circumstances, the district court acted within its discretion in denying plaintiffs' motion for leave to amend the complaint. The judgment of the district court is

AFFIRMED.

Bender v. Southland Corp.

United States Court of Appeals for the Sixth Circuit

September 18, 1984, Argued ; December 7, 1984

No. 83-1525

Reporter

749 F.2d 1205 *; 1984 U.S. App. LEXIS 16094 **; 1984-2 Trade Cas. (CCH) P66,309

PAUL BENDER, Plaintiff, GEORGE and DIANE DECARLO, et al., Plaintiffs-Appellants, v. SOUTHLAND CORPORATION, Defendant-Appellee

Prior History: [1]** ON APPEAL from the United States District Court for the Eastern District of Michigan.

Core Terms

franchisee, inventory, suggested retail price, plaintiffs', prices, district court, retail price, tying arrangement, price fixing, vertical, deposit, vendors, summary judgment, nonrecommended, magistrate's order, franchises, genuine issue of material fact, accounting system, injunctive relief, suppliers, recommended, percent, tied product, interrogatories, antitrust, coercion, defraud, retail, mail, franchise agreement

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Civil Procedure > ... > Summary Judgment > Motions for Summary Judgment > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > 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

HN1[] **Vertical Restraints, Price Fixing**

Although the use of summary procedures certainly is not prohibited in antitrust cases, summary judgment motions in antitrust litigation are disfavored. Accordingly, a court must strictly apply the general rule that the party seeking summary judgment must conclusively show that there exists no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. The evidence and all reasonable inferences which may be drawn therefrom must be viewed in the light most favorable to the party opposing the summary judgment motion.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > ... > Private Actions > Standing > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN2[] Sherman Act, Claims

Vertical price fixing is a per se violation of § 1 of the Sherman Act, 15 U.S.C.S. § 1. Establishing a per se violation of the Sherman Act in a private action brought under a vertical price fixing theory requires proof of four elements: a defendant must have intended to fix prices charged by traders at lower levels in the distribution system; a defendant must have coerced the plaintiff into charging higher or lower prices; a defendant's conduct must have caused antitrust injury; and a plaintiff must show an entitlement to relief.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Business & Corporate Compliance > ... > Labor & Employment Law > Affirmative Action > Program Compliance

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

HN3[] Vertical Restraints, Price Fixing

Coercion in the context of vertical price fixing under the Sherman Act is actual or threatened affirmative action, beyond suggestion or persuasion, taken by a defendant in order to induce a plaintiff to follow the defendants' prices.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Clayton Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN4[] Tying Arrangements, Clayton Act

An unlawful tying arrangement under § 1 of the Sherman Act, 15 U.S.C.S. § 1, exists where a seller will sell one product, the tying product, only if the buyer will purchase a second product, the tied product. Such arrangements are per se violations of § 1 if the seller has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a "not insubstantial" amount of interstate commerce is affected. In order to have a per se unlawful tying arrangement, two distinct products or services must jointly be sold.

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > Elements

Criminal Law & Procedure > ... > Fraud Against the Government > Mail Fraud > General Overview

HN5[ ] **Mail Fraud, Elements**

The crime of mail fraud has two elements: a scheme or artifice to defraud and a mailing for the purpose of executing the scheme. The scheme to defraud must involve intentional fraud, consisting in deception intentionally practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. A scheme to defraud requires intent to deceive or defraud. The scheme to defraud must involve misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension.

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > Fraud Claims

Civil Procedure > ... > Pleadings > Heightened Pleading Requirements > General Overview

HN6[ ] **Heightened Pleading Requirements, Fraud Claims**

Fed. R. Civ. P. 9(b) requires that fraud be pleaded with particularity. A plaintiff must at minimum allege the time, place and contents of the misrepresentations upon which he relied.

Counsel: George DeCarlo, Diane DeCarlo, Baltimore, Maryland; Charles Spinks, Shirley Spinks, N.E., Glen Burnie, Maryland, Steven P. Resnick, Bereano & Resnick, Annapolis, Maryland, for Appellant.

Francis E. Bentley, Detroit, Michigan, David Ettinger, Detroit, Michigan, Mark J. Spooner, Boris Feldman, Arnold & Potter, NW, Washington, District of Columbia, Peter Bleakley, for Appellee.

Judges: Edwards and Contie, Circuit Judges; and Bell, District Judge. *

Opinion by: CONTIE

Opinion

[*1208] CONTIE, Circuit Judge.

The plaintiffs, who are franchisees of 7-Eleven convenience stores, appeal from a summary judgment rendered in favor of defendant Southland Corporation, the franchisor. The plaintiffs' complaint filed on October 2, 1981 accused Southland of vertical price fixing (Count I) and imposing a tying arrangement (Count II) in violation of *15 U.S.C. § 1* (Sherman Antitrust Act) and of racketeering (Count III) in violation of *18 U.S.C. § 1962* **[**2]** (Racketeer Influenced and Corrupt Organizations Act, *i.e.*, RICO). The district court dismissed the RICO count and subsequently granted Southland's motion for summary judgment on the vertical price fixing and tying arrangement counts. We affirm both the dismissal of the RICO claim and the summary judgment on the tying arrangement claim and reverse the summary judgment on the vertical price fixing claim.

I.

* The Honorable Samuel H. Bell, United States District Judge for the Northern District of Ohio, sitting by designation.

The allegations underlying Count I may be summarized as follows. The plaintiffs contracted with Southland to operate 7-Eleven convenience stores in the 1970s. Although Southland suggests retail prices and recommends inventory suppliers, the standard franchise agreement expressly provides that a franchisee is not required either to charge the suggested retail price or to purchase inventory from recommended vendors. The plaintiffs contend, however, that Southland in fact requires them to do both of these things through the operation of its retail inventory accounting system and through pressure exerted by its representatives.

Southland's retail inventory accounting system measures inventory shortages and overages for which the franchisees are contractually responsible **[**3]** (Kanawyer affidavit at 8). Under this system, a franchisee's inventory is valued at Southland's suggested retail price unless the franchisee notifies Southland of a different actual retail price. **[*1209]** The franchisee must complete one line on a form provided by Southland for each product on which the franchisee wishes to deviate from the suggested retail price. Moreover, if a franchisee purchases inventory from a nonrecommended vendor, the franchisee must forward the invoice to Southland together with information about the actual retail price being charged. Furthermore, Southland does not permit franchisees to make permanent price changes. Instead, a franchisee must submit a price change report whenever Southland changes the suggested retail price, even though the franchisee may not have changed the actual retail price.

The plaintiffs do not contend that retail inventory accounting systems are inherently suspect under the Sherman Act. In fact, the plaintiffs appear willing to report all retail price changes and to report, one time, the retail prices of items purchased from nonrecommended suppliers. The plaintiffs object, however, to Southland's requirement that they repeatedly **[**4]** report *unchanged* actual retail prices whenever suggested retail prices change or whenever purchases are made from nonrecommended vendors.

The plaintiffs assert that since dozens of suggested price changes occur in a sixty-day period on the several thousand items stocked in their stores, they are forced to follow Southland's suggested retail prices, which are higher than the prices they wish to charge, on sixty to seventy percent of their items. The plaintiffs claim that although they wish to charge lower prices on more items, they cannot do so because of the extraordinary amount of paperwork that would be involved. Moreover, the plaintiffs contend that partially because of Southland's reporting requirements, they must purchase sixty-five to seventy-five percent of their inventory from recommended suppliers even though these vendors charge between ten and forty percent more than nonrecommended suppliers. [1] These higher wholesale costs are reflected in the actual retail prices. The plaintiffs claim that Southland has intentionally structured its retail inventory accounting system to insure that high prices will be maintained at franchisees' stores.

[5]** The plaintiffs also allege that Southland, through the conduct of its representatives, has forced them to honor its suggested retail prices and to purchase inventory items from recommended vendors. The plaintiffs rely upon the affidavits of Diane DeCarlo and Shirley Spinks to support this claim. The plaintiffs contend that because they independently price thirty to forty percent of their inventory items and purchase twenty-five to thirty-five percent of their inventories from nonrecommended vendors, they have been subject to frequent dishonoring of price change forms (resulting in inventory shortages), abusive audits (including nighttime audits and findings of unusually large inventory shortages), late payments by Southland of payrolls and franchisee draws, threats of terminating the plaintiffs' franchises, threats of Southland opening competing 7-Eleven franchises and visits during which Southland representatives have forced the plaintiffs to conform their prices to Southland's suggested retail prices.

Count II of the complaint involves a provision in the standard franchise agreement requiring franchisees to deposit their daily proceeds, save for amounts used to pay nonrecommended **[**6]** vendors, into Southland accounts at Southland-approved banks. These accounts are accessible only to Southland and Southland retains all interest earned on the accounts. The standard franchise agreement further provides that Southland will pay the franchisees' operating expenses (*e.g.*, inventory costs and payroll) from the funds contained in these accounts. Moreover, Southland is obligated to disburse the franchisees' draws from these accounts.

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[1] The alleged tying arrangement is also said to contribute to this problem.

According to Southland, the daily deposit requirement has three purposes (Kanawyer affidavit at 14). First, the deposits provide Southland a fund from which to pay its **[*1210]** franchisees' operating expenses. Second, the deposits are part of the security interest that Southland possesses in most franchisees' inventory. [2] Third, the daily deposit requirement helps the company to collect its share of a given store's profits. The plaintiffs' complaint alleges that the daily deposit system is a tying arrangement in which "the surrender of the right of the franchisee to manage the proceeds of his own business" (complaint at 9) is tied to the awarding of a 7-Eleven franchise (the tying product).

[7]** Count III of the complaint asserts that Southland, through use of the mails, has engaged in racketeering activity. Southland is alleged to have charged the plaintiffs for expenses that Southland had not paid from the plaintiffs' deposited funds, charged the plaintiffs royalties on sales that never occurred and required inventory suppliers to designate certain allowances as advertising allowances so that these sums would not have to be credited to the plaintiffs' accounts. Under the franchise agreement, advertising allowances need not be credited to the franchisees.

The district court dismissed Count III pursuant to *Federal Rule of Civil Procedure (FRCP) 12(b) (6)* on the alternative grounds that the plaintiffs had inadequately alleged mail fraud (the predicate unlawful conduct for purposes of this RICO claim), that plaintiffs had not pleaded fraud with particularity as required by *FRCP 9(b)* and that RICO does not apply to business organizations like Southland which have no connection with organized crime.

The district court also granted Southland's subsequent motion for summary judgment on Counts I and II. As to the vertical price fixing claim, the court held that whether Southland's **[**8]** retail inventory accounting system had caused the plaintiffs to follow suggested retail prices more than they would have otherwise presented a genuine issue of material fact. On the other hand, the court held that no genuine issues of fact remained on the elements of intent and coercion. Moreover, the court held that since the plaintiffs had not appealed from a magistrate's order imposing sanctions for having unsatisfactorily answered Southland's interrogatories about damages, they were precluded from obtaining monetary relief. The court further ruled that the absence of evidence on damages rendered injunctive relief unavailable.

The district court granted summary judgment to Southland on the tying claim primarily on the ground that surrendering the right to manage the proceeds of a business is not a product or a service for purposes of tying arrangement analysis. The court further held that even if a tied product or service were involved, the plaintiffs were precluded by the magistrate's order from demonstrating any entitlement to monetary or injunctive relief.

II.

Before addressing the vertical price fixing, tying arrangement and RICO claims in detail, several preliminary **[**9]** points merit discussion. First, this case involves a summary judgment granted to defendant Southland by the district court. ***HN1***[] Although the use of summary procedures certainly is not prohibited in antitrust cases, *Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1324 (6th Cir. 1983)*, summary judgment motions in antitrust litigation are disfavored. *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*; *Bouldis, 711 F.2d at 1324*. Accordingly, this court must strictly apply, *id.*, the general rule that the party seeking summary judgment must *conclusively* show that there exists no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Smith v. Hudson, 600 F.2d 60, 63* (6th Cir.), *cert. dismissed*, *444 U.S. 986, 62 L. Ed. 2d 415, 100 S. Ct. 495 (1979)* (emphasis in original). The evidence and all reasonable inferences which may be drawn therefrom must be viewed in the light most favorable to the party opposing the **[**10]** summary **[*1211]** judgment motion. *Id.; Bouldis, 711 F.2d at 1324*.

Two points raised by Southland concerning the evidence that this court may consider in deciding this case must also be addressed. First, the company contends that because the DeCarlo and Spinks affidavits contain hearsay,

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[2] Although not required to do so, most franchisees finance their inventories through Southland because the company charges lower interest rates than regular lending institutions.

argumentative statements and legal conclusions, the affidavits must be totally disregarded. Southland correctly argues that the DeCarlo and Spinks affidavits contain much inadmissible material and that this material may not be considered by this court. *See* *State Mutual Life Assurance Co. v. Deer Creek Park, 612 F.2d 259, 264 (6th Cir. 1979)* (hearsay); *Turoff v. May Company, 531 F.2d 1357, 1362 (6th Cir. 1976)* (hearsay); *Patmon v. Van Dorn Co., 498 F.2d 544, 546-47 (6th Cir. 1974)* (unsupported opinions). The affidavits do, however, contain some statements of fact within the personal knowledge of DeCarlo and Spinks. This information may be considered.

Second, Southland invokes the rule that the plaintiffs may not attempt to raise genuine issues of material fact by filing affidavits that contradict their previous deposition **[**11]** testimony. *See* *Reisner v. General Motors Corp., 671 F.2d 91, 93* (2d Cir.), *cert. denied*, *459 U.S. 858, 74 L. Ed. 2d 112, 103 S. Ct. 130 (1982)*; *Radobenko v. Automated Equipment Corp., 520 F.2d 540, 544 (9th Cir. 1975)*. Southland contends that the DeCarlo and Spinks affidavits contradict their deposition testimony because they admitted during deposition that they frequently deviated from Southland's suggested retail prices and purchased inventory items from nonrecommended vendors. Southland submits that these admissions conclusively demonstrate that it has not intentionally coerced the plaintiffs into maintaining high prices at their stores.

Assuming arguendo the correctness of the proposition of law cited by Southland, we do not agree that the DeCarlo and Spinks affidavits contradict their depositions. The DeCarlo and Spinks affidavits admit that the plaintiffs deviate from Southland's suggested retail prices on thirty to forty percent of their inventory items and purchase twenty-five to thirty-five percent of their inventories from nonrecommended suppliers. The plaintiffs' theory, however, is that they wish to exercise even **[**12]** greater pricing and purchasing freedom and are prevented from doing so by the particular accounting system under review and by the actions of some of Southland's representatives. Indeed, the district court expressly held that an issue of fact exists as to whether the plaintiffs would have exercised greater discretion in the absence of the policies and conduct being challenged. We conclude that taking into account the DeCarlo and Spinks affidavits in deciding this case does not contravene the rule articulated in *Reisner* and *Radobenko*.

A final preliminary point is that the plaintiffs have contended that the alleged vertical price fixing and tying arrangement constitute *per se* violations of the Sherman Act. Since the plaintiffs have not argued this case under the Rule of Reason, we do not undertake that analysis.

III.

The Supreme Court has long held that ***HN2***[] vertical price fixing is a *per se* violation of *§ 1* of the Sherman Act. *See* *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, , 104 S. Ct. 1464, 1469, 79 L. Ed. 2d 775 (1984)*; *Albrecht v. Herald Co., 390 U.S. 145, 151-53, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*; **[**13]** *United States v. Parke, Davis & Co., 362 U.S. 29, 47, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213, 95 L. Ed. 219, 71 S. Ct. 259 (1951)*; *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 (1911)*. *See also* ABA Antitrust Section, ***Antitrust Law*** *Developments 2d*, 64 (1984). [3] The practice is unlawful because it **[*1212]** restricts the freedom of traders who are at lower levels of the product or service distribution system to set their own prices. *See* *Kiefer-Stewart, 340 U.S. at 213*, *AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc., 705 F.2d 1203, 1205 (10th Cir. 1982)*. Establishing a *per se* violation of the Sherman Act in a private action brought under a vertical price fixing theory requires proof of four elements. First, the defendant must have intended to fix prices charged by traders at lower levels in the distribution system. *See* *Monsanto Co., 104 S. Ct. at 1471*; *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980)*, **[**14]** *aff'g 478 F. Supp. 243, 259 (E.D. Pa 1979)*; *Mowery v. Standard Oil Company of Ohio, 463 F. Supp. 762, 767 (N.D. Ohio 1976)*, *affd.*, *590 F.2d 335 (6th Cir. 1978)*. Second, the defendant must have coerced the plaintiff into charging higher or lower prices. *See* *AAA Liquors, 705 F.2d at 1206*; *Carlson*

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[3] In the recent *Monsanto Co.*, case, the Solicitor General of the United States filed an *amicus curiae* brief urging the Court to reconsider the *per se* violation rule adopted in *Dr. Miles Medical Co.* The Court refused to consider this argument on the ground that the defendants had not presented it either in the district court or on appeal. We note that Southland has not challenged the *per se* violation rule at any time during this litigation.

Machine Tools, Inc. v. American Tool, Inc. , 678 F.2d 1253, 1261 (5th Cir. 1982); Yentsch v. Texaco, Inc., 630 F.2d 46, 52-54 (2d Cir. 1980); Santa Clara Valley Distributing Co. v. Pabst Brewing Co., 556 F.2d 942, 945 (9th Cir. 1977); Hanson v. Shell Oil Co., 541 F.2d 1352, 1356 (9th Cir. 1976), *cert. denied*, *429 U.S. 1074, 50 L. Ed. 2d 792, 97 S. Ct. 813 (1977)*; ***Antitrust Law*** *Developments*, at 60. [4] Third, the defendant's conduct must have caused antitrust injury. *See* General Cinema Corp. v. Buena Vista Distribution Co., 681 F.2d 594, 596 (9th Cir. 1982); Belk-Avery, Inc. v. Henry I. Siegel Co., Inc., 457 F. Supp. 1330, 1336 (M.D. Ala. 1978). Finally, a plaintiff must show an entitlement to **[**15]** relief.

We hold that the district court erred in finding no genuine issue of material **[**16]** fact concerning whether Southland intended to fix prices. One feature of Southland's retail inventory accounting system is particularly troublesome. Although franchisees clearly must be required to report retail price changes and retail prices being charged on items purchased from nonrecommended vendors so that Southland's records of actual retail prices will be accurate, [5] Southland has never explained why franchisees must again report *unchanged* actual retail prices whenever Southland alters its suggested retail prices. In light of the substantial paperwork burden that this requirement purportedly creates, and further in light of the absence of any apparent reason why the requirement exists, a reasonable jury could infer that Southland has imposed the requirement with the intent to discourage deviations from its suggested retail prices.

[17]** Furthermore, Exhibits F, 11 and 12, attached to the district court's opinion, show that Southland has instructed auditors and management personnel to monitor price compliance by franchisees. Exhibit F demonstrates that Southland regards deviations from suggested retail prices as being contrary to its best interests. Although the documents in question do not directly **[*1213]** instruct anyone to fix prices, and although Southland has in the past distributed documents concerning franchisees' pricing discretion, a reasonable jury could find from all the evidence that Southland collects price compliance information. Moreover, a jury could reasonably infer that Southland desires the information so that it may act in order to protect its interest in having franchisees comply with suggested retail prices. Indeed, the DeCarlo and Spinks affidavits specify numerous instances in which Southland representatives allegedly have used illegal tactics in order to obtain the plaintiffs' compliance with suggested retail prices. *See infra*. Viewing all the evidence and the reasonable inferences which may be drawn therefrom in the light most favorable to the plaintiffs, *see* Smith, 600 F.2d at 63, **[**18]** we conclude that whether Southland intended to fix prices presents a genuine issue of material fact.

The district court also erred in finding no genuine issue of material fact on the coercion issue. Although Southland was entitled to suggest retail prices and to attempt to persuade the plaintiffs to follow them, AAA Liquors, 705 F.2d at 1206; Carlson Machine Tools, 678 F.2d at 1261; Yentsch, 630 F.2d at 53, it was not entitled to coerce the plaintiffs. ***HN3***[] Coercion in the vertical price fixing context is actual or threatened affirmative action, beyond suggestion or persuasion, taken by a defendant in order to induce a plaintiff to follow the defendants' prices. *See In re Coordinated Pretrial Proceedings in* Petroleum Products Antitrust Litigation, 691 F.2d 1335, 1343 (9th Cir. 1982); General Cinema, 681 F.2d at 597; Belk-Avery, 457 F. Supp. at 1334. *See also* Carlson Machine Tools, 678 F.2d at 1261 (threatening to make a "meaningful event depend upon compliance or non-compliance" **[**19]** with suggested prices is coercion). Threatening to terminate a franchisee in order to induce compliance with suggested

[4] The plaintiffs assert that they need not prove coercion, citing *Albrecht*. The Supreme Court stated in that case, however, that a plaintiff may assert a "combination" between a defendant and himself "as of the day [plaintiff] *unwillingly* complied." 390 U.S. at 150 n.6 (emphasis supplied). Consequently, *Albrecht* supports the notion that coercion must be demonstrated in a private action brought under a vertical price fixing theory.

[5] We reiterate that the plaintiffs have not argued that retail inventory accounting systems are inherently suspect under the antitrust laws. Although the requirement of reporting retail price changes and initially reporting retail prices being charged on items purchased from nonrecommended vendors might constrain retail pricing discretion, not every vertical arrangement affecting prices necessarily violates the Sherman Act. *See* Lewis Service Center, Inc. v. Mack Trucks, Inc., 714 F.2d 842, 846 (8th Cir. 1983), *cert. denied*, ***467 U.S. 1226, 104 S. Ct. 2678, 81 L. Ed. 2d 873 (1984)***; AAA Liquors, 705 F.2d at 1205. Since the plaintiffs have only argued that one element of Southland's retail inventory accounting system was created with the intent to fix prices, we do not consider the rest of the system.

retail prices, for example, is coercion. *See* *Yentsch, 630 F.2d at 53*; *Newberry v. Washington Post Co., 438 F. Supp. 470, 479 (D.D.C. 1977)*.

We hold that if Southland intentionally created the requirement that frachisees report unchanged actual retail prices whenever suggested retail prices change in order to deter franchisees from exercising pricing discretion, this would constitute affirmative action of a coercive nature. Furthermore, we hold that the DeCarlo and Spinks affidavits allege numerous instances of coercive conduct on the part of Southland and its representatives. Both affiants claim that Southland refuses to honor some price change reports; DeCarlo asserts that Southland continues to refuse even after being notified of the problem. The refusal to honor price change reports results in inventory shortages chargeable to the plaintiffs. Although these errors eventually may be corrected, the plaintiffs must pay a penalty in the interim that is not refunded.

Both affiants also allege that in retaliation for not **[**20]** following Southland's pricing and purchasing policies, Southland representatives have threatened to distort, and have in fact distorted, inventory audits. Distorted audits cause the plaintiffs to be charged with shortages. Moreover, DeCarlo claims that because she expressed a desire not to follow a Southland promotion and because she argued with a company representative over retail price changes, Southland once untimely paid her payroll expenses and franchisee draw. [6]

The affiants further claim that because they exercise some pricing discretion and have expressed the desire not to **[**21]** purchase inventory items from recommended vendors such as the Southland Distribution Center, Southland representatives have threatened to terminate their franchises or establish competing franchises nearby. Finally, both affiants recount visits by Southland **[*1214]** representatives occurring in 1979 during which the representatives forced the plaintiffs to change their prices on all candy bars. [7] In view of the claims in the plaintiffs' affidavits and further in view of Southland's failure to provide counter-affidavits of the auditors and managerial employees alleged to have been involved in these incidents, we hold that Southland has not conclusively shown the absence of a genuine issue of material fact on the coercion issue.

[22]** The third element in a private vertical price fixing action is causation. Since the district court found that an issue of material fact was present concerning whether this particular accounting system has prevented the plaintiffs from exercising greater pricing discretion, we pause only to emphasize that the specific acts enumerated above, if they occurred, could also have caused the plaintiffs to follow Southland's suggested retail prices more often than they would have otherwise.

In order to prevail on their vertical price fixing theory the plaintiffs must also be entitled to relief. The district court correctly held that the plaintiffs may not recover monetary relief because of the magistrate's order imposing sanctions against the plaintiffs for failing satisfactorily to answer Southland's interrogatories concerning damages. The magistrate's order precluded the plaintiffs from presenting evidence at trial relating to the information sought in the interrogatories. The plaintiffs never appealed this order to the district court. Contrary to the plaintiffs' assertion, they were represented by counsel when the magistrate's order was entered on October 27, 1982. The motion by plaintiffs' **[**23]** original counsel to withdraw was not filed until November 2, 1982 and was not granted until December 16, 1982. The plaintiffs have presented absolutely no justification for their having failed to appeal the magistrate's order.

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[6] Although DeCarlo also charges that Southland "deliberately" made the payments late, we disregard that allegation because DeCarlo could not have personal knowledge of the company's ulterior motives. In reviewing the affidavits, we have disregarded all similar comments about Southland's purported motives. This does not mean, however, that Southland's objective conduct is not evidence of coercion or of an intent to fix prices.

[7] Although DeCarlo recounts a similar incident occurring in 1982, the Southland representative in question was reprimanded at a meeting attended by DeCarlo. While Southland's reaction to this incident certainly is evidence that it has not engaged in coercion, we do not agree with Southland either that the plaintiffs' affidavits allege only isolated or unauthorized actions that do not amount to coercion as a matter of law, *see* *Belk-Avery, 457 F. Supp. at 1335*, or that there is no issue of material fact on the coercion issue.

The district court erred, however, in ruling that the plaintiffs are precluded by the magistrate's order from obtaining injunctive relief. The plaintiffs need not show that they have already suffered actual injury in order to obtain injunctive relief; a showing of a "significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur" will suffice. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 23 L. Ed. 2d 129, 89 S. Ct. 1562 (1969)*; *Rosebrough Monument Co. v. Memorial Park Cemetery Association, 666 F.2d 1130, 1147 (8th Cir. 1981)*, *cert. denied*, *457 U.S. 1111, 73 L. Ed. 2d 1321, 102 S. Ct. 2915 (1982)*. Of central importance is that the magistrate's order precluded the plaintiffs only from introducing information sought by Southland's interrogatories. Those interrogatories inquired solely about damages already suffered **[**24]** by the plaintiffs. Thus, the magistrate's order does not preclude the plaintiffs from introducing evidence of future threatened injury. Since the district court relied solely upon the magistrate's order in holding that the plaintiffs could not obtain injunctive relief (district court opinion at 14 n.5), the district court's ruling on the injunctive relief issue cannot stand.

In summary, we hold that a genuine issue of a material fact exists as to each of the elements of the plaintiffs' vertical price fixing claim. The summary judgment in favor of Southland on that claim must be reversed. On remand, the plaintiffs may pursue only injunctive relief.

IV.

Count II of the complaint alleges that Southland has utilized an unlawful **[*1215]** tying arrangement. ***HN4***[] A tying arrangement exists where a seller will sell one product (the typing product) only if the buyer will purchase a second product (the tied product). *See* *Bouldis, 711 F.2d at 1329*; *Bell v. Cherokee Aviation Corp., 660 F.2d 1123, 1126 (6th Cir. 1981)*. Such arrangements are *per se* **[**25]** violations of *§ 1* if the seller has "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." *Bouldis, 711 F.2d at 1329-30*; *Bell, 660 F.2d at 1127*. Such arrangements "serve hardly any purpose beyond the suppression of competition," *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*. Specifically, competitors of the seller are denied access to the market for the tied product solely because the seller has power in another product market. *See* *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 6, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*; *Bell, 660 F.2d at 1127*. Moreover, buyers are forced to forego a free choice between items in the tied product market. *Id.*

It bears emphasis that in order to have a *per se* unlawful tying arrangement, two distinct products or services must jointly be sold. *See* *Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 507, 22 L. Ed. 2d 495, 89 S. Ct. 1252 (1969)*; **[**26]** *Bouldis, 711 F.2d at 1330*; *Bell, 660 F.2d at 1127*. In the present case, the awarding of a 7-Eleven franchise is one product. We agree with the district court, however, that "the surrender of the right of the franchisee to manage the proceeds of his own business" which accompanies the franchise is not a product or service sold by Southland. This condition simply is a contractual obligation that the plaintiffs find burdensome and now seek to escape.

The plaintiffs attempt to evade this point by asserting alternative tying arrangement theories. First, the plaintiffs claim that although Southland is contractually obliged to pay inventory invoices out of the funds deposited into accounts by the plaintiffs, Southland in fact delays paying, or sometimes refuses to pay, nonrecommended vendors. Moreover, the plaintiffs often have insufficient cash on hand to pay nonrecommended vendors because of the daily deposit requirement. Thus, the plaintiffs as a practical matter are forced to purchase the bulk of their inventories from recommended suppliers such as Southland Distribution Center. The plaintiffs conclude that sales of inventory items by recommended **[**27]** suppliers are tied to the awarding of 7-Eleven franchises.

Second, the plaintiffs contend that banking services at the Southland-approved banks have been tied to the awarding of 7-Eleven franchises. Southland is said to benefit from this arrangement because it retains the interest on the accounts. The plaintiffs purportedly pay for these services in the form of interest lost on accounts that could have been opened at banks of the plaintiffs' choice.

The problem with the plaintiffs' alternative theories is that neither was pleaded in the complaint. The only tied product identified either in the complaint or in the plaintiffs' answers to Southland's interrogatories (App. at 221) is the surrender of the franchisees' right to manage the proceeds of their businesses. As has been indicated, that contractual obligation is not a product or service for purposes of tying arrangement analysis. The plaintiffs' alternative tying theories are not properly before this court, we express no view on their merits. [8]

[28]** We further hold that the district court properly dismissed the RICO claim in which the plaintiffs allege that Southland committed mail fraud. ***HN5***[] The crime of mail fraud has two elements: a scheme or artifice **[*1216]** to defraud and a mailing for the purpose of executing the scheme. *Pereira v. United States, 347 U.S. 1, 8, 98 L. Ed. 435, 74 S. Ct. 358 (1954)*; *United States v. Talbott, 590 F.2d 192, 195 (6th Cir. 1978)*; *United States v. Schilling, 561 F.2d 659, 661 (6th Cir. 1977)*. This court has held that the scheme to defraud must involve:

> *Intentional* fraud, consisting in deception *intentionally* practiced to induce another to part with property or to surrender some legal right, and which accomplishes the end designed. [*A scheme to defraud*] *requires intent to deceive or defraud*. [Emphasis supplied.]

Epstein v. United States, 174 F.2d 754, 765 (6th Cir. 1949). *See also* Schilling, 561 F.2d at 662. This court has also held that the scheme to defraud must involve **[**29]** "misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Van Dyke, 605 F.2d 220, 225* (6th Cir.), *cert. denied*, *444 U.S. 994, 62 L. Ed. 2d 425, 100 S. Ct. 529 (1979)*.

Count III of the plaintiffs' complaint is deficient in several respects. First, the complaint does not allege that Southland acted with intent to defraud. *See* Epstein, supra. Although intent is a state of mind that may be averred generally, *FRCP 9(b)*, it must be alleged. Second, the plaintiffs' complaint does not allege what misrepresentations (or omissions) of material fact Southland made to the plaintiffs that they reasonably relied upon to their detriment. *See* Van Dyke, supra. Hence, the plaintiffs have inadequately alleged the requisite elements of mail fraud.

Moreover, *FRCP 9(b)* ***HN6***[] requires that fraud be pleaded with particularity. To satisfy *FRCP 9(b)*, a plaintiff must at minimum allege the time, place and contents of the (misrepresentations) upon which he relied. *McGinty v. Beranger Volkswagen, Inc., 633 F.2d 226, 228 (1st Cir. 1980)*; **[**30]** *Bosse v. Crowell Collier and Macmillan, 565 F.2d 602, 611 (9th Cir. 1977)*; *Windsor Associates, Inc. v. Greenfeld, 564 F. Supp. 273, 280 (D. Md. 1983)*. The plaintiffs have not met this requirement in this case. The complaint at best alleges that Southland breached the franchise agreement in charging the plaintiffs certain expenses and royalties and in not crediting certain allowances to the plaintiffs' accounts. Since the plaintiffs' RICO allegations are inadequate, that count was properly dismissed. [9]

V.

The summary judgment in favor of Southland on the vertical price fixing claim is REVERSED and the claim is REMANDED for further proceedings. The plaintiffs may seek to obtain only injunctive relief on that claim. The dismissal of the RICO claim and the summary judgment in favor of Southland on the tying **[**31]** arrangement claim are AFFIRMED.

End of Document

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[8] We do not address the other reasons relied upon by the district court in granting summary judgment on the tying arrangement claim.

[9] We do not address the issue of whether a business entity must be affiliated with organized crime in order to be liable for damages in a private civil RICO action.

General Battery Corp. v. Slaton

Common Pleas Court of Berks County, Pennsylvania

December 12, 1984, Decided

no. 5250 Equity, 1984

Reporter

1984 Pa. Dist. & Cnty. Dec. LEXIS 108 *; 37 Pa. D. & C.3d 459 **

General Battery Corp. v. Slaton

Disposition: [*1] Petition for preliminary injunction.

Core Terms

trade secret, control system, computerized, battery, paste-weight, secret, manufacturer, secrecy, grid, disclose, paste, confidential, competitors, grid-weight, cases, preliminary injunction, lead oxide, injunctive relief, lead acid battery, terminated

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

In order to obtain preliminary injunctive relief, a plaintiff must establish each of the following criteria: (a) Such relief is necessary to prevent immediate and irreparable harm which cannot be compensated for by damages; (b) it will operate to restore the parties to the status quo as it existed immediately before the alleged wrongful conduct; and (c) greater injury will result from denial of the preliminary injunction than from granting it. In addition, the court must be satisfied that plaintiff's right is clear and the wrong manifest.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > ... > Remedies > Injunctions > General Overview

HN2[] **Trade Secrets & Unfair Competition, Trade Secrets**

A person may be enjoined from disclosing or using another's trade secrets.

Trade Secrets Law > Trade Secret Determination Factors > Business Use

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Trade Secret Determination Factors > Definition Under Common Law

Trade Secrets Law > Protected Information > General Overview

Trade Secrets Law > Protection of Secrecy > General Overview

HN3[] **Trade Secret Determination Factors, Business Use**

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Trade Secret Determination Factors > Definition Under Common Law

Trade Secrets Law > Trade Secret Determination Factors > General Overview

HN4[] **Trade Secrets & Unfair Competition, Trade Secrets**

An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) The extent to which the information is known outside of his business; (2) The extent to which it is known by employees and others involved in his business; (3) The extent of measures taken by him to guard the secrecy of the information; (4) The value of the information to him and to his competitors; (5) The amount of effort or money expended by him in developing the information; (6) The ease or difficulty with which the information could be properly acquired or duplicated by others.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Protected Information > Combinations & Compilations

Trade Secrets Law > Trade Secret Determination Factors > Ready Availability

HN5[] **Trade Secrets & Unfair Competition, Trade Secrets**

Novelty or uniqueness are not prerequisites for a product or concept to qualify as a trade secret. A trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectible secret.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Trade Secret Determination Factors > Business Use

Trade Secrets Law > Misappropriation Actions > General Overview

HN6[] **Trade Secrets & Unfair Competition, Trade Secrets**

To succeed in an action alleging misappropriation of a trade secret the burden is on plaintiff to show: (1) That there was a trade secret; (2) That it was of value to the employer and important in the conduct of his business; (3) That by reason of discovery or ownership the employer had the right to the use and enjoyment of the secret; and (4) That the secret was communicated to the employee while he was employed in a position of trust and confidence under such circumstances as to make it inequitable and unjust for him to disclose it to others, or to make use of it himself, to the prejudice of his employer.

Antitrust & Trade Law > ... > Intellectual Property > Ownership & Transfer of Rights > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Federal Versus State Law > ***Antitrust Law***

HN7[] **Intellectual Property, Ownership & Transfer of Rights**

Ownership of a trade secret does not give the owner a monopoly in its use, but merely a proprietary right which equity protects against usurpation by unfair means.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

HN8[] **Trade Secrets & Unfair Competition, Noncompetition & Nondisclosure Agreements**

Equity will protect an employer from the disclosure or use of a trade secret by an ex-employee if the employee entered into an enforceable restrictive agreement or was bound to secrecy by virtue of a confidential relationship existing between the employer and employee.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Employee Duties & Obligations > Employee Knowledge & Skill

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > General Overview

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Trade Secrets Law > Protection of Secrecy > General Overview

HN9[] **Trade Secrets & Unfair Competition, Trade Secrets**

Where a trade secret was not disclosed to the employee during his employment but was developed by him while pursuing his duties with the employer, an express or implied agreement of secrecy must be shown. Otherwise, such information forms a part of the technical knowledge and skill the employee has acquired by virtue of his employment and which he has an unqualified privilege to use.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN10[] **Trade Secrets & Unfair Competition, Noncompetition & Nondisclosure Agreements**

An implied agreement of secrecy may be inferred from the existence of a confidential relationship between the employer and an employee.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > ... > Remedies > Injunctions > Duration

Trade Secrets Law > ... > Remedies > Injunctions > General Overview

HN11[] **Trade Secrets & Unfair Competition, Trade Secrets**

The Pennsylvania courts have not articulated a standard for the duration of injunctions entered in trade-secret cases.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Protection of Secrecy > General Overview

HN12[] **Trade Secrets & Unfair Competition, Trade Secrets**

What in reality is protected in trade secret cases is not the product or process, but the secrecy of it.

Trade Secrets Law > Civil Actions > Defenses

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > ... > Remedies > Injunctions > General Overview

Trade Secrets Law > ... > Remedies > Injunctions > Duration

Trade Secrets Law > Misappropriation Actions > Independent Development

Trade Secrets Law > Nonprotected Information > Reverse Engineering

Trade Secrets Law > Protected Information > Products

HN13[] **Civil Actions, Defenses**

Under the "independent development" test the appropriate duration for injunction in trade-secret cases is the period of time it would take for one, either by reverse engineering or by independent development, to produce the product by lawful means.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Employee Duties & Obligations > Employee Knowledge & Skill

HN14[] Trade Secrets & Unfair Competition, Trade Secrets

Conflicting social and economic policy considerations arise in each trade-secret case. A business which invests time, money, and manpower to develop secret advantages over its competitors must be afforded protection against the wrongful appropriation of secrets by a prior employee who was placed in a position of confidence. On the other hand, where the employer has no protectible trade secret, an individual who worked in a particular field of expertise cannot be compelled to erase from his mind the knowledge and skills learned through his employment. Our economic system is based upon competition and an individual has a fundamental right to follow and pursue the particular occupation for which he is best trained.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Express Contracts

Labor & Employment Law > Wrongful Termination > Breach of Contract > Express Contracts

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

Labor & Employment Law > Wrongful Termination > Breach of Contract > Implied Contracts

HN15[] Types of Contracts, Express Contracts

A former employer can restrict his ex-employee's use of secrets he himself developed during his employment by express agreement.

Labor & Employment Law > ... > Conditions & Terms > Trade Secrets & Unfair Competition > Trade Secrets

Trade Secrets Law > Protection of Secrecy > General Overview

HN16[] Trade Secrets & Unfair Competition, Trade Secrets

In many cases the question of whether a specific matter is a trade secret is an extremely close one, often not readily predictable until a court has announced its ruling. At the same time, the countervailing social and economic policy considerations relative to a person's right to pursue employment in a field in which he has expertise and knowledge cannot totally be cast aside: What in reality is protected in cases is not the product or process but the secrecy of it. The commercial morality is preserved by preventing one from wrongfully using secret information for a period of time no longer than that required to discover or reproduce that information by lawful means. Where that period can be ascertained, defendant should be put out of business only for that length of time and, thus, be prevented from obtaining any advantage by the wrongful use of trade secrets.

Counsel: *Byron Yatron*, *Anthony S. Volpe*, *C. Frederick Koenig III*, for plaintiff.

Lee E. High, *Zachary T. Wobensmith*, *Donald R. Piper, Jr.*, for defendant.

Judges: SAYLOR, J.

Opinion by: SAYLOR, J.

Opinion

[460]** SAYLOR, *J.,* December 12, 1984 --

FINDINGS, CONCLUSIONS AND ORDER MODIFYING PRELIMINARY INJUNCTION

BACKGROUND

This case involves trade secrets and injunctive relief. On March 16, 1984, we entered a temporary or special injunction with bond in the amount of $ 500,000. Since then we have had extensive preliminary hearings on the continuation of the injunction under *Pa.R.C.P. 1531*. We now make the following findings, conclusions and modification order.

FINDINGS OF FACT

1. Plaintiff is General Battery Corporation (GBU), a Delaware corporation, having a place of business in Reading, Berks County, Pa.

[461]** 2. GBC is engaged in the manufacture and sale of lead acid batteries for automotive, commercial and industrial markets.

3. Defendant is Earl J. Slaton (Slaton), an adult individual residing at R.D. 5, Sinking Spring, Berks County, Pa.

4. On April 2, 1982, GBC offered Slaton a job to work in the quality control **[*2]** department as its Quality Systems Engineer at a starting salary of $ 2,917 a month (Exhibit "A" to complaint).

5. Slaton was to report to Michael Reed, Corporate Director of Quality Assurance and Control.

6. Slaton accepted the job on April 12, 1982.

7. As an incident to his employment, Slaton signed a Confidential Disclosure Agreement (Exhibit 2) and an Invention Agreement (Exhibit 3).

8. These are GBC's standard agreements which it requires all salaried employees to sign as an incident to employment.

9. The Confidential Disclosure Agreement provides, in part, that (unless GBC's written consent is first secured) Slaton will not disclose at any time during or after his employment any ideas, inventions, know-how, trade secrets, technical information, processes, machinery and customer information disclosed to him by GBC during the course of his employment, whether or not developed by him.

10. The Confidential Disclosure Agreement further provides that, upon termination of his employment, Slaton will promptly deliver to GBC, and not keep or deliver to anyone else, all documents, drawings, blueprints and all other material of a secret or confidential nature.

11. In the manufacture **[*3]** of batteries it is recognized in the lead acid battery industry that substantial **[**462]** production savings and product quality can be realized if paste weight and grid weight can be controlled.

12. Computerized paste-weight control systems have been available in the market place to the lead acid battery industry for some time.

13. GBC found such control systems to be expensive and unsuitable. These systems, described as "Non-contact measurement systems," use radioisotopes to monitor the product by backscatter techniques. They require factory calibration; assume that the weight of uncoated grids are constant and accurately known; and require continuous measurement on-line.

14. In the market place computerized grid-weight control systems have been proposed, but none have been implemented.

15. One of Slaton's initial assignments was to work on the development of a computerized management information system which would store various GBC business activities; such as, warranty information, quality costs, warranty costs, process control perimeters, pricing information and personnel records. Necessary to this assignment Slaton was given access to GBC's confidential management information **[*4]** system (MIS).

16. GBC, early in 1982, started a research project to develop an inexpensive system to accurately measure and control paste weight.

17. This was a joint quality-control and manufacturing department project.

18. Finding a solution to this common industrial problem would give GBC a substantial competitive edge in the market Place.

19. While working on the development of a computerized management information system, Slaton General Battery Corp. v. Slatons **[**463]** became aware of GBC's paste-weight control project.

20. Before coming to GBC, Slaton was employed by P. R. Mallory Company (Duracell).

21. Although it manufactures and sells batteries, Duracell is not a competitor of GBC -- it is not in the lead acid battery industry; it is in the primary and alkaline battery market.

22. While at Duracell, Slaton designed several computerized quality-control systems.

23. Having previously designed computerized quality-control systems at Duracell and having become aware of GBC's paste-weight control project, Slaton made known to GBC's manufacturing and engineering department that he might aid in developing a system.

24. Thereafter, Slaton played a key and central role **[*5]** in developing an off-line, non-continuous, real time computerized system for determining the weight of pasted grids so that the amount of paste applied to the grids could be varied to meet certain specifications (paste-weight control system).

25. The paste-weight control system utilizes scales connected to a computer. The computer directs the on-line pasting machine operator to take measurements or to make adjustments. The computer takes into account variation in grid weight and paste moisture and computes optimum setting to achieve consistent lead usage.

26. The paste-weight control system components are storebought or off-the-shelf items, namely, a Commodore computer connected by a modem to an Apple computer, but the method of interconnecting these systems is not generally known in the industry.

[464]** 27. Development and use of the paste-weight control system led GBC to consider its application to a grid casting-weight control system (sometimes in the record referred to as "plate-weight control system").

28. Slaton actively participated in the development of a proposed grid-weight control system. 29. The grid-weight control system was only approved by GBC after Slaton terminated **[*6]** his employment.

30. GBC has yet to install and use the proposed and approved computerized grid-weight control systems at any of its plants.

31. GBC has installed and uses four computerized paste-weight control systems in two plants.

32. These systems are located in lead hazard areas of the plants. Access is limited to personnel who are trained in handling lead and required to wear protective equipment, including respirators. People would not normally visit these areas of the plants.

33. The cost to purchase and install one computerized paste-weight control system of the type available in the market place exceeds $ 100,000. Excluding start-up costs, GBC's system installed costs $ 15,000 to $ 20,000.

34. According to a report Slaton submitted, in addition to other benefits, a combined program of computer-based grid and paste controls at GBC would conservatively result in savings of $ 351,261 per year in grid lead and $ 314,058 in lead oxide -- a significant savings, in the opinion of Michael Reed, which would give a lead acid battery manufacturer a competitive advantage.

35. On May 13, 1983, Slaton resigned from his job at GBC. He gave 30 days notice but was terminated by GBC on **[*7]** May 13, 1983 (Exhibit 55 is **[**465]** Slaton's exit interview; Exhibit 56 is GBC's official discharge).

36. Some time before leaving GBC, Slaton told Michael Reed he was thinking about leaving and going into a venture using his systems expertise and offering to the industry paste and grid weight computer-based systems. Reed cautioned against it, reminding Slaton of the agreements he had signed.

37. After terminating his employment with GBC, Slaton helped to form and became associated with a new corporation known as CBE Corp. (CBE).

38. CBE offers for sale to GBC competitors computerized paste-weight and grid-casting control systems similar to those Slaton played a key role in devising and developing at GBC.

39. Slaton caused two GBC engineering drawings to be identically duplicated and incorporated in CBE's ad literature and technical materials.

40. Slaton is no longer employed by CBE; he is currently employed elsewhere.

41. One can reasonably expect that Slaton will attempt to profit by using and disclosing the computerized weight-control systems he helped to develop at GBC.

THE LAW

1. ***HN1***[] In order to obtain preliminary injunctive relief, GBC must establish each of the following **[*8]** criteria:

(a) Such relief is necessary to prevent immediate and irreparable harm which cannot be compensated for by damages;

(b) it will operate to restore the parties to the status quo as it existed immediately before the alleged wrongful conduct; and

(c) greater injury will result from denial of the preliminary injunction than from granting it.

[466]** In addition, the court must be satisfied that plaintiffs right is clear and the wrong manifest. *Keystone Guild, Inc. v. Pappas, 399 Pa. 46, 159 A.2d 681 (1960)*; and *Valley Center, Inc. v. Parkhouse, 62 Pa. Commw. 453, 437 A.2d 74 (1981)*.

2. ***HN2***[] A person may be enjoined from disclosing or using another's trade secrets. *Air Products and Chemicals, Inc. v. Johnson, 296 Pa. Super. 405, 442 A.2d 1114 (1982)*, *Restatement of Torts § 757* (1936).

3. Trade secrets may cover a wide spectrum of categories. A definition of the possible objects of trade secrecy is subject to variations and changes depending upon the facts in each case. Pennsylvania has adopted the definition of trade secret set forth in Comment (b) to section 757 of the Restatement of Torts which reads:***HN3***[]

"A trade secret may consist of **[*9]** any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it…"***HN4***[]

An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are:

(1) The extent to which the information is known outside of his business;

(2) The extent to which it is known by employees and others involved in his business;

(3) The extent of measures taken by him to guard the secrecy of the information;

(4) The value of the information to him and to his competitors;

(5) The amount of effort or money expended by him in developing the information;

(6) The ease or difficulty with which the information could be properly acquired or duplicated by **[**467]** others. *Van Products Company v. General Welding and Fabricating Company, 419 Pa. 248, 213 A.2d 769 (1965)*.

4. ***HN5***[] Novelty or uniqueness are not prerequisites for a product or concept to qualify as a trade secret. *Computer Printing Systems, Inc. v. Lewis, 281 Pa. Super. 240, 422 A.2d 148, 153 n.3 (1980)*. A trade secret can **[*10]** exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectible secret. *Anaconda Company v. Metric Tool & Die Company, 485 F. Supp. 410 (E. D., Pa. 1980)*.

5. ***HN6***[] To succeed in an action alleging misappropriation of a trade secret the burden is on plaintiff to show:

(1) That there was a trade secret;

(2) That it was of value to the employer and important in the conduct of his business;

(3) That by reason of discovery or ownership the employer had the right to the use and enjoyment of the secret; and

(4) That the secret was communicated to the employee while he was employed in a position of trust and confidence under such circumstances as to make it inequitable and unjust for him to disclose it to others, or to make use of it himself, to the prejudice of his employer. *McBeth-Evans Glass Co. v. Schnelbach, 239 Pa. 76, 87 Atl. 688 (1913)*.

6. ***HN7***[] Ownership of a trade secret does not give the owner a monopoly in its use, but merely a proprietary right which equity protects against usurpation **[*11]** by unfair means. *Wexler v. Greenberg, 399 Pa. 569, 160 A.2d 430 (1960)*.

7. ***HN8***[] Equity will protect an employer from the disclosure or use of a trade secret by an ex-employee if **[**468]** the employee entered into an enforceable restrictive agreement or was bound to secrecy by virtue of a confidential relationship existing between the employer and employee. *Wexler v. Greenberg, supra.*

8. ***HN9***[] Where a trade secret was not disclosed to the employee during his employment but was developed by him while pursuing his duties with the employer, an express or implied agreement of secrecy must be shown. Otherwise, such information forms a part of the technical knowledge and skill the employee has acquired by virtue of his employment and which he has an unqualified privilege to use. *Wexler v. Greenberg, supra.*

9. ***HN10***[] An implied agreement of secrecy may be inferred from the existence of a confidential relationship between the employer and an employee. *Wexler v. Greenberg, supra*,

10. ***HN11***[] The Pennsylvania courts have not articulated a standard for the duration of injunctions entered in. trade-secret eases. *Anaconda Company v. Metric Tool & Die Company, supra.*

[*12] 11. ***HN12***[] What in reality is protected in cases of this nature is not the product or process, but the secrecy of it, *ILG Industries, Inc. v. Scott, 49 Ill.2488, 273 N.E.2d 393 (1971)*.

12. Other jurisdictions have adopted the "independent development" test. *Anaconda Company v. Metric Tool & Die Company, supra.*

13. ***HN13***[] Under the "independent development" test the appropriate duration for injunction in trade-secret cases is the period of time it would take for one, either by reverse engineering or by independent development, to produce the product by lawful means. *ILG Industries, Inc. v. Scott, supra*; *Schulenburg v. Signatrol, Inc., 33 Ill.2d 379, 212 N.E.2d 865 (1965)*.

[469]** DISCUSSION***HN14***[]

Conflicting social and economic policy considerations arise in each trade-secret case. A business which invests time, money and manpower to develop secret advantages over its competitors must be afforded protection against the wrongful appropriation of secrets by a prior employee who was placed in a position of confidence. On the other hand, where the employer has no protectible trade secret, an individual who worked in a particular field of expertise cannot be compelled to erase **[*13]** from his mind the knowledge and skills learned through his employment. Our economic system is based upon competition and an individual has a fundamental right to follow and pursue the particular occupation for which he is best trained.

With these considerations in mind, we conclude from the foregoing facts and law that the computerized paste-weight and grid-weight control systems developed primarily by Slaton are GEC's trade secrets. Although the components are not unique or novel, the manner in which these computerized-based control systems in their completed state are either proposed or used, is unknown in the lead acid battery industry. GBC has spent considerable money in developing these systems; a substantial saving in its manufacturing process has been realized, giving GBC a competitive edge; the systems are of value to competitors and GBC has taken reasonable precautions to guard them from others.

This case is a bit unusual. Most cases involve misappropriation of pre-existing trade secrets (ones already developed or formulated and disclosed to an employee by his employer). In such cases, equitable relief is predicated upon the trust and confidence which the employer places **[*14]** in the employee by revealing the pre-existing trade secret to him. In other **[**470]** words, it is the confidence placed in the employee by the employer which gives rise to an implied agreement of secrecy. Slaton argues that since he was in large measure the creator of these systems, GBC did not communicate them to him and, therefore, relief is unavailable. We disagree. ***HN15***[] A former employer can restrict his ex-employee's use of secrets he himself developed during his employment by express agreement, and the parties entered into one here. Slaton, as an incident to his employment, in writing agreed not to use or divulge to others secrets -- including those he developed -- after termination of his employment. Slaton's actions since leaving GBC show that he has violated his agreement by appropriating these systems and seeking to profit from them. We are, therefore, satisfied that GBC's right to equitable relief is clear and that Slaton has wrongly appropriated GBC's secrets.

Furthermore, we think GBC is entitled to preliminary injunctive relief. If we are wrong in our conclusion that GBC's right to equitable relief has been established, Slaton is protected by bond and will be entitled **[*15]** to damages. On the other hand, if we don't grant immediate relief, GBC will immediately lose its competitive edge and would realistically be unable to measure and prove damages. By granting preliminary relief the status quo is restored. GEC's secrets are protected and Slaton is not prohibited from working in his field of expertise; in fact, he is currently so employed.

We come then to the final and most perplexing question: should the duration of injunctive relief be limited in trade-secret cases? Pennsylvania has never addressed this question. In a case such as this where the parties did not fix a restrictive time period in their agreement: where the secrets were developed by the ex-employee within one year and where **[**471]** it seems apparent that others will soon be able to produce them, we conclude that injunctive relief should be limited. At this time, of course, we are only to decide whether our preliminary injunction should be dissolved, continued or modified, but it is difficult to justify enjoining Slaton for a period of time longer than that required to produce the systems by lawful means either through reverse engineering or by independent development. And, as a practical **[*16]** matter, a longer period of time might be consumed before this litigation is finally resolved. Although this question was not raised and the present record contains no indication of the time so required, the testimony does reveal that GBC, through Slaton, developed the systems within a period of one year. There is no indication that it would take GBC's competitors more time to develop the same or similar systems. Accordingly, unless or until further evidence is presented on this question, we believe it is only fair to limit the preliminary injunction for a period of one year.

In *ILG Industries, Inc. v. Scott, supra*, the court, in arriving at a similar result, said:***HN16***[]

"In many cases the question of whether a specific matter is a trade secret is an extremely close one, often not readily predictable until a court has announced its ruling. At the same time, the countervailing social and economic policy considerations relative to a person's right to pursue employment in a field in which he has expertise and knowledge cannot totally be cast aside:

"What in reality is protected in cases of this nature is not the product or process but the secrecy of it. (Citation omitted.)…. we believe **[*17]** commercial morality is preserved by preventing one from wrongfully using secret information for a period of time no longer than that required to discover or reproduce **[**472]** that information by lawful means. Where General Battery Corp. v. Slaton that period can be ascertained, the defendant should be put out of business only for that length of time and, thus, be prevented from obtaining any advantage by the wrongful use of trade secrets." *273 N. E.2d at 398*.

Finally, in light of the present record, we feel the scope of the original order must be narrowed.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the parties and the subject matter of this action.

2. The computerized paste-weight and grid-weight control systems involved in this action are GBC's trade secret which equity will protect.

3. Slaton in violation of his express agreement of secrecy has misappropriated said trade secrets.

4. GBC has established the necessary preliminary injunction prerequisites.

5. For the reasons discussed, this court's order of March 16, 1984, is hereby modified in scope and duration as follows:

ORDER

December 12, 1984, the March 16, 1984 preliminary injunction order **[*18]** issued against defendant, Earl J. Slaton, is hereby modified as follows:

Until further order, for a period of one year commencing March 16, 1984, defendant Earl J. Slaton, his employees and/or agents, are preliminary enjoined from:

1. Directly or indirectly using or disclosing General Battery Corporation's computerized paste-weight and grid-weight control systems, including engineering drawings and any and all documents relating thereto.

[473]** 2. Engaging in any employment directly or indirectly relating to equipment, processes and/or techniques for quality control in the lead oxide battery industry or any other such employment in the lead oxide battery industry which would create the risk that Slaton might disclose said trade secrets.

3. Offering service and/or accepting employment on a contract basis, or on any other type of per job basis is directly or indirectly relating to equipment, processes and/or techniques in the lead oxide battery industry, or engaging in any other such activity in the lead oxide battery industry which would directly and/or indirectly create the risk that Slaton might disclose said trade secrets; or offering services to any lead oxide battery manufacturer, **[*19]** which

services would create the risk that Slaton would disclose to such competing battery manufacturer the said trade secrets.

Bond fixed in the amount of $ 500,000 remains.

National Independent Theatre Exhibitors, Inc. v. Buena Vista Distribution Co.

United States Court of Appeals for the Eleventh Circuit

December 12, 1984

No. 83-8638

Reporter

748 F.2d 602 *; 1984 U.S. App. LEXIS 15990 **; 1984-2 Trade Cas. (CCH) P66,311; 40 Fed. R. Serv. 2d (Callaghan) 954

NATIONAL INDEPENDENT THEATRE EXHIBITORS, INC., Plaintiff, James T. Patterson, Sr., individually and d/b/a/ Screen Advertising Film Fund, Plaintiff-Appellant, v. BUENA VISTA DISTRIBUTION COMPANY, et al., Defendants-Appellees

Prior History: [1]** Appeal from the United States District Court for the Northern District of Georgia.

Screen Advertising Film Fund Corp. v. Buena Vista Distribution Co., 100 F.R.D. 14, 1983 U.S. Dist. LEXIS 14570 (N.D. Ga., 1983)

Core Terms

advertising, Film, screens, theatre, distributors, exhibitors, antitrust, summary judgment, on-screen, movies, district court, motion picture, discovery, contributions, participating, defendants', target, antitrust violation, deposition, dissolved

LexisNexis® Headnotes

Civil Procedure > ... > Summary Judgment > Entitlement as Matter of Law > Materiality of Facts

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[] **Entitlement as Matter of Law, Materiality of Facts**

In determining whether the existence of material fact issues precluded the entry of summary judgment in the district court, the appellate court treats the evidence presented to the district court in the light most favorable to the nonmovant plaintiffs.

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 > Clayton Act

Antitrust & Trade Law > Sherman Act > Claims

Civil Procedure > Remedies > Damages > Monetary Damages

HN2[] **Clayton Act, Claims**

The prerequisites to a private cause of action under § 4 of the Clayton Act are well established: the plaintiff must show (1) a violation of the antitrust laws, (2) injury to its business or property, and (3) a causal relationship between the antitrust violation and the injury. The last two elements require the valuation of the plaintiff's injury in terms of money damages with some degree of certainty.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Evidence > Burdens of Proof > General Overview

HN3[] **Private Actions, Remedies**

The law does not require an antitrust plaintiff to show that the defendant's wrongful action was the sole proximate cause of the injury sustained. The plaintiff need only prove, with a fair degree of certainty, that defendant's illegal conduct materially contributed to the injury.

Antitrust & Trade Law > ... > Private Actions > Remedies > General Overview

Evidence > Burdens of Proof > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

HN4[] **Private Actions, Remedies**

It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4 of the Clayton Act.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Civil Procedure > ... > Justiciability > Standing > General Overview

Evidence > Burdens of Proof > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

HN5[] **Standing, Clayton Act**

Standing to prosecute a private antitrust action under § 4 of the Clayton Act requires the plaintiff to prove that he is within that sector of the economy, which is endangered by a breakdown of competitive conditions in a particular industry. The plaintiff must be the target against which anticompetitive activity is directed. The injury must be of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' act unlawful. Incidental or consequential injury or injury remotely caused by an antitrust violation does not give a plaintiff standing to complain that he has been injured by reason of anything forbidden in the antitrust laws.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Civil Procedure > ... > Justiciability > Standing > General Overview

HN6[] **Private Actions, Standing**

Neither an officer nor an employee of a corporation has standing to bring an action in his own right for an antitrust violation causing injury to the corporation and its business. Such persons may suffer indirect or secondary financial injury from antitrust violations, but they are not the target of the anticompetitive practices.

Civil Procedure > Parties > Pro Se Litigants > General Overview

HN7[] **Parties, Pro Se Litigants**

See *28 U.S.C.S. § 1654*.

Civil Procedure > Parties > Pro Se Litigants > General Overview

HN8[] **Parties, Pro Se Litigants**

Corporations must always be represented by legal counsel.

Business & Corporate Law > ... > Dissolution & Receivership > Termination & Winding Up > Limited Survival

Civil Procedure > Parties > Substitution > General Overview

HN9[] **Termination & Winding Up, Limited Survival**

Georgia law provides that a cause of action on behalf of a corporation, which is the subject of litigation pending on the date of dissolution, may continue to be prosecuted by the corporation in its corporate name. Ga. Code Ann. § 14-2-293 (1982). A dissolved corporation may maintain a federal suit when it has been given that power by state law.

Civil Procedure > Parties > Substitution > General Overview

HN10[] **Parties, Substitution**

See *Fed. R. Civ. P. 25(c)*.

Civil Procedure > Parties > Substitution > General Overview

HN11[] **Parties, Substitution**

The decision whether to allow substitution is discretionary.

Counsel: James T. Patterson, Sr., Pro Se, Riverdale, Georgia, for Appellant.

William N. Withrow, Jr., Tench C. Coxe, J. Kirk Quillian, Atlanta, Georgia, for Appellee.

Joseph B. Haynes, Atlanta, Georgia, for Appellee.

A. Vernon Carnahan; Daniel R. Murdock, New York, New York, for Appellee.

Judges: Tjoflat and Hatchett, Circuit Judges, and Garza, [*] Senior Circuit Judge.

Opinion by: TJOFLAT

Opinion

[*603] TJOFLAT, Circuit Judge:

This private antitrust dispute concerns the alleged attempt of eight major **[*604]** motion picture distributors to prevent a potential competitor from entering the marketplace. The district court entered summary judgment for the distributors. *100 F.R.D. 14*. This appeal questions that decision and several of the district court's procedural and discovery rulings. We find no error in any of these latter rulings but vacate the summary judgment because certain material fact issues remain to be litigated. [1]

[2]** I.

Buena Vista Distribution Company, Inc., Columbia Pictures Industries, Inc., Metro-Goldwyn Mayer, Inc., Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Warner Brothers Distributing Corporation, the eight defendants below, collectively supply eighty-five percent of the high quality motion pictures exhibited at theatres in the United States. They were producing approximately one hundred such motion pictures a year when this controversy arose. All eight belong to the Motion Picture Association of America (MPAA), a trade organization composed of the ten largest film distributors in the country.

National Independent Theatre Exhibitors, Inc. (NITE) is a trade association of independent movie theatre exhibitors who own and operate some five thousand screens in the continental United States. They formed NITE to protect and promote their interests. James Thomas Patterson, Sr., an independent theatre owner-operator, is NITE's president and a member of its board of directors.

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[*] Honorable Reynaldo G. Garza, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

[1] **HN1**[] In determining whether the existence of material fact issues precluded the entry of summary judgment in the district court, we treat the evidence presented to the district court in the light most favorable to the nonmovant plaintiffs. *Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970)*; *Thrasher v. State Farm Fire & Casualty Co., 734 F.2d 637, 638 (11th Cir.1984)*.

In the early 1970's Independent theatres found themselves in a serious financial crisis. Faced with growing competition **[**3]** from large circuit exhibitors, shrinking attendance, and rising film rentals, they found it difficult to obtain top quality films for exhibition. In 1976, NITE decided that the solution for this problem was to increase the supply of quality films to the independent distributors. A greater variety of movies, NITE assumed, would foster more vigorous price competition by all distributors, resulting in lower film rentals, and would permit the independent theatres to offer movies to their patrons that were not being shown by most of their competitors. In addition, the lower admission prices and greater variety would increase public interest in going to the movies. NITE concluded that the major film producers lacked the economic incentive to cure the supply problem it perceived and that it should enter the production and distribution market. NITE lacked the financial resources to take this step, however.

In an effort to raise the capital that would be necessary to finance the production of high quality films, NITE's board of directors, in April 1977, created a "Film Fund," to which its members could make donations, and gave Patterson the job of soliciting their contributions. He, in **[**4]** turn, devised the following plan. NITE's member theatres would show several minutes of on-screen advertising before each feature film and contribute revenues generated by this advertising to the Film Fund. A board of advisors, chosen by the participating independent theatre owners, would select the movies the Fund would finance. The Film Fund would then contract with independent motion picture companies to produce the movies. The NITE members who participated in this voluntary screen advertising program would receive a discount on the rental of these movies in return for their contributions to the Fund. *Daily Variety*, a leading trade newspaper, reported on the NITE Film Fund in a front-page story on April 26, 1977. The story related strong interest in the program from film producers and exhibitors alike.

[*605] In June 1977, NITE entered into a four-year contract with Cinemavision, Inc., a company engaged in the selling of on-screen theatre advertising, for the sale of advertising space on NITE's members' movie screens. The contract provided that at least fifty percent of the net revenues Cinemavision collected from its advertisers for the participating theatres would **[**5]** be paid directly to the Film Fund. The contract required NITE to use its best efforts to solicit exhibitors to participate in the screen advertising program. NITE anticipated that its Film Fund would generate $42 million from the program over the four-year contract period.

NITE's board of directors decided that the Film Fund should be organized as a separate legal entity and persuaded Patterson to incorporate Screen Advertising Film Fund Corporation (SAFFCO). SAFFCO in turn contracted with NITE and Cinemavision to administer the program. The contract provided that SAFFCO would receive the theatre contributions generated by the on-screen advertising and would retain two percent of these contributions as a profit margin to pay Patterson a salary. Cinemavision eventually enrolled independent exhibitors representing four thousand screens to display advertisements, two thousand of whom agreed to contribute their advertising revenues to SAFFCO.

On September 27-28, 1977, at a NITE regional meeting held in St. Louis, Cinemavision announced that the screen advertising program would be launched in late October with a one thousand theatre test run. A reporter from *Daily Variety* **[**6]** attended the meeting and filed a long story entitled "NITE's Screen Advertising Network Gets 1000-Theatre Test Run Beginning Oct. 24," which appeared on the front page of the September 29 edition. The story stated, in part:

> Following the tryout, additional theatres in other markets will be added until all 4200 screens signed up for the program are unreeling soft-sell commercials, William Woosley of Cinemavision told NITE's national conference of small circuits and independent buyers.
>
> Included in that number, per NITE prexy Tom Patterson, are 2000 screens (not all NITE members) which will be donating proceeds from the ads to the Screen Advertising Film Fund Corp. (SAF[F]CO), the NITE group established to purchase, finance and produce features.
>
> All exhibitors signed by Patterson have agreed to put three minutes of advertising on their screens before showing the feature for four years. Over that period, Patterson estimated, $42,000,000 would be generated for SAF[F]CO from the 2000 subscribing screens.

A second *Daily Variety* reporter in Hollywood, California placed phone calls to the major motion picture distributors to obtain their response to the NITE **[**7]** film advertising program. Senior executives from Universal Pictures, Buena Vista, Twentieth Century Fox, Columbia, and Warner Brothers returned the reporter's calls. All the executives were familiar with the program. They all voiced strong opposition to NITE's program because they feared the advertisements would "clutter the screen" and alienate theatre patrons. The executives' responses were quoted in the September 29, September 30, and October 5, 1977 editions of *Daily Variety*.

The MPAA Advertising-Publicity Committee met on October 27, 1977 and discussed the NITE Film Fund. Richard Kahn, chairman of the committee and vice president of Metro-Goldwyn Mayer, told a *Daily Variety* reporter that the committee unanimously voted to take a stand urging theatres not to exhibit screen ads. A story on the cover of the November 4, 1977 edition of *Daily Variety* reported that

> A new voice -- that of the ad-pub committee of the Motion Picture Association of America -- has been added to the campaign to dissuade theatre owners from participating in the screen advertising program through which the National Independent Theatre Exhibitors Association **[*606]** hopes to generate **[**8]** financing for new feature film product.
> Richard Kahn, ad-pub-exploitation v.p. of MGM, chairman of the MPAA panel, yesterday disclosed a unanimously approved committee stand deploring the "rebirth" of screen advertising, and urging exhibitors "to keep their screens free of nonentertainment oriented clutter."
> Action of the ad-pub committee was endorsed by MPAA president Jack Valenti, and the association's advertising chief, Bethlyn Hand. Both attended the session, along with representatives of Universal, United Artists, Warner Bros. and MGM. Nonmember observers from American International and First Artists concurred.

On October 31, 1977, Twentieth Century Fox issued a statement that it would require all future exhibitors of its films to pay it a percentage of any revenues they might derive from on-screen advertising. The purpose of this statement was to discourage theatre participation in screen advertising programs.

On November 22, 1977, Warner Brothers mailed out bid solicitations for "Superman," one of the most commercially important movies of the year. The bid solicitation stated that theatres exhibiting screen ads would not be considered eligible for licensing **[**9]** the new film. The clear intent was to discourage screen advertising programs.

As a result of the major distributors' coercive activities, numerous theatre exhibitors withdrew from the NITE program; they could not afford to lose their principal sources of supply. At the same time, Cinemavision tried to separate itself from SAFFCO and NITE in order to save its business. These efforts came too late, and in 1978 Cinemavision went out of business.

NITE, Patterson, and SAFFCO, invoking section 4 of the Clayton Act, *15 U.S.C. § 15 (1982)*, brought this private anti-trust action against the eight defendant film distributors we have referred to *supra*, alleging that they had conspired to destroy SAFFCO, in violation of *sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2 (1982)*, because SAFFCO threatened to compete vigorously in their oligopolistic market. The plaintiffs alleged that the statements by the defendants' executives concerning the NITE Film Fund and the subsequent meeting of the MPAA Advertising-Publicity Committee evidenced this conspiracy and that Warner Brothers' and Twentieth Century Fox's threatened boycott of any exhibitor **[**10]** who participated in the on-screen advertising program was in pursuance thereof. The conspirators knew, plaintiffs alleged, that the exhibitors would respond to such threats by refraining from on-screen advertising.

After answering plaintiffs' complaint, the defendants moved for summary judgment on the ground that plaintiffs lacked standing to prosecute their antitrust claims. Following a period of discovery limited to the standing issue, the court granted the defendants' motions as to Patterson and NITE because they were not within the target area of the alleged antitrust violations.

The parties subsequently engaged in extended discovery on the merits of SAFFCO's claims, and the defendants again moved for summary judgment. Before the court could hear argument on their motions, though, SAFFCO's attorneys withdrew from the case. SAFFCO obtained new counsel, but Patterson soon became dissatisfied with his performance and sought to represent SAFFCO himself. The court refused to permit him to do so, however. Patterson then tried another approach; he dissolved SAFFCO and moved the court to substitute him for the company as party plaintiff. The court denied his motion and proceeded **[**11]** to consider the defendants' motions for summary judgment. It concluded that the defendants' actions were not responsible for SAFFCO's alleged injury and consequently granted summary judgment for the defendants.

SAFFCO and Patterson appeal. SAFFCO contends that the court erred in granting the distributors summary judgment because material facts remained unresolved. **[*607]** Patterson contends that the court erred in concluding that he lacked standing to sue under the antitrust laws. Both appellants challenge the trial court's denial of Patterson's motion for substitution as party plaintiff and its disposition of several procedural and discovery matters. We discuss these points in order.

II.

HN2[] The prerequisites to a private cause of action under section 4 of the Clayton Act are well established: the plaintiff must show (1) a violation of the antitrust laws, in this case *sections 1* and *2* of the Sherman Act, (2) injury to its "business or property," and (3) a causal relationship between the antitrust violation and the injury. *Nichols v. Mobile Board of Realtors, Inc., 675 F.2d 671, 675 (5th Cir. Unit B 1982)*; **[**12]** [2] *Jot-Em-Down (JEDS) Store, Inc. v. Cotter & Co., 651 F.2d 245, 247 (5th Cir.1981)*. [3] The last two elements require the valuation of the plaintiff's injury in terms of money damages with some degree of certainty. *Id.*

In the instant case, the distributors moved for summary judgment against SAFFCO on the ground that SAFFCO failed to establish the third element of its antitrust claims, the causal relationship between the distributors' alleged anticompetitive behavior and SAFFCO's injury. The distributors presented a two-part argument. First, the distributors **[**13]** noted that SAFFCO failed to obtain contributions from exhibitor on-screen advertising revenues because Cinemavision collapsed and that Cinemavision collapsed because it could not persuade anyone to advertise on its network of theatre screens. Second, they pointed out that there was no proof that they had ever contacted any of Cinemavision's potential advertisers in an attempt to discourage them from engaging in on-screen advertising. Absent any interference on their part with Cinemavision's sources of income, the distributors concluded, they could not be held responsible for SAFFCO's injury. The district court accepted their argument and gave them summary judgment.

We begin our assessment of the validity of the distributors' argument, and hence the summary judgment, by observing that ***HN3***[] the law does not require an antitrust plaintiff to show that the defendant's wrongful action was the *sole* proximate cause of the injury sustained. The plaintiff need only prove, with a fair degree of certainty, that defendant's illegal conduct *materially contributed* to the injury. *Comfort Trane Air Conditioning v. Trane Co., 592 F.2d 1373, 1383 (5th Cir.1979)*; **[**14]** *Alabama v. Blue Bird Body Co., Inc., 573 F.2d 309, 317 (5th Cir.1978)*; *Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 20* (5th Cir.), *cert. dismissed*, *419 U.S. 987, 95 S. Ct. 246, 42 L. Ed. 2d 260 (1974)*. ***HN4***[] "It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4 [of the Clayton Act]." *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 n. 9, 89 S. Ct. 1562, 1571-72 n. 9, 23 L. Ed. 2d 129 (1969)*. The causation argument the distributors advanced in the district court, and repeat, here, ignores this rule of law, for it does not address the question of whether the distributors' threats to boycott or otherwise penalize any exhibitor who engaged in on-screen advertising played a role in the decision of Cinemavision's putative advertisers not to participate in its advertising program.

In determining whether such threats, especially Twentieth **[**15]** Century Fox's and Warner Brothers' communications to exhibitors of October 31 and November 22, **[*608]** 1977, *supra*, played a role in the advertisers' decisions, we must view the evidence in a light most favorable to SAFFCO. In doing so, we conclude

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[2] In *Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir.1982)*, this court adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

[3] In *Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir.1981)* (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

that a large number of movie theatres, both those who had agreed to contribute to SAFFCO's Film Fund and those who had not, withdrew from the Cinemavision's screen advertising program because of the distributors' coercive conduct and that such withdrawal was a *natural cause* of Cinemavision's failure. These exhibitors could not risk losing their supply of motion pictures and had no choice except to refuse to exhibit on-screen advertising. We think a jury could infer that this significant contraction in the number of screens participating in Cinemavision's advertising program reduced its attractiveness as an advertising medium. A network of five thousand screens was obviously more attractive than one with only two thousand screens to national advertisers who wished to reach the largest audience possible. In sum, the inference that the distributors' conduct may have caused SAFFCO's injury was sufficient to preclude the entry **[**16]** of summary judgment. *Thrasher v. State Farm Fire & Casualty Co., 734 F.2d 637, 638 (11th Cir.1984)*; *Griffis v. Delta Family-Care Disability, 723 F.2d 822, 823-24* (11th Cir.), *cert. denied*, *467 U.S. 1242, 104 S. Ct. 3514, 82 L. Ed. 2d 823 (1984)*.

III.

Patterson challenges the district court's conclusion that he lacked standing to pursue his antitrust claims. His challenge lacks merit. ***HN5***[] Standing to prosecute a private antitrust action under section 4 of the Clayton Act requires the plaintiff to prove that "he is within that sector of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Jeffrey v. Southwestern Bell, 518 F.2d 1129, 1131 (5th Cir.1975)*. *See* *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc., 710 F.2d 752, 762 (11th Cir.1983)*. The plaintiff must be the target against which anticompetitive activity is directed. *Midwestern Waffles, Inc. v. Waffle House, Inc., 734 F.2d 705, 710 (11th Cir.1984)*; *Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 546-47 (5th Cir.1980)*, **[**17]** *cert. denied*, *454 U.S. 927, 102 S. Ct. 427, 70 L. Ed. 2d 236 (1981)*. The injury must be "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' act 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)*. "Incidental or consequential injury or injury remotely caused by an antitrust violation does not give a plaintiff standing to complain that he has been injured by reason of anything forbidden in the antitrust laws." *Midwestern Waffles, 734 F.2d at 710-11*. *See* *Jeffrey, 518 F.2d at 1131* (citing cases).

The film production and distribution market was the target of the distributors' alleged anticompetitive behavior in this case. Patterson never intended or prepared to enter this market, whether as a sole proprietor or as a member of a partnership or joint venture. Moreover, there was no evidence that any of the distributors' alleged behavior was directed against him individually. He clearly fell outside the target area.

Patterson claimed individual injury in his capacity as an officer and shareholder **[**18]** of SAFFCO, the target of the alleged conspiracy. The law on standing in this situation is clear. ***HN6***[] Neither an officer nor an employee of a corporation has standing to bring an action in his own right for an antitrust violation causing injury to the corporation and its business. *Midwestern Waffles, 734 F.2d at 710-11*; *Pitchford v. Pepi, Inc., 531 F.2d 92, 97-98 (3d Cir. 1975)*, *cert. denied*, *426 U.S. 935, 96 S. Ct. 2649, 49 L. Ed. 2d 387 (1976)*; *Jeffrey , 518 F.2d at 1131*; *Reibert v. Atlantic Richfield Co., 471 F.2d 727, 730-31 (10th Cir.1972)*, *cert. denied*, *411 U.S. 938, 93 S. Ct. 1900, 36 L. Ed. 2d 399 (1973)*. Such persons may suffer "indirect" or "secondary" financial injury from antitrust violations, but they are not the target of the anticompetitive practices. *Jeffrey, 518 F.2d at 1131*. Patterson **[*609]** plainly lacked standing to sue the defendants in this case.

IV.

SAFFCO and Patterson contend that the district court erred in ruling on a variety of motions **[**19]** made during the discovery process. Only two of these claims are worthy of discussion; the remainder are frivolous. A trial judge has broad discretion to control the course of discovery, especially in a complex antitrust case such as this one, and we will not disturb his discovery rulings absent an abuse of discretion. *Commercial Union Insurance Co. v. Westrope, 730 F.2d 729, 731 (11th Cir.1984)*; *Majd-Pour v. Georgiana Community Hospital, Inc., 724 F.2d 901, 903 (11th Cir.1984)*; *Aviation Specialties Inc. v. United Technologies Corp., 568 F.2d 1186, 1189 (5th Cir.1978)*.

A.

On September 10, 1982 SAFFCO's counsel, in Atlanta, received the defendants' notice to take the deposition of a key witness in New York City on September 14, 1982. At the time, counsel for both sides were in the midst of trial in a related case in the district court. Late in the afternoon of the day before the deposition, SAFFCO's attorneys moved the district court for a protective order requiring the defense to reschedule the deposition because they could not be present in New York the next day. Defense counsel had already arrived in New York for the deposition, **[**20]** however. The district court granted SAFFCO's motion on the condition that it pay for one-half of defense counsel's round-trip air fare to New York. *Fed.R.Civ.P. 26(c)* and *37(a)(4)*.

SAFFCO contends that the order was patently unfair because the notice of deposition was not filed within a "reasonable" time, as required by *Fed.R.Civ.P. 30(b)*, and was not scheduled in good faith. This may be so, but SAFFCO's attorneys could have avoided the situation by advising opposing counsel about their problem before counsel departed for New York. We find no abuse of discretion in the court's award of partial expenses in this situation.

B.

SAFFCO's counsel withdrew three years into the suit. Patterson, SAFFCO's only shareholder, thereafter sought to represent the corporation *pro se* pursuant to *28 U.S.C. § 1654 (1982)*. The court correctly refused to allow him to do so.

Section 1654 provides: ***HN7***[] "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage **[**21]** and conduct causes therein." Patterson failed to recognize that SAFFCO, the corporation, and Patterson, its sole shareholder, were separate legal persons and that *section 1654* precluded him from appearing *pro se* in behalf of another person. Moreover, ***HN8***[] corporations must always be represented by legal counsel. *Southwest Express Co., Inc. v. Interstate Commerce Commission, 670 F.2d 53, 55 (5th Cir.1982)*; *K.M.A., Inc. v. General Motors Acceptance Corporation, 652 F.2d 398, 399 (5th Cir.1981)*.

This rule ensures that a licensed attorney, an officer of the court, is responsible for conducting the corporation's litigation. It protects the court and the public from unscrupulous and irresponsible behavior. In this case, for example, Patterson continually made unwarranted personal attacks on the court and opposing counsel, repeatedly misled the court as to the state of the record, and raised frivolous motions and objections. An attorney would have been deterred from engaging in such behavior because of his obligations to the court and his fear of the sanctions **[**22]** that might otherwise be imposed by the court and the bar.

Patterson sought to circumvent the rule which prevents a nonlawyer from representing a corporation by dissolving SAFFCO. To this end, Patterson dissolved SAFFCO in accordance with Georgia law and moved to substitute himself, doing **[*610]** business as Screen Advertising Film Fund Company, as party plaintiff. As a sole proprietor, he could proceed *pro se* under *section 1654*.

The trial court denied Patterson's motion. In its dispositive order, the court observed that

> this is a complicated antitrust case; that the appropriate handling of this case demands skilled attorneys, who are officers of this Court; that attempts by Mr. Patterson to act pro se have been and will be disruptive of the orderly processing of this litigation (observe the *ad hominem* approach adopted in the motion to substitute order and the motion for sanctions).
> In a courtroom setting should Mr. Patterson be on the witness stand and at the same time attempting to act as his own attorney, the task of the trial judge in preventing the trial from degenerating would be a difficult one.

Patterson takes issue with the court's **[**23]** ruling.

HN9[] Georgia law provides that a cause of action on behalf of a corporation, which is the subject of litigation pending on the date of dissolution, may continue to be prosecuted by the corporation in its corporate name. Ga.Code Ann. 14-2-293 (1982). A dissolved corporation may maintain a federal suit when it has been given that power by state law. *Bauer v. Uniroyal Tire Co., 630 F.2d 1287, 1290 n. 2 (8th Cir.1980)*; *Froning's, Inc. v. Johnston Feed Service, Inc., 568 F.2d 108, 110 (8th Cir.1978)*. When Patterson moved to substitute himself for his dissolved corporation, the question became whether the court could insist that SAFFCO continue to prosecute the case.

Fed.R.Civ.P. 25(c) speaks to this question; it governs the substitution of parties during pending litigation due to a transfer of interest through corporate dissolution. *Froning's, Inc. v. Johnston Feed Service, Inc., 568 F.2d at 110*; *Panther Pumps & Equipment Co. v. Hydrocraft, Inc., 566 F.2d 8, 23 (7th Cir.1977)*, *cert. denied*, *435 U.S. 1013, 98 S. Ct. 1887, 56 L. Ed. 2d 395 (1978)*. **[**24]** The rule states, in pertinent part,

> ***HN10***[] **(c) Transfer of Interest**. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

HN11[] The decision whether to allow substitution is discretionary. *Collateral Control Corp. v. Deal (In re Covington Grain Co.), 638 F.2d 1357, 1360 (5th Cir. Unit B 1981)*; *Prop-Jets, Inc. v. Chandler, 575 F.2d 1322, 1324 (10th Cir.1978)*; *Fontana v. United Bonding Insurance Co., 468 F.2d 168, 170 (3d Cir.1972)*. In this case, the district court refused substitution because Patterson's participation had been and would continue to be highly disruptive of the orderly administration of the litigation. We find no abuse of discretion.

V.

For the reasons we have stated, the district court's summary judgment in favor of the **[**25]** defendants and against SAFFCO is VACATED, and the case is REMANDED for further proceedings on SAFFCO's antitrust claims against the defendants. In all other respects, the district court is AFFIRMED.

End of Document

[United States v. American Cyanamid Co.](#)

United States District Court for the Southern District of New York

December 13, 1984

No. 60 Civ. 3857-CLB

Reporter
598 F. Supp. 1516 *; 1984 U.S. Dist. LEXIS 21251 **; 1985-1 Trade Cas. (CCH) P66,385

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN CYANAMID COMPANY, Defendant

Core Terms

melamine, divestiture, consent judgment, termination, Decree, producers, domestic, inventory, laminates, vertical, preferred stock, manufacture, terms, leveraged buyout, purchase order, purchases, chemical, parties, merger, anticompetitive, proceedings

Counsel: **[**1]** Richard Martin and Gregory Hovendon, Department of Justice, Antitrust Division, Washington, District of Columbia, for Plaintiff.

Kenneth Newman, Donovan, Leisure, Newton & Irvine, New York, New York, for Defendant.

Robert Brookhiser, Washington, District of Columbia, for Defendant-Intervenor Melamine Chemicals Co., Inc.

Judges: Brieant, J.

Opinion by: BRIEANT

Opinion

[*1517] MEMORANDUM DECISION

Brieant, J.

By a motion dated October 18, 1984, and heard November 13, 1984 and fully submitted on November 21, 1984, defendant American Cyanamid seeks, for the second time in less than two years, to terminate a Consent Judgment (sometimes hereinafter referred to as the "Decree" or "Consent Decree"), made August 4, 1964, by the late Hon. Richard H. Levet of this Court in the above antitrust action. The United States and intervenor, Melamine Chemicals Co., Inc. ("MCI"), have made submissions in connection with the application. The intervenor opposes the relief requested and also tenders to the Court for resolution issues presented by the unfulfilled 1984 purchase requirements pursuant to the Decree, discussed in greater detail below.

The prior unsuccessful effort of Cyanamid to terminate the **[**2]** Final Consent Judgment in this action, is reported in [*United States v. American Cyanamid Co., 556 F. Supp. 361*](#) (S.D.N.Y.), *aff'd in part, rev'd in part and remanded*, [*719 F.2d 558 (2d Cir. 1983)*](#), *cert. denied*, *465 U.S. 1101, 104 S. Ct. 1596, 80 L. Ed. 2d 127 (1984)*, and familiarity therewith is assumed. Since the prior attempt, Cyanamid has altered the factual predicate by entering into a contract to divest its Formica Division, discussed below, and now seeks to have the Court consider its request *de novo*, based on the current circumstances. The Government, as it did before, has consented to the relief sought here, providing that the Court adopt certain procedural safeguards to assure that the divestiture of the Formica profit center by Cyanamid does take place substantially in compliance with the terms proposed. [1]

[3]** Melamine is a fine white crystalline powder which is used in the manufacture of resins, which in turn are used for high pressure laminates, such as "Formica" a well-known trademarked product, manufactured by a division of Cyanamid, as well as artificial chinaware, plastic parts for the automobile industry, and coatings for textile and paper products. In this Court's prior opinion in the last round of the litigation, dated January 10, 1983, and reported **[*1518]** at *556 F. Supp. 361*, the use of this intermediate plastic product is fully discussed, presented with statistics for industry usage in 1982. These facts found by the Court and essentially not disturbed by the Court of Appeals in its partial reversal and remand, are believed to be sufficiently current at this time and substantially unchanged since 1982.

As this Court observed before, shortly following the entry of the Consent Judgment, there were four domestic producers of melamine, including Cyanamid and Fisher Chemical Co., a predecessor of MCI. Since 1979, there have been only two domestic producers, MCI and Cyanamid. Of the total world production capacity of melamine, as estimated in 1982 by the United States Department **[**4]** of Commerce, only 12% existed in the United States. Melamine is essentially a fungible intermediate chemical. There is no distinctive difference in quality or chemical content according to plant or county of origin. Its production is capital intensive, increased put-through in an operating plant does not increase the fixed costs, and the chemical reaction by which melamine is made proceeds on a continuous flow process, much the same as that of an oil refinery. Urea derived from natural gas is the principal raw material.

It was represented to this Court, without contradiction, that MCI's parent continues to enjoy a favorable, low-cost source of natural gas for its production capacity, while the fix-price contracts of Cyanamid have expired. Because of the nature of the product melamine, it should be expected to sell at a competitive price, having a long term relation to the marginal costs of the least efficient producer.

The complaint in this civil antitrust action was filed October 5, 1960, and alleged violations of *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*, and *§ 7* of the Clayton Act, *15 U.S.C. § 18*. The complaint alleged that Cyanamid unlawfully allocated and **[**5]** monopolized the foreign and domestic melamine and melamine-contained markets through its leadership of an international cartel of melamine producers, its exclusive control and manipulation of melamine technology and the chemical pre-curser product known as "Dicy," then, but no longer, used to produce melamine, and by its acquisition in 1956 of Formica, Inc., the principal domestic user of melamine crystals for the production of high-pressure laminates. As a result of these alleged violations the Government contended in 1960 that the price of melamine and melamine-contained products was unreasonably high, the available supply of melamine unreasonably low, and actual competition in the melamine and melamine-related industries lessened, also that the potential emergence of new competitors in those industries was effectively foreclosed. The litigation was settled by entry of the Consent Judgment, which, of course, did not admit any violation.

Various proceedings during the years in 1969, 1973 and 1974 resulted in modification of the Decree at the request of Cyanamid and with the consent of the Government. In 1975 the Government initiated criminal contempt proceedings against Cyanamid, **[**6]** alleging that Cyanamid in 1972 had wilfully violated the Consent Judgment's maximum melamine production level. This Court, after a trial, found Cyanamid not guilty of criminal contempt. *See* *United States v. American Cyanamid Co., 427 F. Supp. 859 (S.D.N.Y. 1977)*; *see also* *Stamicarbon N.V. v. American Cyanamid Co., 506 F.2d 532 (2d Cir. 1974)*. In 1983, after a hearing, this Court terminated the Decree

[1] The Government took the position that "once Cyanamid files an affidavit stating that the divestiture of Formica has in fact been completed in accordance with the terms supplied in these proceedings, the Court should enter an Order terminating the Final Judgment" (Memorandum filed November 9, 1984, p. 2). Essentially, the Government also expresses its own independent conclusion in the same memorandum that "Cyanamid is accurate in representing to the Court that divestiture will transform Formica into 'a fully independent company '." *Id*. p. 4.

because of changed circumstances, but that determination was reversed and remanded for further proceedings, as will be described in greater detail below.

The purpose of the Consent Judgment was to dissolve Cyanamid's monopoly of the United States melamine industry and encourage the entrance of new producers into the domestic melamine market. To the extent it is possible to do so, this has already been achieved. MCI has entered the market, and it and Cyanamid are the sole domestic producers.

[*1519] Following the prior proceedings in this Court in 1983, and following modification thereof by the Court of Appeals, the only surviving provision of significance which is still in effect, and imposes legal burdens on Cyanamid in excess of those already existing under the statutes **[**7]** and case law, is found in provision XI of the Judgment. This provision, by its terms, appears to operate in perpetuity, subject only to defeasance after ten years, upon application to the Court as therein contemplated, and subject also to modification by the Court under its inherent powers as defined by the Court of Appeals in *United States v. American Cyanamid Co., 719 F.2d 558 (2d Cir. 1984)* (hereinafter "*Cyanamid I*").

The relevant portions of provision XI are quoted in full at page 365 of 556 F. Supp. In essence, they require Cyanamid to purchase annually from other producers of melamine, with the preference to United States producers, an amount of melamine equivalent to the requirements of its Formica Division. Neither this provision nor anything else in the Consent Judgment prevented Cyanamid from manufacturing and selling in a lawful fashion in the merchant market for melamine in its crystal or powdered form. This market consists of Formica's competitors, as well as other users of melamine for other purposes, and they are and have for some time been purchasing directly from either Cyanamid or MCI. Furthermore, Cyanamid uses melamine in its paper surface coating and textile **[**8]** treating activities, and for other purposes unrelated to its Formica Division.

The Court of Appeals, in *Cyanamid I* held:

> "We therefore reverse the decision of the district court insofar as it holds that 'the conditions which the decree was designed to remedy no longer exist [and] the decree should be terminated, ' and we remand for the district court to apply the factors for analyzing the legality of a vertical merger set forth by *Brown Shoe* [*370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)]*, *Fruehauf* [*Corp. v. FTC, 603 F.2d 345 (2d Cir. 1979)]*, and other applicable cases, and to make findings of fact as to the current state of the melamine market and the market for products that contain melamine." *719 F.2d at 567*.

In so holding, the Court of Appeals concluded that:

> "While *Brown Shoe* and its progeny have been the subject of considerable criticism by academicians who believe these cases apply overly harsh standards in assessing the legality of vertical mergers, these cases nonetheless continue to constitute the current state of the law. . . ." [Footnote omitted]; *Id. at 567*.

Following the denial of *certiorari* by **[**9]** the Supreme Court, no proceedings were conducted on remand by Cyanamid. The Court takes this as a concession that while Cyanamid continued to own the Formica Division it would not be able to demonstrate that an analysis of the current facts would show that a vertical merger at this time between itself and Formica would not violate *§ 7* of the Clayton Act when tested by the obsolete factors enumerated in *Brown Shoe* and *Fruehauf, supra*.

Instead, bearing out this Court's prior findings to that effect, rejected by the Court of Appeals, but held by Professor Yale Brozen, Professor (now Judge) Richard A. Posner, Professor Paul A. Samuelson, Judge Robert Bork and other scholars, to the effect that vertical mergers produce no anti-competitive effects, [2] and apparently **[*1520]**

[2] See Professor Brozen's views, quoted at *556 F. Supp. at 369*, from Yale Brozen, *Concentration Mergers and Public Policy* at 402-03 (1982). Richard A. Posner, *Economic Analysis of Law*, at 3 (2d ed. 1977) ("consistent with the economic concept of man as a 'rational maximizer of his self-interest ' an individual will alter the operation of his business in response to economic changes in his surroundings to do so." Paul A. Samuelson, *Economics*, at 44 (10 ed. 1976) ("the method [or raw material] that is

having despaired of convincing the Court of Appeals or the Supreme Court that this particular Emperor (vertical integration as an anti-competitive effect) has no clothes, Cyanamid concluded, with the aid of an investment banking house, to sell its Formica profit center to a management group as part of a leveraged buyout.

[10]** On October 12, 1984 Cyanamid made a public statement, printed in the Wall Street Journal, which advised in relevant part as follows:

> "American Cyanamid Co. said it signed a definitive agreement to sell most of its Formica plastic laminate business for about $200 million in a leveraged buyout. The Formica business will be bought by a new company formed by some Formica managers and Shearson Lehman/American Express Inc. About 10% of the purchase price will be paid in preferred stock of the new company, and the rest will be paid in cash.
> * * * *
>
> The part of the Formica business being sold is expected to have 1984 sales of $275 million to $280 million, a Cyanamid spokesman said. The sale will include all of Formica's operations in the U.S. and abroad except Formica's troubled Latin American business. Last year, sales of Formica products in Latin American [sic] dropped 40%, offsetting a resurgence of Formica business in the U.S. The Cyanamid spokesman said the Latin American sales haven't changed much since then. In a leveraged buyout, a company is taken private in a transaction that is largely financed by borrowing. Ultimately, the debt is paid with funds generated by **[**11]** the target company.
> The planned purchase is subject to the buyers obtaining financing.
> * * * *
> Last May, Cyanamid said it had hired an investment banker to find a buyer for most of the Formica business because of its cyclical nature tied to the building industry.
> The Cyanamid spokesman said the sale is expected to be completed before year-end. If so, the sale is likely to produce a 'nominal gain ' in Cyanamid's fourth-quarter earnings, he said."

The stock market, which is never wrong, reacted to this good news by pricing the common stock of Cyanamid up $1.875 over the price of the prior day, apparently confirming the conclusion of management that vertical integration adds little to corporate efficiency or profitability.

It is insufficient for purposes of this proceeding simply to inform the Court that there has been an agreement to effect a divestiture. The Court must ascertain whether the divestiture is real or merely formal, and whether, following divestiture, the company achieving the leveraged buyout of the Formica assets of Cyanamid ("New Formica") will in fact be a free-standing, independent, economic enterprise, willing and able to purchase its melamine from **[**12]** the most advantageous source at the most competitive price and conditions of sale.

The divestiture agreement, together with exhibits annexed thereto, has been submitted to the Court for perusal as confidential material pursuant to a protective order, and has also been made available to counsel for the intervenor and the Government. There is no need for this Court to recite the details of the agreement, nor will the public interest be served by disclosure of confidential information. Under the agreement, Wayne Group, Inc. agrees to acquire by merger with its subsidiary, WGI Acquisition Corp., all of the capital stock of Formica Corporation presently owned by Cyanamid. Immediately thereafter WGI Acquisition Corp. will merge with Formica Corporation and carry on the Formica business previously conducted by Cyanamid, everywhere, except in Latin America. The Latin American aspect of Cyanamid's efforts have been less than successful and profitable, and so minimal as not to occupy the attention of the Court.

Under the agreement, Cyanamid shall receive $175,100,000 in cash, and preferred **[*1521]** stock of New Formica having a stated value of $20,000,000. The common stock of the new **[**13]** entity will be shared as to ownership by five current members of the Formica management group, who will own one-third thereof and manage the new

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the cheapest at any one time because of both physical efficiency and cost efficiency, will displace a more costly method [or raw material]. The only way for producers to meet price competition and maximize profits is to keep costs at a minimum by adopting the most efficient methods"). P. Areeda and D. Turner, ***Antitrust Law***, paras. 1000-109 (1980); Robert Bork, *The Antitrust Paradox*, 225-45 (1978).

enterprise, and Shearson Lehman/American Express, Inc., which will provide the venture capital and own the remaining two-thirds. [3]

The preferred stock issue by its relatively standard terms raises an immediate red flag. However, as promised in the course of the hearing, Cyanamid, by written instrument dated November 16, 1984, has agreed with New Formica that notwithstanding provisions which grant the preferred shareholders the right to elect one director of New Formica, whenever six consecutive dividend payments are in arrears, "upon termination of the Melamine Consent Decree and for so long as we or any person, firm or corporation, controlling, controlled **[**14]** by or under common control with us are the record or beneficial owners of the cumulative preferred stock, or any portion thereof, we hereby irrevocably waive our right to elect a director as aforesaid."

Upon assurance that no such voting power may ever arise in favor of Cyanamid, this Court finds and concludes that the ownership of the preferred stock issue is a sufficiently attenuated relationship with New Formica, so that it is unlikely to distort any management decisions on the part of New Formica, particularly the decisions as to how or whether it purchases melamine. The existence of the preferred stock will not require that the consent judgment remain in effect.

Apart from the preferred stock, Cyanamid will have no future financial stake in Formica and no role in its management. Specifically, it receives no security interest in any of Formica's assets, and has no right to reassume control over Formica in the future.

The Court concludes that the net effect of the agreement is such that it represents a complete divestiture, with the same force and effect as if divestiture had been required by the Court in 1956 or thereafter, or even now, as an alternative to the execution or **[**15]** continuation of the Consent Judgment. There is absolutely no evidence that the arrangements between Cyanamid and New Formica are anything but what they appear to be, a typical leveraged buyout, whereby management of a division or profit center takes over its operations in behalf of an independent company owned by themselves and the investment bankers. Ample opportunity has been granted to the parties to develop evidence to the contrary, and none is forthcoming.

The Court finds and concludes that defendant has proved that from and after the effective date of the divestiture, it will be out of the Formica business, except in Central and South America.

Since this Court finds that the divestiture of the Formica business of Cyanamid will be complete upon the closing presently scheduled for December 31, 1984 with Wayne Group, there is now no purpose in engaging in the detailed analysis required by the Court of Appeals in *Cyanamid I*. Divestiture is a substitute for all such analysis. Divestiture of Formica was the greatest possible relief which the Government could have obtained in this lawsuit at any time during its lengthy history. Having voluntarily undertaken to divest itself of **[**16]** the Formica business and having destroyed the presumed anticompetitive vertical merger which supposedly foreclosed the competitors of Cyanamid from a segment of the market otherwise open to them, *i.e*., the sale of melamine to the Formica business, creating thereby a "clog on competition" (quoted from *Brown Shoe*, 370 U.S. at 324), Cyanamid now demonstrates that as of such divestiture the Consent Judgment serves no purpose. Cyanamid is correct in contending that, **[*1522]** even without regard to divestiture, the continued effect of the Judgment has long been "unjustified, anticompetitive and unfair" (Affidavit of Frank V. AtLee, docketed August 18, 1984). The Government, since 1982 has taken the position that the provisions of the Decree affecting MCI have become "anticompetitive under contemporary market conditions." (Government Memorandum filed November 9, 1984, p. 11, fn. 15).

There is no necessity, nor is it appropriate, to defer action until divestiture by Cyanamid of its Formica business is complete. Implicit, although not expressed in the agreement with New Formica, is the concept that as a practical matter the divestiture and sale will not close unless the Consent **[**17]** Judgment is terminated. The only reference thereto in the agreement is as follows:

"9. INDEMNIFICATION AND APPORTIONMENT OF OBLIGATIONS.

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[3] The cash financing necessary, $175.1 Million Dollars, will come from sources independent of Cyanamid. Each party has separate outside counsel in connection with the divestiture, and separate investment bankers.

> 9.1 *Cyanamid Indemnity*. Cyanamid shall indemnify and hold harmless [New Formica] from and against any and all loss, liability, cost and expense (including any tax payable by reason of the receipt of indemnification payments) arising out of:
> * * * *
>
> (c) Any liability or obligation with respect to the purchase of melamine which may be imposed upon [New Formica] under the Melamine Consent Decree, filed in the U.S. District Court for the Southern District of New York on July 1, 1964 in *U.S. v. American Cyanamid Company*."

The practical significance of this clause is lost on the Court; the preference for domestic melamine found in the Judgment might conceivably lead to some loss, also it might be expensive to persuade the Court that a particular price quote is "oppressively high." (See subparagraph (C) of Provision XI quoted at *556 F. Supp. at 365*). Other than that, this provision seems to be so much useless boilerplate.

The truth of the matter is that the agreement which Wayne Group, Inc. has with Cyanamid, like most similar **[**18]** leveraged buyout transactions, is probably not subject to specific performance, and if it were the agreement of the non-party lender to provide the necessary funds likewise is probably not amenable to such specific enforcement. No reasonably prudent investor would knowingly acquire a manufacturing business which must buy its raw material from one source when its competitors need not, and where the price is fixed by the supplier only subject to obtaining judicial relief if it is found to be "oppressively high," whatever that means. Faced with such an eventuality, there will be no closing because common sense dictates that the lender, and probably also the buyer, will just walk away.

Accordingly, it is appropriate that the issue be resolved in advance of the closing date in the agreement, now set for December 31, 1984. Conditioned on entry of a detailed order which will require that the divestiture be completed substantially in accordance with the agreement submitted to the Court, the Consent Judgment shall be vacated as of such completion.

Melamine Purchases

As of August 4, 1984 all provisions of the Consent Judgment, other than those which this Court has already found obsolete **[**19]** and as to which no issue has ever been raised, expired, except for the purchase requirement. Divestiture frees MCI and all others to sell melamine to New Formica, so that no foreclosure of market is now possible.

It will be recalled that pursuant to terms of the Consent Judgment discussed fully in *Cyanamid I*, a provision, on its face perpetual, requires Cyanamid to purchase *annually* from other producers of melamine, with the preference to United States producers, an amount of melamine equivalent to the requirements of the Formica Division. In our prior termination of this Consent Judgment, which was reversed, this Court recognized that intervenor MCI is now, in practice, the only other producer of melamine in the United States, and now the sole beneficiary of this requirement. The **[*1523]** Court found, assuming termination of the Decree, which this Court then thought appropriate, that:

> "The present nature of the domestic melamine industry mitigates against an abrupt termination of the Consent Decree. . . . . A serious question is presented . . . whether relief from provision XI should not be done on a gradual basis over time in order to do Equity and enable MCI **[**20]** to make the production and marketing adjustments necessary to compensate for its sudden loss of Cyanamid's Formica Division as a so-called 'captive customer '." (*556 F. Supp. at 371*).

This Court concluded, in the last round of this litigation, that there was a fundamental difficulty of impracticality, a prudent consideration of the sort which also regulates a court of equity in the exercise of its judicial powers, and that for reasons therein stated, the Court could find no valid basis to determine the appropriate length of a period of termination.

The Court of Appeals in *Cyanamid I* rejected this conclusion. It held that if the district court on remand should

> "continue to believe that a phase-out would be appropriate, the court should exercise its equitable power to determine an appropriate duration for such a phase-out. . . . Difficulty in rendering judgment may only rarely be sufficient reason for a court of equity to refuse to exercise its equitable powers, and there is not a sufficient reason upon the facts of this case to justify a refusal herein. Indeed, . . . abrupt termination of Part XI without a phase-out is in itself an exercise of equitable power." (*719* ***[**21]*** *F.2d at 567*).

We now consider what should be done with respect to Part XI, based on current facts.

To begin with, this Court agrees with the position of Cyanamid that "no proper purpose can be served by retaining the Purchase Requirement subsequent to the divestiture of Formica, since that divestiture frees MCI completely to sell melamine to Formica and no "foreclosure [of the market] is any longer possible." (Brief of Cyanamid, docketed October 18, 1984, p. 5).

The equities have changed further since it is undisputed that Cyanamid no longer enjoys a favorable long term natural gas purchase contracts from which it was manufacturing melamine, while MCI continues to enjoy such an advantage.

In light of the complete divestiture, and because MCI has had notice at least since October of the intention by Cyanamid to divest itself of its Formica Division, the Court sees no purpose in imposing any greater or more gradual phase-out. The situation is materially altered from that presented in *Cyanamid I*; after *Cyanamid I*, Cyanamid remained in the laminate business. After divestiture, there is no longer any vertical combination and therefore no "foreclosure" of the market, and **[**22]** MCI will be at least on equal terms with Cyanamid in providing melamine to New Formica. Indeed, this Court believes that MCI will be in a better position than Cyanamid or anyone else because of its continuing favorable natural gas supply contracts. [4]

The Consent Judgment, neither by its terms, nor as administered by the parties had fixed the date as of which purchase orders had to be issued for annual requirements. It merely required Cyanamid to buy an amount equal to the annual needs of its Formica Division by giving a purchase order at some time during or immediately after the close of the year in which the requirements applied. There was no requirement that the melamine so purchased actually be used to make laminates; it could be and was commingled with Cyanamid's own product and used for whatever defendant **[**23]** wanted. It is uncontradicted that as of September 1, 1984 Cyanamid's **[*1524]** inventory was more than twice the normal inventory, and that monthly carrying charges for this inventory were approximately $67,000.

Beginning in mid-1982, when Cyanamid initiated the first round of this litigation to terminate the Consent Judgment, it purchased no melamine from MCI or any outside source, until the end of the year, when it placed an order with MCI for an amount equal to the balance of 1982 melamine requirements for the Formica Division. Due to the size of that order, production and delivery did not take place, apparently by mutual agreement, until some time later in 1983. In 1983 while *Cyanamid I* was pending appeal or awaiting action on a petition for *certiorari*, Cyanamid purchased no melamine from MCI. In 1984 it purchased and took delivery of the 1983 purchase obligations. This had an adverse effect on MCI, causing it to reduce its capacity and shut its plant down for longer than normal periods in 1983, and also to lose the use of funds which would have been received had the sales been made in 1983. However, it is apparently not disputed that Cyanamid was within its rights **[**24]** under the literal provisions of the Consent Judgment to withhold issuing a purchase order for the balance of its 1983 requirements until 1984.

In April 1984, according to the undisputed affidavit of Scotty B. Patrick, Vice President and General Manager of MCI, Cyanamid declined to make a commitment for 1984 purchases, or to schedule the issuance of purchase orders. However, at no time until about October, 1984, did Cyanamid advise that it would not purchase its 1984 requirements under the Decree. On October 12, 1984 Cyanamid told MCI formally, what was already a matter of

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[4] Since 1982 the Government has taken a position that a phase-out period for the purchase requirement is "not warranted or appropriate." (Government Memorandum filed November 9, 1984 at p. 11, fn. 15).

public knowledge, that it had agreed to sell its Formica Division and planned to seek relief from the Court. Cyanamid then declined to purchase any melamine from MCI for 1984.

It would seem relatively obvious that the Consent Judgment, which partakes of contractual elements, should not be vacated retrospectively. The Government takes the position that the Consent Judgment, by its terms, obligates Cyanamid to purchase a *pro rata* share of melamine from outside domestic sources (MCI), for the Formica operations for the period of time during any calendar year that the Judgment has been in effect, and this Court **[**25]** agrees. It is the law of the case, pursuant to *Cyanamid I*, that the Consent Judgment *cannot* be vacated until the criteria set forth by the Court of Appeals in *Cyanamid I* have been satisfied. Since they apparently cannot be satisfied without divestiture, Cyanamid has opted for divestiture. [5] Only effective on divestiture will Cyanamid's obligations cease.

This Court concludes that as a condition of the relief requested herein, and indeed, in all events, Cyanamid and/or New Formica must issue a purchase order to MCI immediately prior to the divestiture for an amount of melamine equal **[**26]** to the amount of melamine used by the Formica Division of Cyanamid during the calendar year 1984 in production of its laminates, and also for that amount of melamine, if any, used by the Formica Division of Cyanamid during any part of 1985 prior to actual closing and performance of the divestiture agreement. If the purchase order is issued by New Formica, Cyanamid must guaranty payment therefor. The delivery schedule for the purchase of the 1984 requirements shall provide for dates acceptable to both parties, provided that all melamine required to be purchased thereunder shall be taken prior to July 31, 1985, unless MCI shall consent to a later date.

The mechanics of divestiture may not be permitted to frustrate MCI expectations that it will continue to benefit from the Judgment with respect to all of the **[*1525]** requirements of Cyanamid for melamine used by the Formica Division through the date of closing of the divestiture agreement. Accordingly, the opening inventory of melamine of New Formica and the amount, if any, ordered by but not delivered to New Formica from MCI at closing may not exceed the amount of melamine which Cyanamid was required by the Judgment to purchase **[**27]** from outside sources since January 1, 1982 through the day of divestiture, less the amount of melamine actually used by Cyanamid since January 1, 1982 through the date of divestiture, in the manufacture of laminates by its Formica Division. Essentially, the Court observes that equity deems done that which should have been done, and either New Formica or Cyanamid should perform the Judgment fully through the date of its termination. New Formica's inventory of melamine owned or on order should not exceed the amount of melamine inventory which it would have possessed, if, since 1982, all of the division purchases had been made from non-Cyanamid sources and all such purchases had been used in or held for the manufacture of laminates. Following divestiture Cyanamid may not sell any melamine to New Formica from its inventory which existed on the day of divestiture, at less than cost, applying FIFO principles of accounting and lot identification. If the computation necessary to achieve this result, presents practical difficulty, counsel for the parties may take the matter up with the Court on the settlement of the order terminating the Consent Judgment.

We note in closing that the national **[**28]** economy is not served by MCI actually making a large quantity of useless melamine, which Cyanamid or New Formica will have to purchase, inventory and carry at great expense until it can be used, simply to satisfy a Consent Judgment. [6] Nothing prevents the parties from negotiating a release of the unperformed purchase obligation, whereby MCI would receive its lost profits in lieu thereof. The Court, however, is not in a position to compel such rational conduct, unless the parties wish to do so.

The foregoing constitutes the findings of fact and conclusions of law of this Court after a hearing.

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[5] We do not suggest that this is the sole motive for selling the Formica Division; there are obviously economic benefits flowing from the divestiture apart from the elimination of the purchase obligations of the Judgment. Whatever the Judgment provides, it does not require Cyanamid to remain in the laminate business forever; probably any such provision would be unconstitutional, if not void for vagueness or impossibility.

[6] Cyanamid's hardship is largely self-created since it was foreseeable that the Court of Appeals might reverse in *Cyanamid I*, as it did, and that *certiorari* might be denied by the Supreme Court, as it was.

Submit a final order on five (5) days notice of settlement or waiver of notice, which will dispose of the issues presently tendered to the Court consistently with these findings and conclusions.

[Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.](#)

Supreme Court of Appeals of West Virginia

December 14, 1984, Filed

No. CC939

Reporter
174 W. Va. 538 *; 328 S.E.2d 144 **; 1984 W. Va. LEXIS 490 ***; 1984-2 Trade Cas. (CCH) P66,321

HARTSOCK-FLESHER CANDY CO., etc., et al. v. WHEELING WHOLESALE GROCERY CO., etc., et al.

Subsequent History: [*1]** Rehearing Denied February 8, 1985.

Prior History: Certified. From Circuit Court of Harrison County. Robert B. Ziegler, Judge.

Disposition: Answered and Dismissed.

Core Terms

Wholesale, Unfair, Practices, vague, substantive due process, Sherman Act, retailers, discounts, prices, special legislation, Cigarette, violates, matters, courts, Sales, sales-below-cost, antitrust, discriminatory, destroying, provisions, regulation, customary, exemption, Appeals, unconstitutionally, competitor, invalidate, questions, markup, cases

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN1[ ] **Regulated Practices, Trade Practices & Unfair Competition**

W. Va. Code § 47-11A-1,reads, in part: "The sale of goods at less than the cost thereof results in economic maladjustments and tends toward the creation of monopolies, thereby destroying fair and healthy competition and tending toward bankruptcy among merchants who maintain a fair price policy, and is, therefore, an unfair trade practice". *W. Va. Code§ 47-11A-2*, states that it is unlawful for a retailer or wholesaler to sell any product below the cost to the vendor "for the purposes of unfairly diverting trade from or otherwise injuring one or more competitors, and destroying competition." Violations of the Unfair Practices Act, *W.Va. Code §47-11A-1 through -14*, are punishable through civil and criminal sanctions.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN2[ ] **Regulated Practices, Trade Practices & Unfair Competition**

See *W. Va. Code § 47-11A-2*.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > Substantive Due Process > General Overview

Constitutional Law > Substantive Due Process > Scope

HN3[] Fundamental Rights, Procedural Due Process

W. Va. Const. art. III, §10 provides: "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers".

Governments > Legislation > Enactment

HN4[] Legislation, Enactment

The power of the Legislature to enact laws relating to the public welfare is "almost plenary" under W.Va.Const. art. 6, § 1, and its powers are limited only by express restriction or restrictions necessarily implied by a provision or provisions of the state's Constitution.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN5[] Regulated Practices, Trade Practices & Unfair Competition

See W. Va. Code § 47-11A-6(a).

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > General Overview

HN6[] Regulated Practices, Trade Practices & Unfair Competition

See W. Va. Code §47-11A-8.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Governments > Legislation > Overbreadth

Governments > Legislation > Vagueness

HN7[] Fundamental Rights, Procedural Due Process

There is no satisfactory formula to decide if a statute is so vague as to violate the due process clauses of the State and Federal Constitutions. The basic requirements are that such a statute must be couched in such language so as to notify a potential offender of a criminal provision as to what he should avoid doing in order to ascertain if he has violated the offense provided and it may be couched in general language.

Governments > Legislation > Overbreadth

Governments > Legislation > Vagueness

HN8[] **Legislation, Overbreadth**

The degree of vagueness that the United States Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.

Governments > Legislation > Enactment

Governments > Legislation > Types of Statutes > Special Legislative Acts

HN9[] **Legislation, Enactment**

W. Va. Const. art.VI, § 39, states, in part: "And in no case shall a special act be passed, where a general law would be proper, and can be made applicable to the case, nor in any other case in which the courts have jurisdiction, and are competent to give the relief asked for".

Constitutional Law > Equal Protection > Nature & Scope of Protection

Governments > Legislation > Effect & Operation > General Overview

Constitutional Law > Equal Protection > General Overview

HN10[] **Equal Protection, Nature & Scope of Protection**

The constitutional requirement that a law be general does not imply that it must be uniform in its operation and effect in the full sense of its terms. If a law operates alike on all persons and property similarly situated, it is not subject to the objection of special legislation or class legislation and does not violate the *Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States*, *U.S. Const. amend. XIV*.

Constitutional Law > Equal Protection > General Overview

HN11[] **Constitutional Law, Equal Protection**

Where economic rights are concerned, the court looks to see whether a classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate *W. Va. Const. art. VI, §39*.

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] Antitrust & Trade Law, Sherman Act

See 15 U.S.C.S.§ 1.

Syllabus

1. Syllabus Point 2 of State v. Wender, 149 W. Va. 413, 141 S.E.2d 359 (1965), which suggests that our former Cigarette Sales Act, W. Va. Code, 47-13-1 through -15, as well as other sales-below-cost statutes, was a price-fixing statute is disapproved. Furthermore, the language in the text of Wender which indicates that because a commodity is not "affected with the public interest," the legislature may not constitutionally regulate that commodity in this State is also disapproved.

2. The Unfair Practices Act, W. Va. Code, 47-11A-1 through -14, is a rational means of achieving the legitimate legislative goal of promoting healthy competition in this State by penalizing retailers and wholesalers that sell goods below cost in an attempt to destroy competition and does not violate substantive due process concepts of Article III, Section 10 of the West Virginia Constitution.

3. It is appropriate under the Due Process Clause vagueness doctrine to apply a less restrictive test to statutes or ordinances involving economic matters **[***2]** in which criminal penalties are not at issue.

4. "Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 39 of Article VI of the West Virginia Constitution." Syllabus Point 7, Atchinson v. Erwin, 172 W. Va. 8, 302 S.E.2d 78 (1983).

5. W. Va. Code, 47-11A-1 through -14, does not violate the antitrust provisions of the Sherman Act, 15 U.S.C. § 1, since both acts prohibit sales below cost for the purpose of injuring or destroying competition.

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Phillips, Gardill, Hazlett & Kaiser and Charles J. Kaiser, Jr., Wheeling, West Virginia for Defendants.

Amicus Curiae: Chauncey H. Browning, Attorney General: Donald L. Darling, and Walt Auvil, Assistant Attorneys General.

Judges: Miller, Justice.

Opinion by: MILLER

Opinion

[*540] [146] [***3]** Four certified questions have been presented, pursuant to W. Va. Code, 58-5-2, relating to the constitutionality of our Unfair Practices Act, W. Va. Code, 47-11A-1 through -14. This case arises from a complaint filed in the Circuit Court of Harrison County by the Hartsock-Flesher Candy Company and others against the Wheeling Wholesale Grocery Company. [1] All of the parties involved are competing wholesalers in northern West Virginia. In its complaint, Hartsock-Flesher alleged that Wheeling Wholesale was selling cigarettes below

[1] The other parties who joined with the Hartsock-Flesher Candy Company were the Chas. M. Sledd Company, the Weirton Wholesale Distributing Company, and the Shulick-Taylor Company. For convenience, we will refer to the appellees as Hartsock-Flesher and the appellant as Wheeling Wholesale.

cost, in violation of *W. Va. Code, 47-11A-2*, and requested an injunction and treble damages, pursuant to *W. Va. Code, 47-11A-9*.

Wheeling Wholesale moved to dismiss the complaint, claiming that the Unfair **[***4]** Practices Act was unconstitutional, but this motion was denied by the trial judge. Subsequently, the following four certified questions were presented to the Circuit Court of Harrison County:

> (1) Is the Unfair Practices Act unconstitutional under the substantive due process standard established in *Article III, Section 10 of the West Virginia Constitution*? (2) Is the Unfair Practices Act unconstitutionally vague under *Article III, Section 10 of the West Virginia Constitution* and the *Fourteenth Amendment to the United States Constitution*? (3) Is the Unfair Practices Act special legislation in violation of *Article VI, Section 39 of the West Virginia Constitution*? (4) Is the Unfair Practices Act violative of the Sherman Act (*15 U.S.C. § 1*)?

The trial judge answered all four questions in the negative, from which ruling Wheeling Wholesale now appeals.

The Unfair Practices Act was adopted in 1939. The legislature's main reason for adopting the Unfair Practices Act is summarized **[**147]** in ***HN1***[] *W. Va. Code, 47-11A-1*, which reads, in part: "The sale of goods at less than the cost thereof results in economic maladjustments and tends toward the creation of monopolies, thereby **[***5]** destroying fair and healthy competition and tending toward bankruptcy among merchants who maintain a fair price policy, and is, therefore, an unfair trade practice." *W. Va.* ***[*541]*** *Code, 47-11A-2*, states that it is unlawful for a retailer or wholesaler to sell any product below the cost to the vendor "for the purposes of unfairly diverting trade from or otherwise injuring one or more competitors, and destroying competition." [2] Violations of the Act are punishable through civil and criminal sanctions. *W. Va. Code, 47-11A-9* and -11. Since the action brought against Wheeling Wholesale is civil in nature, we will not address the criminal provisions in the Act.

[*6]** Sales-below-cost statutes have been enacted in a majority of states. [3] **[***7]** Some of these statutes prohibit the sale of all goods and services below cost while others are limited to specific products, such as cigarettes or milk. See 1A R. Callman, The Law of Unfair Competition Trademarks and Monopolies § 7.02 (4th ed. 1981) for a discussion and compilation of these statutes. [4] Most jurisdictions have upheld sales-below-cost statutes as valid constitutional exercises of a state's police power. [5] *See generally* 1A R. Callman, *supra,* §§ 7.07 through .23;

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[2] ***HN2***[] The material portion of *W. Va. Code, 47-11A-2*, is:

> "It shall be unlawful for any person, partnership, firm, corporation, joint-stock company, or other association engaged in business as a retailer or wholesaler within this State, to sell, offer for sale or advertise for sale any article, product or item of merchandise at less than the cost thereof to the vendor, or give, offer to give or advertise the intent to give away any article, product or item of merchandise for the purposes of unfairly diverting trade from or otherwise injuring one or more competitors, and destroying competition."

[3] On the federal level, the Robinson-Patman Act, *15 U.S.C. § 13a*, is somewhat similar to these sales-below-cost statutes, although the comparison is not entirely accurate. The Robinson-Patman Act states that it is unlawful for "any person engaged in commerce" to "sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." *See* Section IV, *infra.*

[4] Legal commentators have analyzed sales-below-cost statutes in a number of articles. *See, e.g.,* Clark, *Statutory Restrictions on Selling Below Cost,* 11 Vand. L. Rev. 105 (1957); Henderson, *Selling Below Cost in Wyoming,* 1 Land & Water L. Rev. 235 (1966); LaRue, *Pitfalls for Price Competitors: State and Federal Restrictions on Below Cost or Unreasonably Low Prices,* 15 W. Res. L. Rev. 35 (1963); McCarthy, *Whatever Happened to the Small Businessman?* The California Unfair Practices Act, 2 U.S.F.L. Rev. 165 (1968); Reiley, *Enforcement of Legislation Prohibiting Sales Below Cost in Washington,* 42 Wash. L. Rev. 817 (1967); Note, *Further Developments in the Field of Statutory Bans Against Selling Below Cost,* 34 Va. L. Rev. 201 (1948); Comment, *Sales Below Cost Prohibitions: Private Price Fixing Under State Law,* 57 Yale L.J. 391 (1948).

[5] *See, e.g., Carroll v. Schwartz, 127 Conn. 126, 14 A.2d 754 (1940)*; *Moore v. Northern Kentucky Independent Food Dealers Ass'n, 286 Ky. 24, 149 S.W.2d 755 (1941)*; *Rust v. Griggs, 172 Tenn. 565, 113 S.W.2d 733 (1938)*; *McElhone v. Geror, 207 Minn. 580, 292 N.W. 414 (1940)*; *Associated Merchants of Montana v. Ormesher, 107 Mont. 530, 86 P.2d 1031 (1939)*; *State v. Langley, 53 Wyo. 332, 84 P.2d 767 (1938)*; *Dikeou v. Food Distributors Ass'n, 107 Colo. 38, 108 P.2d 529 (1940)*; *State v.*

Annot., 128 A.L.R. 1126 (1940); Annot., 118 A.L.R. 506 (1939). With this brief background discussion, we now turn to the specific issues raised in this case.

[*8]** I.

SUBSTANTIVE DUE PROCESS

Wheeling Wholesale contends that our Unfair Practices Act should be declared unconstitutional as violative of substantive due process under *Article III, Section 10 of the West Virginia Constitution*, which provides: "No ***HN3***[] person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." We have recognized in several cases that this provision does include a substantive due **[**148]** process standard. Although this constitutional provision was not mentioned in Syllabus Point 1 of *State v. Wender, 149 W. Va. 413, 141 S.E.2d 359 (1965)*, it was mentioned in the text and its principles summarized in Syllabus Point 1:

> "The legislature is vested with a wide discretion in determining what the public interest requires, the wisdom of which may not be inquired into by the courts; however, to satisfy the requirements of due process of law, legislative acts must **[*542]** bear a reasonable relationship to a proper legislative purpose and be neither arbitrary nor discriminatory."

See also *DeCoals, Inc. v. Board of Zoning Appeals of City of Westover, 168 W.Va. 339, 284 S.E.2d 856 (1981)*; *Thorne* ***[***9]*** *v. Roush, 164 W.Va. 165, 261 S.E.2d 72 (1979)*; *O'Neil v. City of Parkersburg, 160 W. Va. 694, 237 S.E.2d 504 (1977)*; *State ex rel. Harris v. Calendine, 160 W. Va. 172, 233 S.E.2d 318 (1977)*.

In *Wender,* our Cigarette Sales Act, *W. Va. Code, 47-13-1* through -15, [6] was challenged on the ground that it was unconstitutional. In examining cases from other jurisdictions, we noted that similar sales-below-cost statutes had generally been upheld and after listing several of these cases, stated:

> "The general principle derived from these cases is that the prohibition of sales below cost lies within the police power of the state and the legislature is vested with a wide discretion in determining whatever economic policy may be deemed to promote the public welfare, which policy the courts are powerless to override provided the laws passed bear a reasonable relationship to the legislative purpose and are neither arbitrary nor discriminatory." *149 W. Va. at 417, 141 S.E.2d at 362*.

[*10]** Despite this broad statement of deference to legislative judgment, we concluded that since the cigarette industry is not one affected with the public interest, it was a violation of due process under our State Constitution for the legislature to attempt to regulate the sale of cigarettes. Wheeling Wholesale argues that the reasoning used in *Wender* to invalidate the Cigarette Sales Act should be applied to the Unfair Practices Act. We are unable to agree.

Our holding in *Wender* is comparable to our decision in *State v. Memorial Gardens Development Corp., 143 W. Va. 182, 101 S.E.2d 425, 68 A.L.R.2d 1233 (1957)*, in which we held that the legislature lacked the authority to regulate the funeral industry. However, *Memorial Gardens* was reversed in *Whitener v. W. Va. Board of Embalmers, 169 W.Va. 513, 288 S.E.2d 543 (1982)*, where we held that the regulation of the funeral industry is within the legitimate scope of the State's police power. Syllabus Point 2 of *Whitener* states, in part: "Regulations about how businesses are conducted must simply bear a rational relationship to a legitimate state goal, to be constitutional." We also observed in Syllabus Point 3 of **[***11]** *Whitener,* quoted in part, that "it is the function of legislatures to determine the wisdom and utility of economic legislation."

Walgreen Drug Co., 57 Ariz. 308, 113 P.2d 650 (1941); *Wholesale Tobacco Dealers Bureau of Southern California v. National Candy & Tobacco Co., 11 Cal.2d 634, 82 P.2d 3, 118 A.L.R. 486 (1938)*; *State v. Sears, 4 Wash.2d 200, 103 P.2d 337 (1940)*.

[6] The Cigarette Sales Act was repealed in 1967. 1967 W. Va. Acts ch. 167.

The point that needs to be emphasized is that the authority of our legislature to regulate economic matters in this State is quite broad, as we stated in *Thorne v. Roush, 164 W.Va. 165, 261 S.E.2d 72, 74 (1979)*:

> ***HN4***[] The power of the Legislature to enact laws relating to the public welfare is 'almost plenary' under *W.Va.Const. art. 6, § 1*, and . . . . its powers are limited only by express restriction or restrictions necessarily implied by a provision or provisions of our Constitution. *Robertson v. Hatcher, 148 W. Va. 239, 135 S.E.2d 675 (1964)*; *State ex rel. County Court of Marion County v. Demus, 148 W. Va. 398, 135 S.E.2d 352 (1964)*."

Both *Wender* and *Memorial Gardens* are indicative of a time when substantive due process was used by courts to invalidate various laws regulating economic matters. Perhaps the most famous judicial intrusion was by the United States Supreme Court when it struck down New **[**149]** York's statutory limitation on the maximum number of hours that bakers could work in a week. *Lochner v. New* ***[***12]*** *York, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905)*. Since the intrusive approach exemplified by *Lochner* has subsequently been abandoned, courts rarely overturn legislation regarding economic matters on the ground that substantive due process has somehow been violated. The United States Supreme Court in *Ferguson v. Skrupa, 372 U.S. 726, 730, 10 L. Ed. 2d 93, 97, 83 S. Ct. 1028, 1031, 95 A.L.R.2d 1347, 1352 (1963)*, observed:

> **[*543]** "The doctrine that prevailed in *Lochner* . . . . and like cases--that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely--has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

See also, e.g., Rice v. Norman Williams Co., 458 U.S. 654, 73 L. Ed. 2d 1042, 102 S. Ct. 3294 (1983); *Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 49 L. Ed. 2d 752, 96 S. Ct. 2882 (1976)*; *Weinberger v. Salfi, 422 U.S. 749, 45 L. Ed. 2d 522, 95 S. Ct. 2457 (1975)*; *Richardson v. Belcher, 404 U.S. 78, 30* ***[***13]*** *L. Ed. 2d 231, 92 S. Ct. 254 (1971)*; *Dandridge v. Williams, 397 U.S. 471, 25 L. Ed. 2d 491, 90 S. Ct. 1153 (1970)*; *Washington Star Co. v. International Typographical Union Negotiated Pension Plan, 235 U.S. App. D.C. 1, 729 F.2d 1502 (D.C. Cir. 1984)*; *DiPippa v. United States, 687 F.2d 14 (3d Cir. 1982)*; *Leikind v. Schweiker, 671 F.2d 823 (4th Cir. 1982)*; *Tobacco Accessories v. Treen, 681 F.2d 378 (5th Cir. 1982)*; *Matter of Gifford, 688 F.2d 447 (7th Cir. 1982)*; *First American Title Co. v. South Dakota Land Title Ass'n, 714 F.2d 1439 (8th Cir. 1983)*, *cert. denied, 464 U.S. 1042, 79 L. Ed. 2d 173, 104 S. Ct. 709 (1984)*.

The Court in *Wender* failed to fully appreciate the fact that as a general rule, in matters of economic legislation, the legislature must be accorded deference, particularly under a substantive due process standard. We are not suggesting that economic legislation may never be found to violate substantive due process. There may be occasions when the use of substantive due process to invalidate legislation on some economic matters may be appropriate, such as where the challenged legislation bears no rational relationship to the public **[***14]** health, safety, morals, and general welfare of this State or where the statute impinges on some fundamental or constitutional right. For example, in *Thorne,* we held that a junior barber apprenticeship, mandated by *W. Va. Code, 30-27-3*, violated substantive due process because the method chosen to achieve the purpose did not promote the public welfare and intruded on the fundamental right to pursue a livelihood. In *Moore v. City of East Cleveland, 431 U.S. 494, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977)*, the United States Supreme Court struck down a zoning ordinance on substantive due process grounds because it adversely affected the sanctity of the family and only marginally advanced the government's interest in protecting the general welfare. Neither the facts in *Wender* nor in the present case rise to this level of a substantive due process violation.

While we approve of the language in Syllabus Point 1 of *Wender* as a correct general statement of substantive due process concepts, we disapprove of the overly intrusive manner in which these principles were applied.

Specifically, Syllabus Point 2 of *Wender,* [7] which suggests that our former Cigarette Sales Act, **[***15]** as well as other sales-below-cost statutes, was a price-fixing statute is disapproved. Furthermore, the language in the text of *Wender* which indicates that because a commodity is not "affected with the public interest," the legislature may not constitutionally **[**150]** regulate that commodity in this State is also disapproved. Our disapproval is based on two grounds. First, the Cigarette Sales Act was not a price-fixing statute. *See* Part IV, *infra.* Second, a product or commodity does not have to be "affected with a public interest" before the legislature may constitutionally regulate the product or commodity and survive a substantive due process analysis. We, therefore, conclude that the present case is not controlled by our decision in *Wender,* which incorrectly applied the substantive due process principles stated therein.

[*16]** Wheeling Wholesale next argues that *W. Va. Code, 47-11A-6*, our cost definition statute, which provides for stated markups for the cost of doing business "in the absence **[*544]** of proof of a lesser cost" and includes the phrase "there shall be deducted [from the invoice cost of an article] all trade discounts, except customary discounts for cash," [8] is arbitrary and irrational, in violation of substantive due process.

[*17]** Similar arguments were raised and rejected in *Baseline Liquors v. Circle K Corp., 129 Ariz. 215, 630 P.2d 38* (App.), *cert. denied sub nom. Skaggs Drug Centers, Inc. v. Baseline Liquors, 454 U.S. 969, 70 L. Ed. 2d 387, 102 S. Ct. 515 (1981)*. In *Baseline,* a challenge was made to the Arizona Unfair Sales Act, which has a 12 percent markup provision and an accompanying right to demonstrate a lesser cost of doing business. The appellees in *Baseline* argued that a retailer would be unable to establish a lesser cost of doing business, therefore, the statute requiring a 12 percent markup to cover the cost of doing business was arbitrary. The Arizona Court of Appeals concluded, after citing *Trade Commission v. Skaggs Drug Centers, Inc., 21 Utah 2d 431, 446 P.2d 958 (1968)*, and *Flank Oil Co. v. Tennessee Gas Transmission Co., 141 Colo. 554, 349 P.2d 1005 (1960)*, that there was no merit to the appellees' argument. In reaching this conclusion, the Arizona Court of Appeals cited this passage from *Trade Commission, 21 Utah 2d at 439-40, 446 P.2d at 963-64*, where this observation was made relative to the lesser cost issue:

> "All the [Utah Unfair Practices Act] **[***18]** requires is a cost figure arrived at by reasonable accounting methods. A statute is not to be declared invalid because of difficulty in applying its provisions. We think the Act is sufficiently clear to require compliance. The constitutionality of a statute is not to be decided on questions of inconvenience, or difficulty in application of a cost standard." (Footnotes omitted).

The Arizona Court of Appeals in *Baseline* reversed the lower court, which had declared the Arizona Unfair Sales Act unconstitutional on a motion to dismiss. The appellate court mentioned that it was handicapped without an evidentiary record, which is the situation in our case. The lack of an evidentiary record is particularly crucial to

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[7] Syllabus Point 2 of *Wender* states: "Legislation authorizing price-fixing must, among other requirements, concern an item or commodity affected with a public interest to avoid contravening the due process clause of the Constitution of this State."

[8] ***HN5***[] *W. Va. Code, 47-11A-6(a)*, defines "cost" for a retailer as follows:

> "The term 'cost' when applicable to the business of retailer shall mean bona fide cost and shall mean (i) the invoice cost of the article, product or item of merchandise to the retailer or the replacement cost thereof to the retailer within thirty days prior to the date of sale, offer for sale or advertisement for sale, as the case may be, in the quantity last purchased, whichever is lower, from either of which there shall be deducted all trade discounts, except customary discounts for cash, and (ii) to either of which there shall be added the following items of expense:
>
> "(1) Freight charges not otherwise included in the cost of the article, product or item of merchandise, but which freight charges shall not be construed as including cartage to retail outlet if done or paid for by the retailer;
>
> "(2) A markup to cover, in part, the cost of doing business, which markup in the absence of proof of a lesser cost, shall be seven percent of the aggregate of invoice cost or replacement cost (whichever is used), less trade discounts as aforesaid, and plus said freight charges."

Subsection (b) defines "cost" for a wholesaler and is substantially the same, except the markup for the cost of doing business is four percent.

Wheeling Wholesale's argument that the provision in *W. Va. Code, 47-11A-6*, permitting the deduction of "all trade discounts, except customary discounts for cash," is irrational and discriminatory. We are without any evidence to ascertain **[**151]** whether any "customary discounts for cash" are involved in this case. Furthermore, *W. Va. Code, 47-11A-8*, provides a series of absolute exemptions to a charge of selling below cost, one of which is: "(d) In an endeavor **[***19]** in good faith to meet the legal prices of a competitor as herein defined selling the same article, product or item of merchandise, in the same locality or trade area." [9]

[*20]** **[*545]** *Cohen v. Frey & Son, Inc., 197 Md. 586, 80 A.2d 267 (1951)*, on which Wheeling Wholesale heavily relies, can be distinguished. In *Cohen,* the Maryland Court of Appeals held that the Maryland Unfair Sales Act was unconstitutionally arbitrary and discriminatory because it did not allow a "cash and carry" wholesaler to deduct customary cash discounts. The court placed considerable emphasis on the facts established at trial involving the substantial disparity occasioned by the Maryland statute's distinction between costs for regular wholesalers and cash discount wholesalers. This distinction was so substantial from a factual standpoint that it caused the court to find the statute to be arbitrary.

In fact, it would appear that *Cohen's* actual holding was limited to this statement: "A statute or ordinance or an administrative order may be valid at one time or place under certain conditions, and invalid at another time and place under other conditions." *197 Md. at 604, 80 A.2d at 276*. The Maryland court had earlier upheld the constitutionality of the statute in *Blum v. Engelman, 190 Md. 109, 57 A.2d 421 (1948)*. It appears that it was the peculiar factual pattern **[***21]** in *Cohen* that brought the court to a different conclusion. [10]

Based on the limited allegations and factual development contained in the pleadings, we are unable to agree with Wheeling Wholesale's argument on the customary cash discount language as rendering the Act violative of substantive due process.

In adopting the Unfair Practices Act, the legislature has sought to penalize retailers and wholesalers that engage in unfair competition. We have no difficulty in concluding that the protection of healthy competition in this State is a legitimate goal **[***22]** of the legislature and one that obviously affects the public welfare. We also conclude that the method chosen to attain this laudable purpose is rational in the context of this case which permits a civil action for damages and an injunction by those injured. Therefore, we conclude that the Unfair Practices Act is a rational means of achieving the legitimate legislative goal of promoting healthy competition in this State by penalizing

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[9] ***HN6***[] The full text of *W. Va. Code, 47-11A-8*, is:

> "The provisions of this article shall not apply to any sale made:
>
> "(a) In closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any such stock or commodity, and in the case of the sale of seasonal goods or to the bona fide sale of perishable goods to prevent loss to the vendor by spoilage or depreciation;
>
> "(b) When the goods are damaged or deteriorated in quality or where merchandise is sold in bona fide clearance sales, and, in each case, merchandise is advertised, marked and sold as such;
>
> "(c) By an officer acting under the orders of any court;
>
> "(d) In an endeavor in good faith to meet the legal prices of a competitor as herein defined selling the same article, product or item of merchandise, in the same locality or trade area;
>
> "(e) For charitable purposes or to relief agencies;
>
> "(f) Where merchandise is sold on contract to departments of the government or governmental institutions."

[10] It is quite possible that a full evidentiary hearing could establish that the exclusion of customary cash discounts has a substantial effect on the cost equation, thereby rendering the equation completely arbitrary and irrational. Under our least intrusive remedy doctrine, such a finding would only require us to strike this portion of the cost formulation and not the entire Act. *Waite v. Civil Service Comm'n, 161 W. Va. 154, 241 S.E.2d 164 (1978)*.

retailers and wholesalers that sell goods below cost in an attempt to destroy competition and does not violate substantive due process concepts **[**152]** of *Article III, Section 10 of the West Virginia Constitution.* [11]

II.

VAGUENESS

[*23]** The second certified question raises the issue of whether or not the Act is unconstitutionally vague under the Due Process Clauses of the West Virginia Constitution and the *Fourteenth Amendment of the United States Constitution*. The terms and provisions of the Act specifically challenged as undefined and vague are in *W. Va. Code, 47-11A-6*, which includes the terms "applicable taxes," "trade discounts," and "customary discounts for cash," and *W. Va. Code, 47-11A-8(d)*, which states that the Act is inapplicable to any **[*546]** sale made "in an endeavor in good faith to meet the legal prices of a competitor." Wheeling Wholesale contends that these undefined terms and provisions make it impossible for a retailer or wholesaler to clearly and fully understand the meaning of the Act.

Our general standard for determining if a particular statute is unconstitutionally vague has traditionally been applied to criminal statutes as indicated by Syllabus Point 1 of *State ex rel. Myers v. Wood, 154 W. Va. 431, 175 S.E.2d 637 (1970)*:

> "There ***HN7***[] is no satisfactory formula to decide if a statute is so vague as to violate the due process clauses of the State and Federal Constitutions. The basic **[***24]** requirements are that such a statute must be couched in such language so as to notify a potential offender of a criminal provision as to what he should avoid doing in order to ascertain if he has violated the offense provided and it may be couched in general language."

See also State ex rel. Whitman v. Fox, 160 W. Va. 633, 236 S.E.2d 565 (1977); *State v. Flinn, 158 W. Va. 111, 208 S.E.2d 538 (1974)*; *State v. Harrison, 130 W. Va. 246, 43 S.E.2d 214 (1947)*.

The United States Supreme Court in *Grayned v. City of Rockford, 408 U.S. 104, 108-09, 33 L. Ed. 2d 222, 227-28, 92 S. Ct. 2294, 2298-99 (1972)*, explained the reasons why vague laws offend due process:

> "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, **[***25]** judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." (Footnotes omitted).

The vagueness standard may vary depending on the type of statute involved. In *Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 498-99, 71 L. Ed. 2d 362, 371-72, 102 S. Ct. 1186, 1193*, *reh'g denied, 456 U.S. 950, 72 L. Ed. 2d 476, 102 S. Ct. 2023 (1982)*, the United States Supreme Court discussed this aspect of the vagueness standard, where a licensing ordinance was attacked as vague:

> "The ***HN8***[] degree of vagueness that the Constitution tolerates--as well as the relative importance of fair notice and fair enforcement--depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. Indeed, the regulated enterprise may have the ability to clarify the meaning of

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[11] Several recent United States Supreme Court cases have rejected substantive due process attacks on economic regulations that have a far more severe monetary impact. *E.g., Hodel v. Indiana, 452 U.S. 314, 69 L. Ed. 2d 40, 101 S. Ct. 2376 (1981)*; *Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 49 L. Ed. 2d 752, 96 S. Ct. 2882 (1976)*.

> the regulation by its own inquiry, or by resort to an administrative **[**153]** **[***26]** process. The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe."

See also Papachristou v. City of Jacksonville, 405 U.S. 156, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972). *See also Storrs v. State Medical Board, 664 P.2d 547* (Alaska), *cert. denied, 464 U.S. 937, 78 L. Ed. 2d 312, 104 S. Ct. 346 (1983)*; *Town of Brookline v. Commissioner of Dept. of Environmental Quality Engineering, 387 Mass. 372, 439 N.E.2d 792 (1982)*; *City of Philadelphia v. Cohen, 84 Pa. Commw. 200, 479 A.2d 32 (Pa. Commw. Ct. 1984)*.

We have not had occasion to adopt this aspect of the vagueness standard, but we believe it is appropriate under the Due Process Clause vagueness doctrine to apply a less restrictive test to statutes or ordinances involving economic matters in which criminal penalties are not at issue.

Furthermore, in a criminal prosecution under the Robinson-Patman Act, where the standard in Section 3 making it unlawful to sell goods at "unreasonably low prices for the purpose of destroying **[*547]** competition or eliminating a competitor" was challenged, the **[***27]** United States Supreme Court in *United States v. National Dairy Products Corp., 372 U.S. 29, 9 L. Ed. 2d 561, 83 S. Ct. 594*, *reh'g denied, 372 U.S. 961, 10 L. Ed. 2d 13, 83 S. Ct. 1011 (1963)*, declined to hold that this language was void for vagueness. The United States Supreme Court reviewed the history of the Act and noted "the business practices against which § 3 was unmistakenly directed" were apparent. *372 U.S. at 36, 9 L. Ed. 2d at 567, 83 S. Ct. at 599*. It also alluded to the fact that the vagueness doctrine did not apply with the same degree of rigor as it would where "constitutionally protected and socially desirable conduct" is involved. *372 U.S. at 36, 9 L. Ed. 2d at 568, 83 S. Ct. at 600*. Several courts have addressed this same argument with regard to sales-below-cost statutes and have rejected the same. *Baseline Liquors v. Circle K Corp., supra; Trade Commission v. Skaggs Drug Centers, Inc., supra; Red Owl Stores, Inc. v. Commissioner of Agriculture, 310 N.W.2d 99 (Minn. 1981)*, *appeal dismissed, 456 U.S. 986, 73 L. Ed. 2d 1280, 102 S. Ct. 2263 (1982)*; *Flank Oil Co. v. Tennessee Gas Transmission Co., supra.* Consequently, we do not find the challenged **[***28]** portions of our Unfair Practices Act to be unconstitutionally vague under this less restrictive vagueness standard.

III.

SPECIAL LEGISLATION

The third certified question concerns whether or not the Unfair Practices Act is special legislation, in violation of ***HN9***[🡅] *Article VI, Section 39 of the West Virginia Constitution*, which states, in part: "And in no case shall a special act be passed, where a general law would be proper, and can be made applicable to the case, nor in any other case in which the courts have jurisdiction, and are competent to give the relief asked for." In *Atchinson v. Erwin, 172 W. Va. 8, 302 S.E.2d 78 (1983)*, we discussed at some length this provision against special legislation. We began by stating that:

> "The determination of whether a statute is general is essentially a classification analysis, and thus we have utilized constitutional equal protection concepts in addressing whether a statute is general or special. In Syllabus Point 7 of *State ex rel. Heck's, Inc. v. Gates, [149 W. Va. 421, 141 S.E.2d 369 (1965)]*, we said:
>
>> ***HN10***[🡅] 'The constitutional requirement that a law be general does not imply that it must be uniform in its operation and effect **[***29]** in the full sense of its terms. If a law operates alike on all persons and property similarly situated, it is not subject to the objection of special legislation or class legislation and does not violate the *Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States*.'
>>
>> *See also Shackleford v. Catlett, [161 W. Va. 568], 244 S.E.2d 327 (1978)*; *Cimino v. Board of Education of County of* ***[**154]*** *[158 W. Va. 267], 210 S.E.2d 485 (1974)*." __ W. Va. at __, 302 S.E.2d at 83.

We went on to point out that a number of states have applied equal protection concepts to their constitutional prohibition against special legislation. *E.g., State v. Lewis, 559 P.2d 630* (Alaska), *cert. denied sub nom. Lewis v. Alaska, 432 U.S. 901, 53 L. Ed. 2d 1073, 97 S. Ct. 2943 (1977)*; *Anderson v. Wagner, 79 Ill.2d 295, 37 Ill. Dec. 558, 402 N.E.2d 560 (1979)*, *appeal dismissed sub nom. Woodward v. Burnham City Hospital, 449 U.S. 807, 66 L. Ed. 2d 11, 101 S. Ct. 54 (1980)*; *Paul Kimball Hospital, Inc. v. Brick Township Hospital, Inc., 86 N.J. 429, 432 A.2d 36 (1981)*.

Finally, in *Atchinson,* we **[***30]** observed that the statute in question dealt with economic matters and did not involve fundamental or constitutional rights and concluded in Syllabus Point 7:

> "Where ***HN11***[] economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does **[*548]** not violate *Section 39 of Article VI of the West Virginia Constitution.*"

Wheeling Wholesale offers two arguments to support its claim that the Act violates our constitutional prohibition against special legislation. First, it does not operate uniformly on all retailers because independent retailers must buy products from wholesalers that are required to markup their prices in accordance with the Act while chainstore retailers can purchase goods directly from manufacturers that are not covered by the Act and therefore are not subject to the same markup price requirements. Second, the Act permits different standards **[***31]** and prices to be imposed depending on the trade area in which the retailer or wholesaler is located, under *W. Va. Code, 47-11A-8(d)*. Wheeling Wholesale, therefore, contends that the Act does not operate uniformly on all persons in the same class and is not rationally related to a proper governmental purpose. Again, we disagree.

The classification of retailers and wholesalers is natural and reasonable because goods are sold both by retailers or wholesalers. The fact that chainstore retailers buy from manufacturers does not exempt them from the Act when they sell at retail. Furthermore, this set of circumstances is not involved in this case and we decline to discuss hypothetically what cost advantage, if any, may occur. The fact that the cost provision in *W. Va. Code, 47-11A-8(d)*, is tied to the geographical area is not irrational since this provision relates to an exemption from the provisions of the Act to meet local competition. [12] We, therefore, conclude that Wheeling Wholesale's argument on special legislation lacks merit.

[*32]** IV.

SHERMAN ACT

The final question presented is whether or not the Unfair Practices Act should be declared void as violating the federal antitrust prohibitions contained in the Sherman Act, *15 U.S.C. § 1*. [13] Wheeling Wholesale argues that the Unfair Practices Act is a price-fixing statute analogous to a fair trade law, which allows a manufacturer to set the minimum price at which its products can be sold. It points out that state **[**155]** fair trade laws were specifically

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[12] *See* note 9, *supra,* for the full text of *W. Va. Code, 47-11A-8*.

[13] ***HN12***[] The Sherman Act, *15 U.S.C. § 1*, provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is 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."

exempted from Sherman Act coverage until the U.S. Consumer Goods Pricing Act of 1975, 89 Stat. 801, was passed by Congress removing this exemption. This point was recognized in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102, 63 L. Ed. 2d 233, 241, 100 S. Ct. 937, 941-42 (1980)*:

> "For many years . . . . the Miller-Tydings Act of 1937 permitted the States to authorize resale price maintenance. 50 Stat. 693. The goal of that statute was to allow the States to protect small retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters. But in 1975 that congressional permission was rescinded. The Consumer **[***33]** Goods Pricing Act of 1975, 89 Stat. 801, repealed the Miller-Tydings Act and related legislation. Consequently, the Sherman Act's ban on resale price maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity." (Footnote omitted). [14]

[*34]** Wheeling Wholesale argues that our Unfair Practices Act is analogous to a fair **[*549]** trade law and, therefore, violates the Sherman Act. We are cited several United States Supreme Court cases, which hold that even though a state statute violates the Sherman Act, the statute may be upheld if it falls within the state immunity exception to the Sherman Act. [15]

We decline to address the state immunity issue because immunity only arises as a consideration after the challenged state statute has initially been found to violate the Sherman Act. The threshold inquiry, therefore, is whether our Unfair Practices Act violates the Sherman Act. *Cf., California Retail Liquor* ***[***35]*** *Dealers, 445 U.S. at 102, 63 L. Ed. 2d at 241, 100 S. Ct. at 941* ("The threshold question is whether California's plan for wine pricing violates the Sherman Act."). We do not agree with Wheeling Wholesale's argument that fair trade laws are analogous. As explained in *California Retail Liquor Dealers,* fair trade laws are price maintenance schemes. Their distinctive characteristic is a provision that enables a trademark owner, usually a manufacturer, to set by contract with a retailer or wholesaler the price at which the trademarked product should be sold. *See* 1A R. Callman, *supra,* § 6.03.

We have not been cited nor have we found any United States Supreme Court case which has had occasion to directly consider whether a state sales-below-cost statute violates the Sherman Act. In *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc., 360 U.S. 334, 3 L. Ed. 2d 1280, 79 S. Ct. 1196 (1959)*, the United States Supreme Court upheld Oklahoma's statute prohibiting sales below cost against an equal protection challenge. It declined to address the claim that the statute was preempted by federal antitrust laws. *360 U.S. at 342 n.7, 3 L. Ed. 2d at 1286 n.7, 79 S. Ct.* ***[***36]*** *at 1202 n.7*.

The Ninth Circuit Court of Appeals had this issue before it in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc., 668 F.2d 1014 (9th Cir. 1981)*, *cert. denied, 459 U.S. 825, 74 L. Ed. 2d 61, 103 S. Ct. 57 (1982)*, and had no difficulty in upholding California's sales-below-cost statute against a claim that the field had been preempted by the federal antitrust laws. Although the issue that it violated federal antitrust laws was not directly raised, it is clear from the court's comments in note 62 that it found the statute to be completely compatible with federal antitrust laws:

> "The inference of preemption is especially inappropriate because the basic **[**156]** purposes of the state and federal statutes are similar. *See Exxon Corp. v. Governor of Maryland, [437 U.S. 117, 132-33, 57 L. Ed. 2d 91, 104-05, 98 S. Ct. 2207, 2217 (1978)]*. The California statute was designed to 'safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition.' *Cal.Bus. & Prof. Code § 17001* (West 1964) (statement of legislative purpose); *Harris v. Capitol Records Distributing Corp., 64 Cal.2d*

[14] Our Fair Trade Act, *W. Va. Code, 47-11-1* through -8, was repealed in 1976, presumably in recognition that, with the repeal of the Miller-Tydings Act of 1937, it was in conflict with the Sherman Act. *See* 1976 W. Va. Acts ch. 115.

[15] *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., supra; Parker v. Brown, 317 U.S. 341, 87 L. Ed. 315, 63 S. Ct. 307 (1943)*; *see also Hoover v. Ronwin, 466 U.S. 558, 80 L. Ed. 2d 590, 104 S. Ct. 1989 (1984)*; *Community Communications Co. v. City of Boulder, 455 U.S. 40, 70 L. Ed. 2d 810, 102 S. Ct. 835 (1982)*.

> *454, 461,* **[***37]** *413 P.2d 139, 144, 50 Cal.Rptr. 539, 544 (1966)*. The purposes of the Sherman Act hardly could be stated more succinctly." *668 F.2d at 1050*.

See also Baseline Liquors v. Circle K Corp., supra; Walker v. Bruno's, Inc., 650 S.W.2d 357 (Tenn. 1983).

We have initially set out the legislative intent under our Act, which is to prevent sales at less than cost for purposes of injuring competition. *W. Va. Code, 47-11A-1* and -2. This type of predatory price fixing lies at the heart of the Sherman and Robinson-Patman Acts as evidenced by this statement from *United States v. National Dairy Products Corp., 372 U.S. 29, 33-34, 9 L. Ed. 2d 561, 566, 83 S. Ct. 594, 598*, *reh'g denied, 372 U.S. 961, 10 L. Ed. 2d 13, 83 S. Ct. 1011 (1963)*:

> "The history of § 3 of the Robinson-Patman Act indicates that selling below cost, unless mitigated by some acceptable business exigency, was intended to **[*550]** be prohibited by the words 'unreasonably low prices.' That sales below cost without a justifying business reason may come within the proscriptions of the Sherman Act has long been established. *See, e.g., Standard Oil Co. v. United States, 221 U.S. 1 [55 L. Ed. 619, 31 S.* **[***38]** *Ct. 502, 34 L.R.A. N.S. 834]* (1911). Further, when the Clayton Act was enacted in 1914 to strengthen the Sherman Act, Congress passed § 2 to cover price discrimination by large companies which compete by lowering prices, 'oftentimes below the cost of production . . . . with the intent to destroy and make unprofitable the business of their competitors.' H.R. Rep. No. 627, 63d Cong., 2d Sess. 8. The 1936 enactment of the Robinson-Patman Act was for the purpose of 'strengthening the Clayton Act provisions,' *Federal Trade Comm'n v. Anheuser-Busch, Inc., 363 U.S. 536, 544 [4 L. Ed. 2d 1385, 1390, 80 S. Ct. 1267, 1271-72]* (1960), and the Act was aimed at a specific weapon of the monopolist--predatory pricing. Moreover, § 3 was described by Representative Utterback, a House manager of the joint conference committee, as attaching 'criminal penalties in addition to the civil liabilities and remedies already provided by the Clayton Act.' 80 Cong. Rec. 9419."

We, therefore, conclude that *W. Va. Code 47-11A-1* through -14, does not violate the antitrust provisions of the Sherman Act, *15 U.S.C. § 1*, since both acts prohibit sales below cost for the purpose of injuring or destroying **[***39]** competition. [16] Because we find no violation of the Sherman Act, there is no need to discuss the applicability of the state exemption doctrine under the Sherman Act.

[*40]** The certified questions having been answered, this case is dismissed from the docket.

Answered and Dismissed.

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[16] Trade associations have been prosecuted either under the Sherman Act or Federal Trade Commission regulations for attempting to stabilize prices or set minimum prices under the guise of enforcing a state sales-below-cost statute. Since only the retailer or wholesaler can possibly know what its own costs are, any attempt by a trade association to inform retailers and wholesalers what their costs should be for a particular product, with an implied threat of prosecution under the state sales-below-cost statute, could possibly subject the association to an antitrust action. In such an event, the fact that the association was attempting to enforce a sales-below-cost statute would not be a valid defense. *See generally Schnapps Shop, Inc. v. H.W. Wright & Co., Ltd., 377 F. Supp. 570 (D. Md. 1973)*; *California Retailer Grocers & Merchants Ass'n v. United States, 139 F.2d 978 (9th Cir. 1943)*, *cert. denied,* ***322 U.S. 729, 88 L. Ed. 1564, 64 S. Ct. 945 (1944)***; *Western Confectioners Ass'n,* 34 F.T.C. 1431 (1942); 1 S. Kanwit, Federal Trade Commission § 15.06 (1983); Comment, *Sales Below Cost Prohibitions: Private Price Fixing Under State Law,* 57 Yale L.J. 391 (1948).